REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Ojwang, Sitati, JJ.)

CRIMINAL APPEAL NOs. 28 AND 29 OF 2006 (CONSOLIDATED)

BETWEEN

CHARLES WENZE KIETI..……..……..1ST APPELLANT

ANTHONY M. MUTUA……..2ND APPELLANT

AND

REPUBLIC……..……RESPONDENT

(An appeal from the Judgement of the Chief Magistrate, Ms. H.A. Omondi at the Law Courts, Machakos in Criminal Case No.1060 of 2004 dated 23rd March, 2006)

JUDGMENT OF THE COURT

When we began the hearing of this appeal, on 1st March, 2007 the learned State Counsel, ***Mr. Wang'ondu*** applied for a consolidation of Criminal Appeal No. 28 of 2006 with Criminal Appeal No. 29 of 2006, as the trials from which the appeals arose had been conducted together, and the facts and the circumstances leading to the prosecution were common to both. As the 2nd appellant had no objection, we consolidated the appeals, to be dealt with, within the framework of Criminal Appeal No. 28 of 2006.

The grounds of appeal in both appeals are represented by the content of the 1st appellant's Petition of Appeal; and they are as follows:

(a) that, the learned trial Magistrate erred in law and in fact and misdirected herself on principle, in convicting the appellant on the evidence of a single identifying witness, without the appellant being positively identified, and without corroborative evidence;

(b) that, the learned trial Magistrate erred in law and in fact, in convicting the appellant without addressing her mind to the legal requirement that an identification parade was mandatory;

(c) that, the learned trial Magistrate misdirected herself on principle by convicting the appellant by relying on conjectures, suppositions, and on extraneous matters when the exhibits produced before the trial Court, namely an axe and sword, were not booked in the Police Occurrence Book, for the purpose of being produced as Court exhibits;

(d) that, the learned trial Magistrate erred in law and in fact by basing her conviction on evidence which was tainted with contradictions;

(e) that, the learned trial Magistrate erred in law and in fact, in convicting the appellant without giving reasons for her findings, contrary to the provisions of s.169 of the Criminal Procedure Code (Cap.75);

(f) that, the learned trial Magistrate erred in law and in fact, in sentencing the appellant to death, and also to two and three years respectively on other counts, without specifying whether sentence was concurrent or consecutive.

Right at the beginning, learned State Counsel, ***Mr. Wang'ondu***, conceded the appeal; so obviously the appeal was not going to be heard on its merits. But counsel at the same time asked for a retrial. His reasons had nothing to do with the points raised in the Petition of Appeal, and which would have been canvassed on the merits, as regards findings of fact and applications of the law.

Learned counsel was concerned only with s.200(3) of the Criminal Procedure Code (Cap.75), which provides:

> ***"Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding Magistrate shall inform the accused person of that right."***

That provision had not been complied with. Hearing began before the Senior Resident Magistrate, ***D.W. Nyambu***, Esq, on 11th August, 2004; and she heard all the witnesses up to PW7; then, as the record for 1st August, 2005 shows, the learned trial Magistrate was no longer at the station; and it became necessary to mention the matter before the Chief Magistrate. On 16th August, 2005 the learned Chief Magistrate, ***Ms. H.A. Omondi*** ordered that trial should continue before a different Magistrate; and on 18th October, 2005 the learned Chief Magistrate herself heard the last witness for the prosecution.

It is not shown on the record that the learned Chief Magistrate made any communication in Court to the accused persons, as required by s.200(3) of the Criminal Procedure Code; but on 18th October, 2005 after hearing PW8, she declared the prosecution case closed, and thereafter she took preliminary submissions, and gave a ruling, on 25th October, 2005 putting the accused persons to their defence. On 31st January, 2006 the trial Court heard the defences of the accused persons. On 13th March, 2006 the learned Chief Magistrate gave date of judgement as 23rd March, 2006. She gave judgement on 23rd March, 2006 convicting the accused persons; and on 29th March, 2006 she pronounced the sentences.

In this appeal the question that ended up preoccupying us, and in respect of which we give our judgement, is whether or not this matter should be remitted to the Subordinate Courts for retrial.

