REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 9 of 2006

PETER KAMONJO NJOROGE…....…….....APPELLANT

-AND-

REPUBLIC……..……..……..…….RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate

L. Mutai dated 6th January, 2006 in Criminal Case No. 1268 of 2004

at Githunguri Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap.75, Laws of Kenya). The particulars were that he, while in the company of others not before the Court, on 20th July, 2004, along Moi Road, Magomano Village in Kiambu District, within Central Province, and while armed with dangerous weapons, namely machetes, iron bars, hammers and knives, robbed *Henry Kang'ara Njoroge* of one pair of safari boots, a national identity card, one pocket diary, one Kenya Commercial Bank plate, and cash, in the sum of Kshs.3000/= – all valued at Kshs.8000/= – and at, or immediately before, or immediately after such robbery, used actual violence by striking the said *Henry Kang'ara Njoroge.*

The appellant faced the alternative charge of being in possession of stolen goods contrary to s.322 of the Penal Code. The particulars in this regard were that the appellant, on 21st July, 2004 at Kiaria Village in Githunguri Location, in Kiambu District aforesaid, dishonestly retained one pair of safari boots, one pocket diary, and one Kenya Commercial Bank plate – all valued at Kshs.2,400/= – the property of *Henry Kang'ara Njoroge*, knowing or having reason to believe them to be stolen property.

After hearing the four prosecution witnesses, the learned Magistrate ruled on 23rd December, 2005 that a *prima facie* case had been made out, and put the appellant herein to his defence. After the appellant made a sworn statement and responded to cross-examination, the Court reserved judgement, which was subsequently delivered and which carried the following key passage:

"I have carefully considered the evidence adduced before [the] Court by all the prosecution witnesses and

the defence, and, as earlier noted, I observed that the complainant was [attacked] during night hours; he had no lighting [set-up]; and although he had said five men did attack him and who were armed with torches, it was his evidence that he never identified any of them. It is clear therefore that the complainant wasn't in a position to state if the accused person was one of those who attacked him and robbed him on the material date. He however identified safari boots, diary [and] KCB bank plate in his name before the Court, which he told the Court was stolen from him on the material date. I was satisfied with the said identification and I believed that the aforesaid items were stolen from the complainant on the material date. I was also satisfied with the identification of the same before the Court, which identification was not challenged."

PW3, Police Force No. 80095093 A.*P. Inspector James Macharia* gave unchallenged evidence that the recovered items which were claimed by the complainant as his, were recovered by him (PW3) from the appellant herein. The Court did believe PW3's evidence, that the said effects were found in the possession of the appellant. It was PW3's evidence that he arrested the appellant and found the appellant wearing safari boots and Jeans trousers which had blood stains; and when he visited the appellant's house, he found a hammer which also had blood stains; and he concluded that the hammer had been used to commit the offence which was the subject of the charge.

PW3 caused blood samples to be extracted from the appellant, and from the complainant; the same were sent to the Government Chemist for analysis, and for comparison and matching with the blood found staining the exhibits.

PW4, *Jeremiah Kavita Munguti*, the Government Analyst, found that the appellant's blood was of the "O" group while that of the complainant was of the "B" group; the blood stains on the pocket diary were of the group "B" category; the Jeans trousers worn by the appellant were stained with blood of the "B" group; the hammer and the safari boots were stained with blood in the "B" group; the blood staining the hammer, the safari boots, the appellant's Jeans trousers, and the pocket diary – all matched the complainant's blood sample; and this blood could have come from the complainant after he was attacked and injured on the material night.

The learned Magistrate found PW4's evidence credible, and this evidence went unchallenged. The Court's position was thus expressed: "…I believed that [the] blood which had stained the aforesaid items as were exhibited before the Court, was [from] the complainant, which blood came from his person on the material night after the attack." The learned Magistrate further recorded:

"I also believed that the said pair of shoes which [the] accused was found wearing belonged to the complainant. I was satisfied with the identification of the same…I was convinced that the accused person, with others not before [the] Court, did rob the complainant of the aforesaid items…"

The learned Magistrate found clearly that the appellant herein was part of the gang of robbers who had attacked the complainant; in the Court's words:

"Even if none of the prosecution witnesses saw [the] accused person [commit] the offence…charged, the circumstantial evidence herein tends to point an accusing finger [at] the accused person. The circumstantial evidence, I find, raised no doubts whatsoever and…I find the same very overwhelming… [and] the same tends to directly link the accused person with the offence as charged."

