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

Criminal Appeal 227 & 230 of 2005

LENKAI SANE OLE KAMPEI…....……...…..…....….1ST APPELLANT

JACKSON JUMBE OLE SERUNGA…….....…..…….2ND APPELLANT

-AND-

REPUBLIC……..……..……...……...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Karani dated 26th April, 2005 in Criminal Case No. 2928 of 2002 at the Makadara Law Courts)

JUDGEMENT OF THE COURT

The appellants herein, ***Lenkai Sane ole Kampei*** and ***Jackson Jumbe ole Serunga*** had been charged, along with two others, with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that all the four, on 6th February, 2002 at Mathare North in Nairobi, jointly with others not before the Court, and while armed with offensive weapons namely swords, robbed ***Samuel Njoroge Nyoike*** of cash in the sum of Kshs.40,000/=, a pressure lamp, a torch, and two packets of sweets all valued at Kshs.41,400/=, and at, or immediately before, or immediately after the time of such robbery they threatened to use violence on the said ***Samuel Njoroge Nyoike.***

After plea was taken before Chief Magistrate (as he then was) ***Muga Apondi*** on 11th February, 2002 this matter was repeatedly mentioned before different Magistrates, and hearing commenced before Principal Magistrate ***Mr. Rinjeu*** on 6th May, 2002. This was followed by mentions on several occasions, and hearing resumed before ***Mr. Rinjeu*** on 2nd July, 2002. Several mentions followed, until 19th December, 2002 when ***Mr. Rinjeu*** resumed hearing again. There were again a number of mentions, and on 26th February, 2003 ***Mr. Rinjeu*** recorded that the prosecution case was closed, and ruled that a *prima facie* case had been established.

On 21st March, 2003 all the defendants gave sworn evidence before the learned Principal Magistrate, ***Mr. Rinjeu*** who then set down 2nd April, 2003 as date of judgment. But on 16th April, 2003 Senior Principal Magistrate ***Mr. C.O. Kanyangi*** recorded that ***Mr. Rinjeu*** had died; and he made orders that the hearing would be conducted *de novo.* Thereafter the matter was repeatedly mentioned before different Magistrates until 12th September, 2003 when a fresh hearing commenced before Senior Principal Magistrate ***Mr. Kanyangi***.

After the Court heard the two witnesses, the matter was again mentioned repeatedly before different

Magistrates, before continued hearing took place on 25th November, 2003. Thereafter, the matter was again repeatedly mentioned before different Magistrates; but on 3rd June, 2004 it came before Senior Principal Magistrate ***R. Nyakundi,*** who reallocated it for hearing before Senior Resident Magistrate ***Ms. Karani.*** After several mentions, ***Ms. Karani*** recorded the informal application of the prosecutor, Inspector of Police ***Musyimi:*** *"It's a part-heard; the witnesses I have had [already] given evidence. [Another witness],* ***Dr. Kamau****, prays for a Wednesday."* The prosecutor went on to say in Court: *"PW1 testified twice, as the matter was ordered to start de novo; it was the same with PW2. Only [PW3] was stood down."*

To the prosecutor's application the several accused persons responded. The 1st accused said: *"This is an old case, and I pray for the Court's assistance. We are opposed to the hearing de novo following the Magistrate's death."* The 2nd accused said: *"I agree with 1st accused; this is double evidence."* The 3rd accused said: *"I pray that the evidence in the Court's record be used to write the judgement."* The 4th accused said: *"I agree with them."*

The learned Senior Resident Magistrate then made a ruling as follows:

"***I have noted the accused [persons'] sentiments; but the order they complain about, directing that trial be held de novo was made on 16th April, 2003; if the accused were genuinely aggrieved, they ought to have appealed against it. Two witnesses have testified so far, and I do not have the mandate to usurp the other trial Court's orders. The accused could seek leave and appeal against the order, albeit belatedly***.

After a number of further mentions, the learned Senior Resident Magistrate, on *11th January, 2005* proceeded to hear PW3, moving on from where Senior Principal Magistrate ***Mr. C.O. Kanyangi*** had left off in *November, 2003*. The trial Court record on 11th January, 2005 sets out the names of those who were present in Court; records that the prosecution had one witness in Court; and records that the accused persons were ready for the hearing. There is no record on that day or on any of the earlier days when mentions took place before the trial Magistrate, indicating that any guidance at all had been given, attendant on change of judicial officers conducting the hearing. At the end of the examination of PW3, ***IP Musyimi*** the prosecutor indicated that he would have two more witnesses including one ***Dr. Kamau.***

Thereafter, several mentions took place before the trial Magistrate. It was not until 22nd February, 2005 that the matter came up for hearing; and on that occasion Police Force No. 46084, ***Police Constable David Seinbui,*** the Investigation Officer, came into the witness-box as PW4; and at the end of his testimony the prosecution closed its case. The learned Magistrate then gave *1st March, 2005* as the date for preliminary submissions. On the appointed date, each of the accused made his submissions, to which the prosecution made a reply; and immediately a ruling was given as follows:

"**From the prosecution evidence on record I am satisfied [that] a *prima facie* case has been established to warrant placing the accused persons on their defence**."

Each accused chose to give unsworn testimony, with no witnesses; and they gave their testimonies on 21st March, 2005.

On 26th April, 2005 the learned Magistrate gave her judgement, finding each accused guilty as charged, and sentencing each to death, as provided in s.296(2) of the Penal Code (Cap.63).

As the appeals herein relate to convictions in one and the same case, learned counsel ***Ms. Gateru*** applied for a consolidation of the same, to save the Court's time, and to give certain advantages to the parties, in relation to efficiency in prosecution of pertinent claims. As learned counsel ***Mr. Nyakeno*** had no objection, we consolidated the two appeals, under Appeal No. 227 of 2005 as the lead file, and with ***Lenkai Sane ole Kampei*** as 1st appellant, and ***Jackson Jumbe ole Serunga*** as 2nd appellant.

To the various grounds of appeal set out in the respective petitions of appeal of the two appellants, learned counsel ***Mr. Nyakeno*** now sought to add a further ground: that the trial Magistrate had erred in law and fact, by not adhering to the terms of s.197 and 198(4) of the Criminal Procedure Code (Cap.75) which relate, respectively, to the *manner of recording evidence* before a Magistrate, and *interpretation of witness-testimony* to accused or his advocate.

While not objecting to the informal application made on behalf of the appellants, learned State Counsel ***Ms. Gateru*** had a different application, which had the potential to *change the direction* of this appeal. She would *concede* to the appeal, but then make a case for a *retrial;* and in that respect learned counsel prayed for leave to start, in the making of submissions. The Court ruled as follows:

"**Learned State Counsel concedes to the appeal. So there is no need for counsel for the appellant to start. Learned State Counsel wants to make a case for a retrial. The order of hearing would then need to change. We hereby direct that learned State Counsel *Ms. Gateru* is to present her case for retrial first."**

Ms. Gateru stated that the State concedes to the appeal on a *technicality,* and was seeking another opportunity for the *merits* of the prosecution case to be considered by the Court.

Learned counsel submitted that when, following the death of ***Mr. Rinjeu*** who first heard the case**, *Mr. Kanyangi*** took over and re-heard the witnesses the language used in Court was not recorded, and there was no indication that any language interpretation was done to the appellants herein, in a language that they understood – and this would contravene the terms of s.77(2) of the Constitution, as well as those of s.198 of the Criminal Procedure Code (Cap.75). Consequently, ***Ms. Gateru*** submitted, the trial as it proceeded, is rendered a nullity.

Learned counsel urged that this Court, as it may pronounce the trial in the Court below to be a nullity, do exercise a discretion to order for a retrial. She submitted that the seriousness of the offence charged would dictate that a retrial should be ordered. She urged that there was strong evidence on record which would probably lead to conviction and, in particular, there was evidence of positive identification of the appellants as suspects. Learned counsel urged that those witnesses who had testified in the trial of the case, can readily be availed if retrial is ordered. Counsel submitted that the period during which the appellants had already been in custody, since the date of judgement in the Court below, should not be viewed as being too long, in the light of the fact that the offence charged, if proved, would lead to the death penalty.

Learned counsel ***Mr. Nyakeno*** contested the State's application for retrial, on the basis that an order in those terms would lead to a miscarriage of justice as it would work prejudice to the appellants. In the words of counsel, "once the appeal is conceded, then the Court has no basis for ordering a retrial, unless the Attorney-General lays the basis."

Mr. Nyakeno submitted that any violation of trial procedure, ought to benefit the accused; because the effect of a retrial would be *"allowing the Attorney-General to go and re-arm, and come up with a new case."*

Already, counsel urged, the appellants had suffered owing to the dilatory mode in which the trial was conducted: *"The proceedings went through three [different] Magistrates. After the first Magistrate, it started de novo.* ***Mr. Kanyangi*** *made it part-heard; then it proceeded before another Magistrate.*" Counsel urged that there was no overwhelming case which the prosecution could mount, on a retrial; for already the appellants had challenged the convictions on identification, manner of arrest, and mode of recovery of exhibits. He urged that the appeal be allowed, and conviction and sentence be set aside.

Judicious exercise of discretion, we believe, in the light of the special facts of each case, is the basis upon which a retrial may be ordered, in a case such as the instant one. It is common cause that there were fundamental procedural irregularities which dictate that this Court must declare the trial to have been a n*ullity* – and we so declare.

There are judicial principles to guide the Court, in determining whether or not a retrial is to be ordered. On this point the Court of Appeal for East Africa, in ***Ahmed Ali Dharamsi Sumar v. Republic*** [1964] E.A. 481 had thus pronounced itself (at p.483, ***per Duffus, J.A.***):

"***it is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the Magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial. The Magistrate's error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused."***

The Court, in that case, was guided also by its earlier decision in ***Pascal Clement Braganza v. R*** [1957] E.A. 152. In that earlier case, the following valuable passage appears (***per Briggs, J.A***. at p.153):

"…**since the retrial will take place, it would clearly be undesirable that we should give our own views as to the meaning which should be attributed to the statement, or as to the effect of other evidence on which the Crown relies. It is possible that on the retrial *there may be more evidence* against the appellant than was produced at the first trial. That is not either a reason against ordering a retrial or a reason in favour of it. The order was not made on the basis that the Crown had failed to prove its case the first time, but might be able to do so the second time, and it could not properly have been made on that footing. We say no more than that there was evidence on the record indicating that on a retrial a conviction might eventuate**."

From the authorities, therefore, it is for certain that the responsibility lies with this Court to *sense the gravity of the factor which nullifies a concluded trial; to have a feel of the weight and character of the evidence available*; to *take due account of any vital issues of administration of justice*; to *bring into the equation a sense of justice for the accused persons;* and *to take into account any weighty and relevant matters,* as a basis for determining whether or not a retrial should be ordered, in a particular case.

It is on the basis of those *broad principles* that we will resolve the question placed before us.

We do recognize that the appellants were not to blame for the technical flaws leading to the nullification of the proceedings and the judgement of the Court below. But it is no less clear to us that the trial Court itself was operating in situations of over-work and general disadvantage; and so we do not lay blame at that Court's doors for the adoption of wrong procedure.

We are left, therefore, with *issues of merit* only, as the basis for deciding the question. We have noted that the prosecution did not lay charges against the appellants *without cause*, and, if the trial had been conducted regularly up to the end, it cannot at this stage, and in our opinion, be said that a conviction could not have been achieved. Of course, this is not the trial Court, and we cannot therefore begin to *assess the evidence* adduced and to say it *would have* led to conviction. We believe, however, that the offence charged was a very serious one, reparations to which would certainly be in the best interests of members of the public. Precisely in the cause of such interests, the Constitution of Kenya

sts the Attorney-General's Office with prosecutorial powers, to be exercised in accordance with the detailed provisions of the Penal Code (Cap.63) and of the Criminal Procedure Code (Cap.75). In this Court, we cannot very well be seen to be gainsaying the obligations of the State Law Office to endeavour to prosecute all persons reasonably suspected to have committed offences contrary to the provisions of the statute law. Indeed, as an adjudicatory institution, it is the business of the Courts to be available for the resolution of justiciable disputes, including those of a *criminal nature.* We cannot, therefore, be saying that the *retrial* of a criminal case is in itself a bad thing.

In the present instance, we think, there is *more merit* in a retrial, than against a retrial, seeing that there is a serious charge to be laid, and there is very specific evidence ready to be adduced in proof of the

charge. A retrial will certainly, we believe, respond to the *public interest* in the due administration of justice; whereas refusing a retrial can only benefit the appellants herein, in a *personal* respect. We do not believe giving the appellants such a personalized advantage is necessarily in the best interests of justice; for justice has broad connotations which incorporate the public interest.

Given the fact that the appellants if found guilty would be subject to the death penalty, we do not believe that they will suffer any prejudice by being brought once again before the Subordinate Court for fresh trial.

The foregoing principles lead us to make orders as follows:

1. The proceedings leading to the Judgement of 26th April, 2005 together with the Judgement itself, are hereby nullified and vacated.

2. A retrial is hereby ordered, to take place at the Makadara Law Courts, before a Magistrate having jurisdiction, but who has not in the past presided at the trial of the case against the appellants herein.

3. This matter shall be mentioned at the Chief Magistrate's Court at Makadara, for trial directions and for orders as the said Court may see fit, on Monday 24th September, 2007.

4. Production order shall issue in respect of the two appellants, for the purpose of Order (3) herein.

DATED and **DELIVERED** at Nairobi this 20th day of September, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Tabitha Wanjiku; Eric

For the Appellants: Mr. Nyakeno

For the Respondent: Ms. Gateru