



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

(CORAM: OJWANG & LENAOLA, JJ.)

CRIMINAL APPEAL NO. 65 OF 2003

BETWEEN

MUSILA MULI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate S.S. Pareno dated 11th March, 2003 at Machakos Law Courts)

JUDGEMENT OF THE COURT

Musila Muli, the appellant herein, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, jointly with others not before the Court, and while armed with dangerous or offensive weapons namely clubs, machetes and iron bars, on 11th August, 2002 at Munyenze Village in Ngwata Location, in Makueni District, Eastern Province, robbed **Simon Kitonyi Mbondo** of cash, in the sum of Kshs.10,000/=, and at, or immediately before, or immediately after the time of such robbery, used personal violence upon the said **Simon Kitonyi Mbondo**.

The appellant was tried, found guilty and convicted, and sentenced to death as prescribed by law. He came before this Court on appeal, on several grounds which need not detain us at this stage, in view of the fact that the respondent's counsel, **Mr. Wang'odu**, asked to be allowed to begin, and he did so by conceding to the appeal. We have to deal with the *merits* of that request, at the very beginning.

Mr. Wang'odu urged that the trial had been irregular, as it had been conducted without regard to the terms of s.85(2) of the Criminal Procedure Code (Cap. 75, Laws of Kenya); throughout the trial, prosecution was conducted by a Police corporal, a person not qualified to perform such a role.

Learned counsel asked this Court, firstly, to annul the trial proceedings, the conviction and the sentence, and secondly, to order for a retrial of the case.

Mr. Wang'odu submitted that there was enough evidence on record to be the basis for a conviction: the appellant had been duly identified at the *locus in quo*, and two witnesses had, thereat, recognised him by voice.

The appellant contested the respondent's request, on the ground that if granted, and a new trial ordered, the same would afford the respondent a chance to prepare an altogether new case – and this would be oppressive to him. The appellant disputed the claim that he had been properly identified at the *locus in quo*, and contended that no first report had been made of initial perceptions, and so there existed no basis for the contention that he had been properly identified. The appellant urged that the complainants could not have known him prior to the criminal incident, and could not have properly identified or recognised him, for if they had they would not have given evidence of footmarks as a signal that was used to trace him, following the robbery.

The parties have clearly taken divergent positions, though only one question falls for determination at this stage: Is annulment of proceedings being sought on account of a *procedural flaw*, or on account of *evidentiary considerations*?

The law is clear on this point: annulment-and-retrial cannot be sought on the basis of a misapprehension or misapplication of the *evidence*; it can only be sought on account of fatally defective *procedure*.

The principle is clear from the case law. In *Ahmed Dharamsi Sumar v. Republic* [1964] E.A. 481 the Court of appeal thus held (at p.483 – *per Duffus, J.A.*):

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the Magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial. The Magistrate’s error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused.”

The principle had already been articulated in an earlier decision of the same Court, *Pascal Clement Braganza v. R* [1957] E.A. 152, in which *Briggs, J.A.* thus stated:

“It is possible that on the retrial there may be more evidence against the appellant than was produced at the first trial. That is not either a reason against ordering a retrial or a reason in favour of it. The order was not made on the basis that the Crown had failed to prove its case the first-time, but might be able to do so the second time, and it could not properly have been made on that footing.”

In a persuasive authority which has sought to apply the foregoing principles, *Lenkai Sane Ole Kampei & Another v. Republic*, Nbi High Ct. Crim. Appeals Nos. 227 & 230 of 2005 (consolidated), it has been thus stated:

“From the authorities, therefore, it is for certain that the responsibility lies with this Court to sense the gravity of the factor which nullifies a concluded trial; to have a feel of the weight and character of the evidence available; to take due account of any vital issues of administration of justice; to bring into the equation a sense of justice for the accused persons; and to take into account any weighty and relevant matters, as a basis for determining whether or not a retrial should be ordered, in a particular case.”