The learned Magistrate took note of the proximity of time between the moment of the robbery attack, and that of the arrest of the appellant herein, and thus observed:

"Even if others have Blood Group 'B', the time factor and the circumstances herein left me convinced that, that blood [on the exhibits] was indeed the complainant's. The evidence of the said expert was so overwhelming, together with that of the Investigating Officer (PW3). Their evidence was not discredited by the defence."

From those findings, which we believe to have been quite properly arrived at, on the basis of the

evidence, it was to be expected that the charge, as laid, would be held to have been duly proved.

However, the trial Court, for reasons not apparent to this Court, went off at a tangent, and made a finding that bore little relation to the law or the evidence. The relevant words of the learned Magistrate may here be set out:

"But since all the ingredients as per the main count of robbery [with violence] weren't met by the prosecution, I find that a charge under section 296(2) [of the Penal Code] cannot stand, for reasons that no P3 form was produced before [the] Court to prove that indeed, the complainant was assaulted and injured on the material date. Although it's not in dispute that the complainant was hit and injured, I at the same time noted that the evidence of a medical officer cannot be ignored [as an element necessary] to make the charge complete."

The learned Magistrate then went on to make the following statement which, with great respect, appears to be a misdirection in law, and in the light of the evidence:

"From the evidence adduced before [the] Court by the prosecution, I find that the same tends to favour a charge under section 296(1) of the Penal Code [and not] under section 296(2) of the [Penal] Code. The said evidence…was so overwhelming, credible, and…demonstrated that [the] accused did rob the complainant on the material [date] of the aforesaid items as *per* the charge-sheet, which items were found in [the] possession of the accused person together with the dangerous weapon used against the complainant on the material date."

The learned Magistrate went on to "declare [the] accused person guilty as if charged under section 296(1) of the Penal Code"; and he convicted the appellant herein, and sentenced him to a *thirty-year* term of imprisonment.

The appellant who formulated and conducted his appeal in person, had filed the following grounds of appeal:

(i) that the trial Magistrate erred in law and fact by convicting him on contradictory evidence;

(ii) that the trial Court erred in law and fact by relying on hearsay evidence;

(iii) that proof beyond reasonable doubt had not been achieved;

(iv) that the sentence imposed against him was "excessive and unconstitutional."

When he appeared in Court for the hearing of the appeal, the appellant had new, written grounds of appeal, which he referred to as "amended grounds of appeal". In these new grounds, he contested the trial Court's reliance on *circumstantial evidence;* and he contended that the prosecution had failed to call essential witnesses.

When the appeal fist came up in Court, it was placed before a single Judge – and this would have been on the basis that it was a s.296(1) and not a s.296(2) matter, under the Penal Code (Cap.63, Laws of Kenya); the one deals with simple robbery, whereas the other deals with capital robbery punishable by the death penalty.

Learned State Counsel *Mrs. Kagiri,* on 11th February, 2008 noted certain unusual elements in the trial Court record, and in the learned Magistrate's assessment of evidence before entering a conviction and imposing sentence. *Mrs. Kagiri* noted that the only reason the trial Court converted a s.296 (2) charge into a s.296(1) charge, was that "a P3 form wasn't produced to prove assault or injury upon the complainant". Counsel submitted, correctly in our view, that the learned Magistrate had acted under a misdirection; and she urged that this Court do exercise its powers to regularize the situation. Counsel gave notice to the appellant on the consequences of proceeding with the appeal; that the appeal-opportunity would afford this Court room to *rectify any errors of law* such as may be found in the trial-

Court record and decision; and so this Court might proceed with the hearing on the basis of the charge as it had been specified in the charge-sheet, and, in the event, if the appellant's case proves unmeritorious, then the penalty might be enhanced to the death sentence as provided for under s.296(2) of the Penal Code.

