REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEALS NOs. 426 OF 2005, 430 OF 2005 & 103 OF 2007

(CONSOLIDATED)

-BETWEEN-

WILBERT OLOO CHUMBU……...…1ST APPELLANT

JACK AMAYO SADIA……...2ND APPELLANT

DAVID GASEKE MOSES…….…. 3RD APPELLANT

-AND-

REPUBLIC …….....…….....RESPONDENT

(An appeal from the Judgement of Principal Magistrate G.M. Njuguna dated 10th August, 2005 in Criminal Case No. 495 of 2004 at Kiambu Law Courts)

JUDGMENT OF THE COURT

Three sets of charges were laid against each of the three appellants herein: the first count being robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya); the second being, personating a public officer contrary to s.105(b) of the Penal Code; the third being, possession of public stores contrary to s.324(2) as read with s.36 of the Penal Code.

It was specified that the appellants, on 5th March, 2004 at Kiambu township, within Kiambu District of Central Province, jointly with another not before the Court, and while armed with a dangerous weapon, namely a pistol, robbed one ***John Mburu Mbugua*** of Kshs.20,000/= in cash, and, at or immediately before or immediately after the said robbery, used physical violence upon the said ***John Mburu Mbugua***.

It was specified, on the second count, that the appellants herein, on 5th March, 2004 at Nairobi, jointly with another not before the Court, falsely presented themselves as persons employed in the public service, namely Police officers, and presumed to arrest one ***John Mburu Mbugua*** and one ***George Ndung'u Mugwe.***

And in the third count it was particularised that the appellants, on 5th March, 2004, along the Nairobi-

Kiambu Road, within Kiambu District, jointly with another not before the Court, had in their possession public store, namely a pair of handcuffs of the Kenya Police Department, such property being reasonably suspected to have been stolen or unlawfully obtained.

The evidence, as set out by the learned Magistrate, runs as follows. PW1, ***John Mburu Mbugua*** and PW4, ***George Ndungu***, are both residents of Githunguri. On the material day, PW1 withdrew Kshs.245,000/= from his account at Post Bank, along Koinange Street in Nairobi; he kept Kshs.225,000/= in the pocket of his jacket, and Kshs.20,000/= in his trouser-pocket. As PW1 walked to the bus stage leading to Githunguri, PW4 joined him, and they walked along together. When the two came close to the Hilton Hotel, they were stopped by four men who claimed to be Police officers. These imposters bundled PW1 and PW4 into a motor vehicle, Peugeot 505 saloon, Reg. No. KYW 344, and claimed to be taking them to Kasarani Police Station, to an identification parade. One of the intruders sat in the front passenger seat, while two sandwiched PW1 and PW4 in the back seat. One of the intruders took the driver's seat. One of the two who sat with PW1 and PW4 had a gun.

As the intruders' car approached the Muthaiga-Kiambu Road round-about, PW1 and PW4 suspected that they were in the hands of robbers, and PW1 shouted out this fear; whereupon PW1 and PW4 were now bound together using one handcuff.

The motor vehicle was driven right up to Kiambu Town, and one of the intruders now made an offer, as a substitute for taking the two captives up to the Police station: *negotiation.* When PW1 and PW4 demanded that they be taken to the Police station, 1st appellant ordered 3rd appellant who was the driver, to turn back and drive to Nairobi. In the meantime, PW1 and PW4 shouted for help; and the intruder seated next to PW1 ran away after robbing him of Kshs.20,000/=; the 1st and 2nd appellants also ran away. PW1 and PW4 held on to 3rd appellant herein, grabbed his neck and stopped him from driving away. In the meantime, a Police warden working at the Kiambu District Commissioner's residence came and helped in the chase of 2nd appellant as he attempted to escape on foot. The warden (PW3) arrested 3rd appellant herein. The 1st appellant was arrested by members of the public, while the 2nd appellant was arrested by Police officers; and the three were taken to Kiambu Police station, their motor vehicle being impounded. They were later charged in Court, and the prosecution called eight witnesses to testify in the case.

Each appellant had given unsworn testimony presenting an alibi defence.