We have read through the proceedings, paying special attention to the competence of the prosecuting officer who turned up in Court at every stage. Our findings may be set out as follows:

- (i) Plea-taking on 21st August, 2002 – *Inspector of Police Mwololo* (for prosecution).
- (ii) Mention on 2nd Sept. 2002 – *Chief Inspector Wambua* (for prosecution).

(iii) Hearing on 9th Sept. 2002 – **Cpl. Ngela** (for prosecution).

[on this occasion PW1 was fully examined; PW2 was fully examined; PW3 was fully examined; PW3 was fully examined; PW4 was fully examined].

(iv) Mention on 23rd Sept. 2002 – Chief Inspector Wambua (for prosecution).

(v) Mention on 30th Sept. 2002 – **Cpl. Ngela** (for prosecution).

(vi) Mention on 11th Oct. 2002 – **Cpl. Ngela** (for prosecution).

(vii) Mention on 14th Oct. 2002 – **Chief Inspector Wambua** (for prosecution).

(viii) Mention on 28th Oct. 2002 – **Chief Inspector Wambua** (for prosecution).

(ix) Mention on 30th Oct. 2002 – **Cpl. Ngela** (for prosecution).

(x) Mention on 13th Nov. 2002 – **Chief Constable Mateli** (for prosecution).

(xi) Mention on 27th Nov. 2002 – **Chief Constable Mateli** (for prosecution).

(xii) Hearing on 9th Dec. 2002 – **Cpl. Ngela** (for prosecution).

[on this occasion PW5 was fully examined; PW6 was fully examined].

(xiii) Mention on 23rd Dec. 2002 – **Cpl. Ngela** (for prosecution).

(xiv) Mention on 9th Jan. 2003 – **Cpl. Ngela** (for prosecution).

(xv) Hearing on 17th Jan. 2003 – **Cpl. Ngela** (for prosecution).

[On this occasion PW7 was fully examined; PW8 (final prosecution witness) was fully examined].

(xvi) Hearing on 14th Feb. 2003 – **Cpl. Ngela** (for prosecution)

[on this occasion the defence statement was heard].

It is clear that **Cpl. Ngela** conducted all the substantive aspects of the prosecution case, and was the key figure in the prosecution process.

S.85(1) and (2) of the Criminal Procedure Code (Cap.75) prior to the recent amendment effected by Act No. 7 of 2007, thus provided:

“(1) The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

“(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.”

By the foregoing provisions **Cpl. Ngela** was not a qualified person to conduct the prosecution case. Consequently, the trial was improperly and irregularly conducted, and we must declare it a nullity.

The only question remaining is *whether a fresh trial should be ordered*. We have considered the principle underlying criminal prosecutions: to give effect to the criminal law enacted by Parliament, to *protect members of the public from criminal acts*. This is a fundamental goal, in the pursuit of social order, that this Court must uphold as a general principle. Thus, when the prosecution has a case entailing robbery from law-abiding citizens, and there is substantial evidence to be tendered in proof, then it is this Courts obligation to see to it that the matter is heard and determined according to law.

The appellant has pleaded, firstly, that a retrial if ordered, will be oppressive to him personally; and secondly, that the evidence of identification which is on the record, is not good enough. We do not, with respect, accept the latter contention, as we are not trying the matter on the merits. But it is apparent that there is substantial evidence on the basis of which a case can be made in favour of a conviction. We, of course, are not of the view that retrial would prove oppressive to the appellant. Consequently, upon declaring the trial null, which we hereby do, we order the commencement of a retrial, before a different Magistrate from the one who heard he case initially. We will make specific orders as follows:

1. The appellant shall remain in prison custody.

2. This matter shall be mentioned, for retrial directions, before the Chief Magistrate at Machakos Law Courts on Monday, 21st April, 2008.

3. Production order to issue.

DATED and DELIVERED at Machakos this 22nd day of April, 2008.

J.B. OJWANG

I. LENAOLA

JUDGE

JUDGE

Coram: Ojwang & Lenaola, JJ.

Court Clerk: Mueni

For the Respondent: Mr. Wang'ond

Appellant in person