The appellant, on that occasion, asked for an *adjournment*, so he may reconsider his position. When the matter again came up, on 25th February, 2008 the appellant sought *more time*, which was granted. The matter was mentioned again on 12th March, 2008, and on this occasion the appellant said in Kiswahili: "I have elected to proceed with the appeal". The matter was then ordered to be listed for hearing before a two-Judge Bench; and when it came up on 29th April, 2008 the appellant said: "I have made a final decision to proceed with this appeal, notwithstanding the notice of enhancement [of sentence]."

The appellant brought with him into Court a set of written submissions, and had little in oral submissions; he only said that those who had arrested him had not been called as witnesses.

Learned State Counsel, *Ms. Gateru* urged that the trial Court record shows a *misdirection* in the conviction and the sentence. She submitted that a 30-year imprisonment term for simple robbery, as was imposed by the trial Magistrate, was an illegal sentence; and besides all the evidence showed the commission of a capital offence under s.296(2) of the Penal Code, just as was shown on the charge-sheet.

Counsel, however, conceded to the appeal on a *technicality*, but asked for a *retrial* to be ordered – on the original charge of robbery with violence (s.296 (2) of the Penal Code).

Ms. Gateru noted that the record, at the commencement of the trial on 17th June, 2005 did not show the *language* of the Court and of the witnesses; this contravened s.77 of the Constitution, and s.198(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya). The appellant at the trial stage, was acting in person, and the law required that any evidence given be interpreted to him in a language that he understood. The failure to state the language used in Court *may have* prejudiced the appellant at that stage; as, in particular, it was noted that PW3 was the only witness he cross-examined.

Learned counsel urged that if this Court comes to the conclusion that the appellant had been prejudiced at the trial stage, then the trial proceedings be annulled, and a retrial ordered. Counsel urged that there was overwhelming evidence which, if a retrial took place, would probably lead to a conviction. Several attackers had afflicted injuries on PW1 who, in consequence, lost an eye; he was robbed of his effects which were recovered, on the very next day, from the house of the appellant herein. Blood from the complainant's injuries had gotten onto the stolen items; and the Government` Analyst (PW4) who tested the blood samples on the said effects, found it to be blood matching that of the complainant. Counsel urged that there was a fundamental link between the bloodied effects and the attack on the complainant, marked by the *doctrine of recent possession*. Counsel urged that if a retrial were ordered, witnesses would be available, and so ends of justice would be met through a fresh hearing. This, counsel urged, would cause no prejudice to the appellant, and the merits of a fair trial, leading to proper sentencing, would far outweigh any inconvenience such as may be caused to the appellant.

From our review of the evidence, it is clear to us that the prosecution has a very weighty case against the appellant; and such is a condition which fully justifies the ordering of a retrial. We are in agreement with learned counsel that the trial Court record, in relation to the important question of language and interpretation, is defective and does not disclose whether a trial was conducted that was not prejudicial to the rights of the accused.

After considering all the relevant circumstances, we find it proper to order as follows:

1. The proceedings taken before the trial Court, and the Judgment

which resulted therefrom, are hereby annulled.

2. A retrial shall take place, before a Magistrate other than the one who conducted the trial proceedings now annulled.

3. This matter shall be mentioned before the presiding Magistrate at Githunguri Law Courts on *Monday, 27th October, 2008* for the purpose of giving trial directions in accordance with the orders herein.

4. The appellant herein shall continue to be held in prison custody.

5. A production Order shall issue in accordance with Order No.3 herein.

DATED and DELIVERED at Nairobi this 16th day of October, 2008.

J.B. OJWANG **H. A. OMONDI**

JUDGE **JUDGE**

Coram: Ojwang & Omondi, JJ

Court Clerks: Huka & Erick

For the Respondent: Ms. Gateru

Appellant in person