REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Ojwang, Sitati, JJ.)

CRIMINAL APPEAL NO. 92 OF 2005

BETWEEN

NOAH NJOGU MBUGUA……..……..APPELLANT

AND

REPUBLIC……..……RESPONDENT

(Appeal from the Judgement of the Chief Magistrate, Ms. H. Omondi at the Law Courts, Machakos in Criminal Case No.71 of 2004 dated 30th August, 2005)

JUDGMENT OF THE COURT

The appellant had been charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that on 4th January, 2004 at the Kyulu Gate of the Tsavo West Game Reserve, in Makueni District, along the Nairobi-Mombasa Highway, jointly with others not before the Court and while armed with dangerous or offensive weapons, namely swords, sticks, bows and arrows and clubs, he robbed ***Michael Borrison*** of a photocopier machine of make, Mita, Serial No. X Au 3 x 3005, model No. KM-1500, and one Wold Space radio, Serial No. S91000 – 9388, motor vehicle ignition keys, a music disc, assorted compact cassettes, swimming costumes and cash in the amount of Kshs.7,000/=, all valued at Kshs.350,000/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence on the said ***Michael Borrison***.

In the trial process, certain events came to pass which, on the occasion of hearing this appeal before us on 1st March, 2007 took the upper hand and presented the Court with a hearing that focused on the question whether or not a retrial should be ordered. That , therefore, is the issue in respect of which our judgment is today being delivered.

Pleas were taken before the Senior Resident Magistrate, ***S.M. Kibunja,*** Esq on 4th of March, 2004; on 20th February, 2004 he began hearing witnesses, and on that occasion he heard the key witness, ***Michael Borrison*** (PW1) and PW2, ***Chief Inspector of Police Peter Matu***, of the Kibwezi CID Office. Before the next occasion of hearing, the learned Senior Resident Magistrate had been transferred to another station. The matter was mentioned several times thereafter, and it came before the learned Senior Resident Magistrate, ***D.W. Nyambu***, Esq on 10th August, 2004, when learned counsel ***Mrs. Mutua***, for the

accused, asked that it be heard *de novo*. After the prosecution was heard on that application, the learned Magistrate directed: "I order that the hearing proceeds from where it had reached; proceedings to be typed forthwith." There were many more mentions afterwards; but on 23rd June, 2005 hearing resumed before learned Senior Resident Magistrate, ***T.O. Okello,*** Esq, who proceeded on that day to hear PW3, **Noor Gufu,** a Platoon Commander with the Kenya Wildlife Service; PW4, ***Cpl. Benklin Mutunga***, attached to Mtito Andei Police Station; and PW5, ***Police Constable Robert Kariuki,*** attached to CID Kibwezi. At that point the prosecution closed its case, and the 8th of July, 2005 was reserved for submissions, after learned counsel ***Mrs. Mutua*** indicated she would submit that there was no case to answer. On 8th July, 2005 learned counsel informed the Court that she had abandoned her proposed submission of no-case-to-answer; and this led to a ruling by the learned Senior Resident Magistrate on 14th July, 2005: "I have considered the evidence [tendered] by the prosecution witnesses and [I am] convinced that a *prima facie* case has been established to warrant the accused being put [to] his defence." Learned counsel ***Mrs. Mutua*** then indicated that the accused had elected to make an unsworn statement and would call no witnesses. In his unsworn statement he said he had been arrested purely by mistake, as he had been robbed of a vehicle which he was driving and he had been tied-up in the forest by those who robbed him. On 22nd July, 2005 the defence made a short submission as follows:

> "We are submitting that the prosecution has not tendered enough evidence. Identification by PW1 only is not safe…We wish to rely on the case of ***John Bosco Karume v. Mombasa***, CR.A.41/98. the superior Court set out the standards to be met [in relation to evidence of identification]. We wish to point out [that] only [the] few …items tendered as exhibits [could not establish the prosecution case]. The prosecution did not show that the same were [in the] possession of the accused. We are submitting that the prosecution has not met the requirements for a safe conviction. We ask that the accused be acquitted."

Hearing had started before the learned Senior Resident Magistrate, ***S.M. Kibunja***; continued before the learned Senior Resident Magistrate, ***T. O. Okello***, Esq; and now judgment was delivered by the learned Chief Magistrate, ***Ms. H. Omondi*** on 30th August, 2005.

It is not shown on record, throughout the entire proceedings, that the consequences of the several changes in the presiding Magistrate were ever adverted to, nor that the implications of such changes for the procedural rights of the accused were ever brought to his attention. Such a position is not in conformity with the terms of s.200(3) of the Criminal Procedure Code (Cap.75), which thus provides:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been reordered 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."***

Learned counsel for the respondent, ***Mr. Omirera***, graciously conceded that the foregoing provision had not been complied with, in the trial process, and that consequently, the trial may be pronounced to have been a nullity. His prayer was that such nullity of proceedings should not automatically work in favour of the appellant who would, naturally, rely on it to canvass for his acquittal.

