REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J)

CRIMINAL APPEAL NOS. 57, 58, 59 & 60 OF 2006 (CONSOLIDATED)

BETWEEN

GEORGE KIBUE GAITHO.....1ST APPELLANT

JOHN MARANGA NYAKIRABA.....2ND APPELLANT

MOSES NDUNGU NJUNGO.....3RD APPELLANT

ROBERT MOKWA ONYANGO.....4TH APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(Appeals from the Judgment of Principal Magistrate M. W. Murage dated 8th December, 2005 in Criminal Case No. 449 of 2005 at the Law Courts, Kikuyu)

JUDGMENT

On the occasion of hearing these appeals, learned State Counsel ***Ms. Gakobo*** applied for a consolidation of the same: on the ground that they arose from the same cause which had been tried on that basis. As learned appellants' counsel ***Mr. Mbugua*** had no objection orders were made consolidating the four appeals, under Criminal Appeal No. 57 of 2006 as the lead file.

The appellants had been charged with two counts of assault, contrary to s.251 of the Penal Code (Cap. 63), and they faced a third count, of malicious damage to property, contrary to s. 339(1) of the Penal Code.

The prosecution case was that on 3rd April, 2005 PW2 had taken his lawyer to Kikuyu Springs, where his pump had been damaged by staff of the Nairobi Water Company. Even as PW2, accompanied by his son-in-law, showed his lawyer the damaged pump, they were attacked by the four appellants, who were armed with cleavers, iron bars, and sticks. Both PW2 and his son-in-law were assaulted, and their camera was damaged by the attackers. After the complainants reported the matter to the Police, the appellants were arrested and charged.

The learned Magistrate proceeded with the trial, and recorded her findings and orders as follows:

"… I am convinced that the accused [persons] attacked the complainant and … in the process, damaged the camera. If [the] complainants had broken any regulation, then the accused [persons] ought to have sought help from the Police. I find that even if the complainant had committed any offence the force used on them was excessive and unjustified. I find that the accused [persons] have not challenged the evidence of [the] prosecution and I find them guilty as charged in the three counts, and convict them accordingly".

The learned Magistrate fined each appellant Kshs.5,000/=, and in default six months in jail, in respect of the first count; it was the same in respect of the second count; and for the third count, each appellant was fined Kshs.10,000/=, and in default, twelve months' imprisonment.

The several petitions of appeal have much in common and indeed, the following items taken from the 1st appellant's petition are perfectly representative of all the petitions. The grounds of appeal are thus set out:

i. ***The learned Magistrate erred and misdirected herself in law by putting the appellant to his defence in the absence of his advocate, and by proceeding to give a judgment date without giving the appellant's advocates an opportunity to make submissions;***

ii. ***the learned Magistrate erred and misdirected herself in law by citing the appellant's advocate's clerk for contempt of Court by detaining him, thereby denying him an opportunity to communicate the appellant's advocate's brief to another advocate to take a date for defence hearing;***

iii. ***the learned Magistrate erred and misdirected herself in law and fact, in arriving at the conclusion that the complainant had the right to be at the alleged locus in quo, when there was no sustainable evidence to support that position;***

iv. ***the learned Magistrate erred and misdirected herself in law and fact, in concluding that there was no basis for the alleged injuries to have been caused by falling, while the evidence of PW1 confirmed that as a possibility;***

v. ***the learned Magistrate erred and misdirected herself in law and fact, in finding that the appellant attacked the complainant, damaged the camera, and used excessive force, when the evidence on record was not sufficient to warrant such a finding;***

vi. ***the learned Magistrate erred and misdirected herself in law and fact in failing to appreciate, consider, or take into account the apparent contradictions and weaknesses in the evidence adduced by the prosecution against the appellant; and had she done so, she would have found that the prosecution had not proved its case beyond reasonable doubt;***

vii. ***the learned Magistrate erred in law in convicting the appellants for the offences of assault contrary to s.251 of the Penal Code, and that of malicious damage to property, when the evidence on record was not sufficient for the purpose of entering convictions;***

viii. ***the learned Magistrate erred and misdirected herself in law and fact by finding that the appellant had not challenged the prosecution's evidence and she failed to appreciate, consider and make findings on issues raised in the appellant's defence.***

At the hearing of this appeal, the ground of appeal canvassed most by learned counsel ***Mr. Mbugua***, was the decision of the learned Magistrate to proceed with the hearing and submissions, up to judgment stage, without according the appellants' advocate a hearing.

Mr. Mbugua stated that the appellants had appointed an advocate to represent them during the trial, and they had wanted representation throughout the trial. I have noted from the trial Court proceedings that on the occasion of plea-taking, on 22nd April, 2005 learned Counsel ***Mr. Mbugua*** appeared for the accused persons; and he is recorded to have said as follows:

> "***I wish to come on record for [the] accused. I apply to be supplied with witness statements and charge sheet. I also apply that [the] accused persons be released on minimal cash bail. They are junior employees of Nairobi Water Company, and the charges relate to happenings while they were working at the said company***".

On 27th June, 2005 when most of the hearing took place, learned counsel ***Mr. Mbugua*** was present in Court, and conducted cross-examination of the prosecution witnesses. Learned counsel continued to cross-examine at the next hearing, on 25th July, 2005. On that occasion, hearing was adjourned to 25th August, 2005, with learned counsel ***Mr. Mbugua*** objecting to adjournment. But ***Mr. Mbugua*** was present on 25th August, 2005 when the prosecution again obtained adjournment. Thereafter the Court did not sit on 2nd September, 2005 as had been ordered; a new date, 17th October, 2005 was later set for resumed hearing. On that occasion ***Mr. Mbugua*** was in Court, and the prosecution closed its case.