The learned Magistrate found as a fact that members of the public had chased the 2nd appellant when he attempted to run away, and, close to the Kiambu DC's residence, he ran into PW3, ***A.P. Paul Kabera Mungai*** who was guarding prisoners working in the compound, and who arrested him. The trial Court rejected 2nd appellant's alibi defence as a falsehood.

The trial Court found that 1st appellant herein was arrested by members of the public who threatened to lynch him. The Court found that both PW1 and PW4 had immediately identified 1st and 2nd appellants herein, the moment these appellants were brought to Kiambu Police Station. The Court found as a fact that at the time PW1 had walked into the bank in Nairobi to withdraw cash, 1st appellant herein had also walked into the same bank, and had talked to somebody else who was in that bank. From this fact the learned Magistrate concluded that:

> **"It would appear that [the] accused persons knew that PW1 had gone to withdraw money in the bank, and that is why the [1st appellant] was in the bank, although how they learned that is unclear."**

The learned Magistrate found as a fact that PW1 after withdrawing cash, had put Kshs.225,000/= in his jacket-pockets, Kshs.20,000/= in his trouser-pocket, and Kshs.5000/= in his shirt pocket – for security reasons – and it is the money in the trouser-pocket which the robber with the gun stole.

The trial Court found all the defences lacking in merit. The Court found that the 3rd appellant had been in the motor vehicle used in the robbery, with the 1st and 2nd appellants, and that the three, together, had been waiting to ambush PW1 and PW4. The Court found that for some time the 3rd appellant's employer had endeavoured, but unsuccessfully, to trace him; while at the time of the ambush on PW1 and PW4, he had sat in the motor vehicle communicating with his companions through sign language. The purpose was to give the impression, as the Court found, that the three intruders were policemen, and sign language was a mode of communication among themselves as officers.

The learned Magistrate dismissed the alibi defence of the 1st appellant who said he was a cobbler working in Kiambu and who had been arrested all by mistake; for the Court had established that he was the member of the gang of robbers who had walked into the bank at the time PW1 was withdrawing money there. The Court also dismissed the 2nd appellant's defence that he was a mechanic working along Jogoo Road in Nairobi, who had been mistaken for a criminal.

The trial Court noted that the three appellants herein had been with PW1 and PW4 for a long time in one motor vehicle, as 3rd appellant drove them from Nairobi to Kiambu, and there was a sufficient opportunity for accurate identification of these intruders.

The Court noted that, in the circumstances in which the offence was committed, *"all the requirements of section 296(2) [of the Penal Code] [were] met...; they were armed with [a] dangerous weapon...; they were more than one person at the time of commission of the offences. They also, in order to commit the offence of robbery with violence, personated persons employed in the public service. They introduced themselves as Police officers to PW1 and PW4"*.

The learned Magistrate also found as a fact that the appellants had been found in possession of public store, namely a pair of handcuffs of the Kenya Police Department which, in the circumstances, were reasonably suspected to have been stolen, or unlawfully obtained.

The foregoing facts as herein reviewed, led the trial Court to the conclusion that the appellants were guilty as charged, and, they were convicted and sentenced accordingly.

At the hearing of this appeal, the appellants were represented by learned counsel ***Mr. Ondieki*** and ***Mr. Nyaberi***. ***Mr. Ondieki*** submitted that the trial Court proceedings should be annulled, because the *language* in which the complainant gave testimony did not appear on the record, an error which he said was repeated in the case of other witnesses – PW2, PW4, PW5, PW6 and PW8. On this ground, ***Mr. Ondieki*** urged: "This is not a trial"; and he submitted that as a result, "the subsequent trial was rendered illegal, null and void". He relied on the Court of Appeal decision, ***Cisse Djibrilla v. Republic,*** Criminal Appeal No. 221 of 2006 in which the following statement appears:

> ***"We deprecate the manner...which the trial magistrate adopted when trying the appellant on a very serious charge which resulted in his being sentenced to life imprisonment. The failure by the trial Magistrate to keep a record of the nature of the interpretation was a serious defect in the trial."***

Mr. Ondieki next submitted that the appellants had requested a recall of PW1, on the ground that PW1 had provided no witness statement at the time when trial commenced; but the Magistrate had ruled that there was no requirement in law that such a pre-recorded statement be supplied to accused persons. Counsel urged that such a ruling was based on a misdirection, in point of law, since s. 77 (2) (b) and (c) of the Constitution required that an accused person be provided with facilities for his or her defence.