Mr. Omirera asked this Court to order a retrial of the original case before the Subordinate Courts. He urged that it be taken as of no consequence, just who bore responsibility for the irregular proceedings that had been conducted, and that led to the conviction of the appellant. Learned counsel urged that, a consideration of merits only would show the crime that had been charged to be a serious one, being capital robbery which carried a mandatory death sentence, as per s.296(2) of the Penal Code (Cap.63). He submitted that although the trial process had run over a period of two-and-a-half years, and therefore, necessarily, the appellant remained in custody during that time, given the gravity of the offence charged, such an elapsed period of time would not be of the essence; for a duly-conducted trial if it led to conviction, would land the appellant with a death sentence. Retrial in those circumstances, it was urged, would not prejudice the appellant in any way.

It was learned counsel's standpoint that, the admissible evidence on record, in this matter, was capable of leading to a conviction if the trial process was conducted regularly. It was not, in our view, appropriate, however, for systematic assessment of such evidence to be conducted so as to convince us that it would certainly lead to a conviction, the reason being that such an undertaking would be more fitting for a trial Court, which must consider all evidence and see if it amounts to proof-beyond-reasonable-doubt.

The basis for ordering a retrial is stated in s.200(4) of the Criminal Procedure Code (Cap.75):

> ***"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."***

So it is a *discretionary* matter whether or not this Court is to order a retrial; and the main consideration in the exercise of this discretion is whether or not the mode of trial adopted did materially prejudice the appellant. The meaning, in our understanding, is that where there is no *prima facie* case that could lead to a conviction, in a properly-conducted trial, then it is to be concluded that the trial would have materially prejudiced the appellant.

Mr. Omirera urged that if a retrial were ordered, the prosecution would be able to produce all the witnesses, including tourists who had come from foreign countries and were affected by the carjacking and robbery which had led to the charges in the case. He submitted that, as the irregularity which affected the trial had arisen from error on the part of the Court, the prosecution should still be given a chance to prove its case, by way of a retrial; he urged that in view of the harm that was suffered by the complainants at the hands of robbers, the ends of justice could only be met if a retrial were conducted.

Those submissions were contested by learned counsel for the appellant, ***Mr. S. Ojienda***. He urged that an acquittal be ordered, not only for non-compliance with s.200(3) of the Criminal Procedure Code, but also for shortfalls in the evidence which the prosecution had tendered in Court. Although, as already noted, this Court is not now trying the question as to whether the prosecution had demonstrated the appellant's guilt beyond-reasonable-doubt, it is proper that we should address the points of law raised for the appellant.

Mr. Ojienda urged that the discretion of the Court to order a retrial, which is provided for in s.200(4) of the Criminal Procedure Code (Cap.75), should in the circumstances of this case, be exercised in favour of the appellant rather than of the respondent. Why? Because past case law has examples in which the Court in its appellate capacity, has quashed convictions and sentences, for failure on the part of the trial Court to comply with the terms of s.200(3) of the Criminal Procedure Code.

Njenga v. Republic [1984] KLR 605 was cited as an example. In that case trial had been conducted before two different Magistrates, and the succeeding one did not inform the appellant of his right to have the complainant resummoned; and at the end the Court accepted the evidence of the prosecution and rejected that of the appellant and of his witnesses, and convicted him. This matter went up to the Court of Appeal, and the Court's reason for quashing the conviction emerges, in our opinion, from the following passage found at page 605 (holding number (1)):

> ***In a case depending on visual recognition, where the principal witness is heard by one Magistrate and the second identifying witness by another, we think it essential that the requirements of [s.200(3) of the Criminal Procedure Code] should be observed, as it is for the protection of the accused person."***

Learned counsel urged that it was not the fault of the appellant that the trial Court had not, in the instant case, complied with the terms of s.200(3) of the Criminal Procedure Code, and that to-date, he had been in custody for some four years, thus suffering prejudice in his constitutional rights.

Mr. Ojienda submitted that in the trial proceedings before the Magistrate's Court, situations had arisen which would have founded challenges to the judgement recorded – quite apart from the irregularity

connected with s.200(3) of the Criminal Procedure Code.

One such situation, counsel urged, was conviction based on the evidence of a single identifying witness and which was uncorroborated. The fellow-tourists of PW1 had not come to bring corroborative evidence before the Court. Counsel urged that the recovered-property element in the identification of the appellant as culprit, was defective because no evidence had been called that such property was in the possession of the appellant. Learned counsel also thought there was inconsistency in PW1's evidence, and in his view this witness was not truthful. He submitted that since the prosecution had tendered no evidence that an identification parade had been conducted, it followed that the appellant was not properly identified as a participant in the night robbery which was staged against PW1 and his fellow-travellers. In these circumstances, it was urged, it was dangerous to convict on the evidence of PW1.