On 17th October, 2005 the Court set the date 24th October, 2005 for mention, for the purpose of setting a date for submissions. ***Mrs. Muthanji*** held brief for ***Mr. Mbugua***, and requested a date for submissions. The date ***14th November, 2005*** was then set for submissions. Counsel was able, on 14th November, 2005 to make submissions, urging that the accused persons had no case to answer. Thereafter the Court reserved its ruling to 23rd November, 2005. In the absence of counsel for the appellants, the learned Magistrate later gave a ruling as follows:

> "***I have considered the evidence before the Court and the submissions plus authorities … I find that [the] accused [persons] have a case to answer***."

The learned Magistrate went on to record that each accused would give sworn evidence, but without calling any witnesses. Each witness was then sworn and apparently examined; it is not stated *who* examined them *in-chief*; but they were cross-examined. At the end, as the record shows, no opportunity was created for *final submissions*; the learned Magistrate directly set a date for delivery of judgment – 8th December, 2005. When that date came, she entered convictions and imposed sentences.

It is the appellants' contention that the learned Magistrate had not accorded their advocate an opportunity to have another counsel hold his brief at least for the purpose of making representations regarding plans for final submissions.

Counsel has contested the conduct of the learned Magistrate, in running through up to conviction and sentence, while skipping the final-submissions stage. The appellants, on that account, missed the representation of counsel in a final-submission process; and it is now argued that the action of the trial Court in that regard, was a breach of s.77(1) and (2)(c) of the Constitution, which relates to the trial rights of an accused person. That section thus provides:

> ***"(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.***
>
> ***(2) Every person who is charged with a criminal offence –***
>
> ***…***
>
> ***(c) shall be given adequate time and facilities for the preparation of his defence*** …"

Learned counsel has particularly underlined the constitutional *obligation* resting on the Court, to accord persons such as those in the position of the appellants herein, ***adequate time*** for the preparation of their defence. In the words of counsel, *"by rushing the accused [persons] to their defence, in the absence of counsel, the [trial Court] was not fair, and was in breach of their fundamental rights"*. This ground even alone, ***Mr. Mbugua*** urged, dictates that the conviction be quashed.

It was not a novel principle being urged. In a recent Court of Appeal decision, ***Albanus Mwasia Mutua v. Republic Criminal Appeal No. 120 of 2004*** it had been held:

> "***At the end of the day, it is the duty of the Courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in our judgment [Ndede v. Republic [1991] KLR 567; Kiyato v. Republic (1982-88) K.A.R. 418; Swahibu Simbauni Simiyu & Another v. Republic Criminal Appeal No. 243 of 2004 C.A.] appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of [the] evidence which may be adduced in support of the charge."***

The foregoing principles were adopted to anchor learned counsel's argument herein, that it was a constitutional right of the accused to choose his mode of representation; and where he chooses to appear by counsel, the Court should act on that basis unless the accused returns to Court and conveys a change of his defensive strategy. Counsel submitted that the appellants, as lay persons, may not have appreciated the significance of the learned Magistrate's preliminary ruling which put them to their defence. They may not have understood, in particular, that their designated advocate *would not again have a chance to represent them*. So, it was urged, the appellants ought to have been accorded enough time to prepare for their defence and, in the circumstances, there was a breach of their fair-trial rights as specified in s. 77 of the Constitution.

Learned State Counsel ***Ms. Gakobo*** conceded to the appeal. She noted that the trial Court, when putting the appellants to their defence, had failed to record the c*oram*. As it is on record that all the appellants gave sworn defences, one would wonder whether even the prosecutor was in Court, and whether whoever prosecuted the case, was qualified under the law to do so (ss. 85(2) and 88 of the Criminal Procedure code (Cap. 75).

Ms. Gakobo's concession to the appeal is, with respect, a meritorious one. For lack of c*oram* Statement when the defence statements were made, it cannot be ascertained from the record *who* examined the accused persons *in-chief*; yet they were *cross-examined*. Cross-examination, the most far-reaching step in the ascertainment of veracity in the trial process, cannot be casually conducted, and in an ideal situation, especially in a criminal case, it should be carried out with *counsel for the defence* present. In the instant case counsel was on record, and it was already abundantly clear that the appellants had chosen representation by counsel, as their mode of access to fair hearing as contemplated under s.77 of the Constitution. The *presence of their counsel*, therefore, was an inherent element in their rights to fair trial, and they had not changed this situation by making a different representation to the trial Court. In these circumstances, I hold that there had been a *breach* of their constitutional rights when they were taken through the trial without their advocate.

Learned counsel ***Ms. Gakobo*** urged that the trial process be nullified, and she would not seek a retrial, as the same would only create opportunities for the prosecution to fill gaps in a defective case.

I am in agreement; and for the reasons already stated, I hereby allow the appeals, and quash the trial process as contrary to s.77 (1) and (2)(c) of the Constitution. I set aside and quash the sentences imposed by the trial Court, with a retroactive effect, and order that all such fines as the appellants may already have paid shall be forthwith refunded to them.

Orders accordingly.

DATED and ***DELIVERED*** at Nairobi this 11th day of July, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Appellants: Mr. Mbugua

For the Respondent: Ms. Gakobo