We have the discretion to order a retrial, in a proper case, in a matter such as this. Section 200(4) of the Criminal Procedure Code (Cap.75) thus provides:

> ***"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

Clearly, there was no compliance with the terms of s.200(3) of the Criminal Procedure Code which confers upon the accused certain trial rights. Where trial rights are thus guaranteed to an accused person, they must be duly rendered unto him, as a matter of rights-to- a-fair-trial, and as a matter of *constitutional rights* to the protection of the law (Constitution of Kenya, s.77). Therefore, we have no doubts that the proceedings which took place before the trial Court were a nullity, and we hereby declare them to be so.

The failure to inform the accused persons that they had the right to recall witnesses, as provided by s.200(3) of the Criminal Procedure Code, was no doubt a failing on the part of the Court – not of the accused, not of the prosecution. The prosecution, in their constitutional role of administration of criminal justice, had found it proper to prosecute the suspects. In principle we must commit this Court to sustaining the due administration of criminal justice, through the initiatives of the Police, the prosecution, as well as other duly-authorised public agencies. In deciding the question whether or not a retrial is to be ordered, we must look at all the circumstances, and weigh the merits of the appellants' plea for acquittal, as against the claims of efficacious administration of criminal justice.

Learned counsel ***Mr. Wang'ondu*** stated his grounds for seeking retrial as follows:

> (i) the appellants had been charged with very serious offences, in respect of which the Courts ought to have the opportunity to determine questions of merit; the charges were: aggravated robbery; attempted rape; attempted robbery;
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> (ii) there was evidence that the 2nd appellant had attempted to rape PW3;
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> (iii) the two appellants had been positively identified as offenders, in the terms of the charges;
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> (iv) the prosecution would be able to produce witnesses, if a retrial were ordered;
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> (v) some of the items grabbed by the robbers, from PW1, had been recovered from 1st appellant;
>
> (vi) as there exists material [evidence] for a *prima facie* proof of the prosecution case, the appellants cannot be perceived as suffering prejudice, by being kept in remand a while longer, as retrial takes place.

On these grounds, learned counsel urged the Court to exercise its discretion in favour of a retrial.

Learned counsel ***Mr. Abobo***, for the 1st appellant, contested the case being made for retrial. The non-compliance with s.200(3) of the Criminal Procedure Code (Cap.75), it was urged, had prejudiced the rights of the appellants. In counsel's words: "Errors or omissions by the trial Magistrate should not be visited upon the appellants; such omission should tilt [the case] in favour of the appellants." He urged that the appellants had, since March, 2004 been in custody, and that they had suffered, by being kept in detention.

Contrary to the representations of counsel for the respondent, ***Mr. Abobo*** maintained that there had been no positive identification of the appellants, as suspects in the crimes charged. Learned counsel's strategy, obviously, was to probe the evidence which the prosecution could marshall; but we do not consider it our task at this stage to undertake any assessment of such evidence, to see if it would lead to the successful prosecution of the appellants if a retrial were ordered. We consider that the case whether or not a retrial is to be ordered, is dependent on *prima fa*cie positions, and on such principles as will secure that the constitutional responsibilities to administer the criminal law in force, are not rendered nugatory.

We have not seen how the appellants' claim in this matter would outweigh the colossal public interest in the maintenance of order and safety in society, with violent robbery and related crimes held in check, so that civil life remains peaceful and is not threatened. Indeed we must state that we see the *prima facie* position as standing clearly in favour of the conduct of a new trial.

We have, in the circumstances, decided as follows:

> 1. This matter is to be remitted to the Subordinate Court having jurisdiction, for hearing and determination, before a Magistrate other than the one who heard it last;
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> 2. The conduct of trial shall be scheduled on the basis of priority.

3. The appellants shall remain in custody, pending their appearance before the subordinate Court for purposes of fixing hearing dates.

Orders accordingly.

DATED and **DELIVERED** at Machakos this 11th day of May, 2007.

J. B. OJWANG

JUDGE

R.N. SITATI

JUDGE