Learned counsel relied on the Court of Appeal decision in ***Makokha v. Republic*** [1989] KLR 238, where it had been held that (p.238):

> ***"While a defendant may be convicted on the identification evidence of a single witness, before a conviction can be based on such evidence the Court must warn itself of the danger of doing so and should only convict if satisfied that the circumstances of identification were favourable and the evidence is reliable and free from the possibility of error."***

He cited also the Court of Appeal decision in ***Thuo v. Republic*** [1988] KLR 763, in which, on the issue of corroboration, it had been thus held (pp.763 – 764):

> ***"…a court should warn itself of the danger of acting on the uncorroborated testimony of a complainant, but having done so, it can convict in the absence of corroboration if it is satisfied that the testimony is truthful. If no such warning is given, the conviction will normally be set aside unless the appellate court is satisfied that there was no failure of justice."***

Counsel urged that the mode of identification of the appellant had not provided a safe basis for conviction.

Learned counsel cited several other cognate past judicial decisions, to advance his challenge to the reliability of the identification which had led to the conviction of the appellant: ***Ngoya v. Republic*** [1985] KLR 309 (C.A.); ***Olweno v. Republic*** [1990] KLR 509 (H.C.); ***Ouma v. Republic*** [1986] KLR 619 (C.A.); ***Wafula & 3 Others v. Republic*** [1986] KLR 627 (H.C.); ***Oluoch v. Republic*** [1985] KLR 549 (C.A.); ***Joseph Kariuki v. Republic*** [1985] KLR 507 (C.A.).

In his reply, learned counsel ***Mr. Omirera*** submitted that the line of cases relied on by counsel for the appellant was largely inapt; for in a case such as ***Njenga v. Republic*** [1984] KLR 605, the reason the Court of Appeal quashed the conviction of the appellant was that there had been a single identifying witness; but in the instant case, it was urged, obligations of a first appellate Court fall due, as was not the case in a second appeal in the ***Njenga case.*** Counsel urged that the prosecution is possessed of evidence, not only of identification, but also of the recent possession of goods lost in a robbery attack.

Learned counsel urged that no issue of corroboration should be raised at this stage, to defeat the prosecution's application – because s.143 of the Evidence Act (Cap.80) provides that –

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact,"***

and so the role of PW1 in the proof of the prosecution case is in every respect proper in law.

Mr. Omirera urged that there was, on record, *prima facie* evidence which justified the mounting of prosecution against the appellant, and that this remains the position to-date. He asked for orders for a retrial, and submitted that whether or not proof beyond reasonable doubt would be achieved, in the event of a retrial, should be left to the prosecution process and to the trial Court.

Much of the submission made for the appellant delved into issues of merits in the conduct of trial; and the essential argument was that the trial was so mired in unreliable evidence as to be both a defective trial, and a trial the outcome of which merited quashing on the merits. Such an approach to the instant case, we think, was not well directed, as it was common cause that the validity of the whole trial had been tainted by irregularity. So the sole proper question before the Court was whether ends of justice demanded a retrial, or whether the appellant should now be spared the burdens of a new trial.

All prosecution when initiated, within the law, is intended for the due administration of criminal justice; and hence, in principle, this Court, which serves the *public interest* in the administration of justice, must begin by upholding such a process. It follows that it is a legitimate object of the administration of justice, to make orders for a retrial, in a proper case. Is this such a case?

It was perhaps unfortunate that transfers of Magistrates to other stations, in quick succession, had taken place and provided a condition in which the terms of s.200(3) of the Criminal Procedure Code (Cap.75) were not complied with; but we think it may not all have been due to lack of due diligence on the part of the Court. The trial rights guaranteed to the accused, in those circumstances, must be observed; and so we do hold that the trial was a nullity.

We cannot and ought not to say that the evidence now held by the prosecution would not result in proof-beyond-reasonable- doubt against the appellant; but it is clear to us that the prosecution does, indeed, have substantial evidence which they would be able to adduce in Court. In principle, therefore, this Court would provide an opportunity for the prosecution to conduct their case, unless there exist claims on the side of the appellant so weighty, in terms of ends of justice, that they dictate an acquittal at this stage.

We have carefully listened to the appellant's case; and the focus of that case on the short-falls in the prosecution case as it was conducted, shows that the correct material has not been placed before the Court; whether or not an appeal would have succeeded, had there been no irregularity, is not the issue we are determining. We have noted too that the offence charged was a serious one, in terms of the protection of the public's rights to peace and to freedom from robbery; and it was also a serious one in its gravity in terms of the prescribed penalty.

On the merits of this case, we are inclined to order a retrial. Accordingly, we declare the original trial a nullity, and remit the matter to the Subordinate Court seized of jurisdiction, to conduct a retrial on the basis of priority. The fresh trial is to be conducted before a Magistrate other than any of those who were involved in the initial trial. In the meantime, the appellant shall continue to be held in prison custody.

Orders accordingly.

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

J. B. OJWANG

JUDGE

R.N. SITATI

JUDGE