Mr. Ondieki next submitted that the ingredients of robbery with violence were missing, and that conviction had been founded on mere suspicion. This was also the contention of learned counsel ***Mr. Nyaberi,*** who adopted the substance of ***Mr. Ondieki's*** submissions.

Learned respondent's counsel, ***Mr. Makura***, conceded to this appeal but only a technicality: namely that

the record of the Court had not, on a number of instances, shown the *language* that was used during trial – and this was a contravention of both s. 77 of the Constitution and s. 198 of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

While agreeing with counsel for the appellants that a mistrial had, consequently, occurred in the proceedings, ***Mr. Makura*** went on to urge that the Court should consider if a *retria*l was proper.

Learned counsel resorted to the ***Cisse Djibrilla*** case, on principles relating to orders for retrial. In that case the Court of Appeal thus stated:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill... gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice requires it."*

Mr. Makura urged that the Court should consider the special circumstances of this case; and that the period during which the appellants will have been in custody, should be weighed against the seriousness of the offences charged. He urged that the Court should have in mind the broad interest of justice, as well as the nature of the evidence on record.

Mr. Ondieki in his response, urged that interests of justice, as contemplated in relation to possible retrial, should exclude "injustice to the appellants"; and he contended that the appellants herein had been in custody, to-date, for about five years, yet they had occasioned no loss of human life, in connexion with the material incident.

We have carefully reviewed and set out all the evidence which was the foundation of the prosecution case. The evidence shows that two innocent men, engaged in normal social and financial activities, were the object of cold-blooded, life-threatening intrusion by a marauding gang of robbers. In all situations where such a threat to civil life occurs, the law-enforcement agencies should in principle, show diligence in apprehending the suspects, and having them subjected to the legal process.

The evidence on record is well-focussed, and points inculpatory signals at each and all of the three applicants herein. That fact, by itself, dictates that the appellants ought to have been subjected to a *regular process of trial.* We are in agreement that the trial which took place was not regular; for, first and foremost, it has no record which shows the appellants to have been enabled to understand the proceedings to which they were being subjected. Therefore we will declare the trial null. But we have to consider whether this is not a fit case for ordering a retrial.

On this very point there are many judicial decisions laying down the governing principles; and we have had occasion to review the same in ***Musila Muli v. Republic***, Machakos High Court Criminal appeal No. 65 of 2003. In that judgment we concluded our determination as follows:

> **"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 Court's obligation to see to it that the matter is heard and determined according to law"(**emphasis original).

We do not, with much respect, agree with learned counsel ***Mr. Ondieki*** that if this Court, in the exercise of its discretion, in the context of the aforementioned principles, ordered a retrial in this case then it

would amount to “injustice” to the appellants.

We are quite convinced this is a fit case for retrial; and we would note that if a retrial were to result in conviction, the appellants would have no basis for claiming that the fact they have been in custody for several years, is a signal of injustice even where a finding of guilt leads to capital punishment.

We will, therefore, make orders as follows:

(1) The trial proceedings and the judgment against which the appeal was lodged, are hereby declared a nullity.

(2) We order that a retrial of the case shall take place.

(3) Retrial shall take place before a Magistrate other than the one who conducted the proceedings now nullified.

(4) This matter shall be listed for mention before the presiding Magistrate at Kiambu Law Courts on 17th November, 2008 for the purpose of giving trial directions.

(5) The appellants shall remain in prison custody.

(6) Production order shall issue for the purpose of order No. (4) herein.

DATED and **DELIVERED** at Nairobi this 11th day of November, 2008.

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

JUDGE **JUDGE**

Coram: Ojwang & Omondi, JJ.

Court Clerks: Huka & Erick

For the 1st & 3rd Appellants: Mr. Ondieki

For the 2nd Appellant: Mr. Nyaberi