REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 340 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 977 of 2003 of the Chief Magistrate's Court at Nairobi (J. O. Oseko–PM)

PAUL KOGI KUNYUA NGARE……..……..…..APPELLANT

VERSUS

REPUBLIC……...……..……....RESPONDENT

J U D G M E N T

PAUL KOGI KUNYUA NGARE was charged with one count or **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge as read to the Appellant on the date of plea i.e. 22nd April 2003, provided as follows: -

"On the 8th day of April 2003, at Kirima House along Mokta Dada Street in Nairobi within Nairobi area, jointly with others not before the court while armed with a dangerous weapon namely a Berreta Pistol S/No B23713 robbed Paul Odhiambo of Kshs.224 and a pair of uniform the property C & A Security Services valued at 1,200/- and at or immediately before or immediately after the time of the said robbery threatened to use actual violence to the said Paul Odhiambo."

He also faced two counts of **POSSESSION OF A FIREARM AND AMMUNITION** contrary to **Section 4(2) (1)** of the **Firearms Act**.

After hearing the Complainant's evidence, who was the first prosecution witness, the prosecution successfully applied to amend the particulars of the charge in count 1 by deleting the following particulars: -

"a pair of uniform the property of C and A Security Services Ltd."

After a full trial, the learned trial magistrate found the Appellant guilty of the three counts and sentenced the Appellant to suffer death in count 1 as prescribed in the law and in counts 2 and 3 to serve 7 years imprisonment and 5 years imprisonment respectively. Being dissatisfied with the convictions and sentences, the Appellant lodged this appeal.

When the appeal came up for hearing before us, **Mrs. Gakobo**, Learned State Counsel, conceded to the Appellant's appeal on a technicality. Learned Counsel submitted that in view of the court's lack of compliance with **Section 214** of the **Criminal Procedure Code**, after allowing the amendment of the charge, after hearing the Complainant, the proceedings were rendered a nullity due to failure by the trial court to inform the Appellant of his rights to re-call the Complainant. Counsel urged us to find the proceedings defective and to order a retrial. **Section 214 (1)** of the **Criminal Procedure Code** provides as follows: -

"214 (1) where, at any state of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substation of a new charge, as the court thinks necessary to meet the circumstances of the case.

Provided that: -

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their

evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

The Appellant was unrepresented during this appeal. However, he gave written submissions in support of his amended grounds of appeal. In those submissions, he raised a totally different ground to support his contention that the proceedings were defective. It was the Appellant's submission that since nowhere in the entire proceedings did the learned trial magistrate indicate the language used in the proceedings, the trial was a nullity and the appeal should be allowed.

We shall deal with the ground argued by the learned State Counsel. We have perused the record of the proceedings and in regard to the issue raised by the learned State Counsel, the charge and particulars of Count 1. Indeed as indicated, the prosecution amended the particulars of charge by deleting part of them. This was done after hearing the evidence of the Complainant in count 1. After the amendment, the learned trial magistrate correctly read over and explained the new charge to the Appellant. However, the learned trial magistrate did not inform the Appellant of his right to re-call the Complainant either to give evidence afresh or for cross-examination in light of the nature of amendment made, as it was obligated under **Section 214(1) (ii)** of the **Criminal Procedure Code**. In the case of **YONGO VS. REPUBLIC [1983] KLR 319** it was held:

"2 Where the charge is defective either by misdescription or at variance with the evidence at the trial, the court has the power to order an amendment or alteration of the charge provided.

(a) the court shall call upon the accused to plead to the altered charge, and

(b) the court shall permit the accused, it he so requests, to re-examine and recall witnesses.

It is a mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the proviso to section 214 of the Criminal Procedure code (cap 75).

3. The Appellant should have been given the opportunity to further question the prosecution witness and it could not be said whether the failure to give him that opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witness' evidence."

In the instant case, the learned trial magistrate allowed the amendment of the charge soon after hearing the evidence of the prosecution. It was imperative for the Court to give the Appellant the opportunity to further cross-examine the Complainant as the amendment directly related to his evidence. We cannot say that failure to give the Appellant the opportunity did not occasion a miscarriage of justice.

Turning now to the ground raised by the Appellant, we have perused the entire record of the proceedings and have confirmed as alleged by the Appellant that nowhere did the learned trial magistrate indicate the language of the court or the language used by each witness. The learned trial magistrate's record indicates as follows:

"PW1 male adult S/S

My name is PAUL ODHIAMBO."

This style of recording was repeated throughout the record in respect of each of the remaining prosecution witnesses. It is not clear what the learned trial magistrate meant by the abbreviation "S/S". We could speculate that she may have referred to the fact that the witness was "sworn" in the first 'S' and "states" in the second 'S'. It cannot however have referred to the language the witnesses used. The language of the court was also not indicated. In the recent Court of Appeal case of **SWAHIBU S. SIMIYU & ANOTHER vs. REPUBLIC CA No. 243 of 2005**, the Court of Appeal observed that failure to indicate in the record the language used in the trial was a violation of the accused person's Constitutional rights under **Section 77(2)** and in the circumstances, such a trial would be rendered a nullity.

We are bound by the Court of Appeal decision in the **SIMIYU** case Supra. Consequently we find and hold that the proceedings of the lower court contravened the Appellant's constitutional right to interpretation or use of language he understood as provide for under **Section 77 (2) (b)** of the **Constitution** and **Section 198** of the **Criminal Procedure Code**. The trial of the Appellant was therefore defective for this reason, in addition to the defectiveness caused by the lack of compliance with the provisions of **Section 214 (i) (ii**) of the **Criminal Procedure Code**.

We therefore find that the conviction entered herein was unsafe and accordingly set it aside. We also set aside the sentence.

The next issue we have to deal with is whether or not to order a retrial. **Mrs. Gakobo** has urged us to order a retrial on the grounds that the evidence on record was sufficient to return a conviction. Learned counsel also submitted that the witnesses would also be availed for a retrial and that no prejudice will be suffered by the Appellant since he had been in prison for only three years as against the sentence of death which he faced.

The Appellant opposed a retrial and urged us to consider that he had been in custody for long. In his written submissions, the Appellant also argued that the evidence was unsafe to find a conviction, that the prosecution concocted the evidence against him and on that ground, he should be set free.

The principles applicable to the issue of when to order a retrial are now well settled.

"An order for retrial should not be made if it will cause the accused person to suffer prejudice. See MANJI vs. REPUBLIC 1966 EA 313.

In any event, whether or not an order of retrial should be made depends with the peculiar circumstances of each case. See AHMED JUMA vs. REPUBLIC 1964 EA 481.

An Appellate court should not order a retrial unless it is of the opinion after a consideration of the admissible or potentially admissible evidence that a conviction may result. See MWANGI vs. REPUBLIC [1983] KLR 522."

We have analyzed the evidence on record. We do not wish to comment much on the evidence in order not to pre-empt the retrial. Suffice it to state that the evidence on record in the nullified proceedings was strong and if adduced in a retrial, it is our view that it could result in a conviction. We therefore find this a suitable case for an order of retrial. We order that a retrial be held in this case. In that regard the Appellant shall be produced before the Chief Magistrate's Court Nairobi for a plea to the self same charges on the 26th January 2007. In the interim period, the Appellant should remain in custody.

These are the orders of the court.

Dated at Nairobi this 23rd day of January 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Gakobo for the Respondent

CC: Tabitha

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE