



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & DULU, JJ.)

CRIMINAL APPEAL NOS. 357 OF 2005, 358 OF 2005 & 361 OF 2005

(CONSOLIDATED)

BETWEEN

SAMUEL KINUTHIA KARIUKI.....1ST APPELLANT

PETER WAHOME WAINAINA.....2ND APPELLANT

JULIUS OTIENO OPONDO.....3RD APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate S. Mokua dated 6th July, 2005 in Criminal Case No. 116 of 2004 at Thika Law Courts)

JUDGEMENT OF THE COURT

The three appellants herein faced charges of robbery with violence contrary to s.296(2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that on 21st December, 2003 at Biafra Estate in Thika District, Central Province, the appellants, while armed with crude weapons, namely iron bars, robbed **Charles Kiarrii Njoroge** of a cellphone, Nokia by make, and cash in the sum of Kshs.2,000/= ? all valued at Kshs.10,500/= ? and at, or immediately before, or immediately after the time of such robbery, wounded the said **Charles Kiarrii Njoroge**.

The trial Court heard nine prosecution witnesses, and the unsworn statements of each of the appellants herein. After reviewing the evidence, the learned Magistrate approached his conclusion of the case as follows:

“Violence was used in the case herein and, in the course of [inflicting the same], money, Kshs.2000/= and a mobile [phone] were taken from PW1. From the evidence on record a robbery with violence took place. The evidence of PW1, PW2, PW3 and PW4 was very consistent, to the effect that 1st and 2nd accused were at the said bar. PW3 testified that he

had discussions with the two accused that evening at Thingira Bar. PW4, the watchman at the said Thingira Bar identified 1st and 2nd accused as those who had come to the bar to see PW3...He was able to identify them when they attacked PW1. The lights at the said Thingira Bar were on, hence [the watchman] was able to identify [1st and 2nd accused ? *Julius Otieno Opondo* and *Samuel Kinuthia Kariuki*].... PW4 also testified that as the robbers attacked PW1, 3rd accused joined them.... PW2 also confirmed that 1st accused hit him using his fist. Therefore, the evidence [of] identification is very credible. I don't believe the evidence by the accused persons as it merely states how they were arrested. It does not rebut the prosecution's evidence. Therefore the prosecution has proved its case against the accused persons beyond reasonable doubt and the accused are convicted for the offence of robbery with violence....”

The appellants herein were sentenced in accordance with the law, and they appealed on several grounds. One of the grounds of set out in the amended petition of appeal dated 14th September, 2007 was that the trial had been “in breach of s.77(2)(b) ...of the Constitution of Kenya and s.198(1) of the Criminal Procedure Code.”

Learned counsel **Mr. Orieyo**, who argued the appeal, began with the point regarding s.77(2)(b) of the Constitution, and s.198(1) of the Criminal Procedure Code, which both relate to the record on language used during trial. Counsel noted that the trial Court record did not show the language used when PW1 had given testimony. He noted that there was no record of any interpretation that may have been done as PW1 gave testimony. Counsel placed before the Court past decisions of the High Court and the Court of Appeal, in which an omission such as the one alleged herein, had been held to render trial proceedings a nullity: ***George Kamau Gachuhi v. Republic***, H.CT. Cr. App. No. 349 of 2004; ***Abdirizak Mohamed Abdullahi v. Republic***, H. Ct. Cr. App. No. 8 of 2005; ***Albanus Mwasia Mutua v. Republic***, Crim. Appeal No. 120 of 2004.

Acknowledging that the trial Court did not, indeed, record the language used by witnesses, learned counsel **Ms. Gakobo** conceded to the appeal, but then asked that this Court do order a retrial. She urged that even though the appellants had been in custody for about four years, they were not likely to be prejudiced by a retrial. Counsel urged that the appellants, to-date, had only served two years of sentence, for a capital offence; and the four years did not compare with the mandatory sentence provided for.

Ms. Gakobo urged that a retrial if ordered, would not in any way be disadvantaged in its conduct, for all the witnesses would be available. She submitted that it was in the interests of justice that a retrial be conducted, as the Court should have a view not only of the position of the appellants, but also that of the complainants. PW7, the doctor who examined PW1, had given evidence that PW1 had suffered injury classified as grievous harm, when the robbers knocked out his seven teeth, in a most vicious attack.

Learned counsel submitted that there was sufficient evidence of identification on the record. PW1 had lost consciousness during the attack, but PW4, the watchman, witnessed the attack, and he had conversed with the appellants just before the attack. The evidence of PW4 was direct evidence of considerable materiality, and there was no possibility of mistaken identity.

Learned counsel **Mr. Orieyo**, by contrast, urged that this was not a proper case for a retrial. He conjectured that a retrial if ordered, might last four years, the period of time during which the appellants had been in custody; and in his view, witness memories would be fading, and so truthful evidence could not be expected.

From the authorities, the Courts are clear as to the importance of the language used in trial proceedings being recorded. This Court as a Court of record, proceeds on the basis of the prepared record, as a basis for its findings and decisions. Therefore, we will declare the proceedings of the trial Court a nullity, for not showing the particulars of language.

The question whether or not a retrial is to be ordered is dependent in the first place on there being substantial evidence, on the basis of which a conviction could be sustained. This is a point on which the

law is already quite clear, having been the subject of decision-making by Courts of superior jurisdiction, as well as of scholarly commentaries. We will cite, for instance, from *Momanyi Bwonwong'a's Procedures in Criminal Law in Kenya* (Nairobi: EAPH, 1994) (at p.251):

“There are instances in the course of an appeal hearing when it comes to light that the trial of the appellant was either illegal or unsatisfactory for one reason or [another]. In cases of [this] nature the appellate Court, depending on the nature of the defect, may either acquit or order a retrial....

“However, a retrial will not be ordered unless it can be shown from the record that, on a proper consideration of the potentially admissible evidence, a conviction might result.”

The learned author of the above-mentioned work also underlines the general principle guiding the Court when it orders a retrial (p.252):

“In short, a retrial can only be ordered where the interests of justice require it.”

After carefully considering the evidence on record, in the instant matter, and after paying attention to the assessment of the same, made by both sides in this case, we have come to the conclusion, firstly, that there is a basis on which a trial Court properly guiding itself, could very well reach a conviction; secondly, we have noted that the incident occasioning the prosecution case was one of grave injury to the complainant, during a censurable act of robbery which this Court must set its face firmly against; thirdly we have considered the legitimate claim, in relation to the function of the criminal-justice system, of the appellants at this point in time; and fourthly, we have addressed our minds to issues of the public interest in the protective scheme of the criminal law. We have come to the conclusion that this is a matter befitting retrial. And accordingly, we will order as follows:

- (1) The proceedings and the Judgement recorded by the trial Court are hereby declared null.***
- (2) There shall be a retrial of the case, before a Magistrate seised of jurisdiction other than the one who had presided over the trial which is the subject of appeal.***
- (3) This matter shall be mentioned before the Chief Magistrate at Thika Law Courts on 21st April, 2008.***
- (4) The Chief Magistrate at Thika Law Courts shall give directions for the expeditious retrial of the case.***
- (5) The appellants shall remain in prison custody.***
- (6) Production order to issue in relation to Order No. (3) herein.***

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

J.B. OJWANG

G.A. DULU

JUDGE

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Huka & Erick

For the Appellants: Mr. Orieyo

For the Respondent: Ms. Gakobo