REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 278 & 279 of 2004

(From original conviction and sentence of the Senior Principal Magistrate's Court at

Nyahururu in Criminal Case No. 126 of 2003 [D. K. Ngomo { P.M.})

SAMUEL MUREITHI GICHINI……...……1ST APPELLANT

JOSEPH GICHIMU GICHINI……..…...2ND APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT OF THE COURT

The appellants, Samuel Mureithi Gichini (*hereinafter referred to as the 1st appellant*) and Joseph Gichimu Gichini (*hereinafter referred to as the 2nd appellant*) were charged with two counts of **Robbery with Violence contrary to Section 296 (2) of the Penal Code**. The particulars of the first count were that on the 25th December 2002 at Kagongo village in Nyandarua District, the appellants jointly with another not before court robbed John Mumbura Mwangi of Ksh.2,800/= and at or immediately before or immediately after the time of such robbery wounded the said John Mumbura Mwangi. The particulars of the second count were that on the same day and in the same place, the appellants jointly with another not before court robbed Elijah Kamau. On the 16th August 2004 after six witnesses testified, the trial magistrate allowed the prosecution to amend the particulars of both counts to include the following words after the words "*jointly with another not before court*;"

"***While armed with dangerous and offensive weapons namely bottles and knives."***

We shall comment about the amendment to the charge that was allowed by the trial magistrate at a later part of this judgment. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After a full trial the appellants were convicted as charged on both counts and sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by the conviction and sentence and have appealed to this court.

Although each appellant filed separate appeals to this court, at the hearing of the appeals, the two appeals were consolidated and heard as one. The grounds of appeal put forward by the appellants were more or less similar. The appellants were aggrieved that they had been convicted by the trial magistrate based on the contradictory, incredible and unsatisfactory evidence of prosecution witnesses. They were aggrieved that the trial magistrate had put undue weight to the evidence adduced by the prosecution witnesses and particularly that of PW1, PW2 and PW3 without considering the evidence that the appellants had adduced in their defence. They were further aggrieved that the trial magistrate had failed to consider the fact that the complainants had initially not complained that they had been robbed but had

rather complained that they had been assaulted and that the robbery allegations were made later so as to secure the detention of the appellants in custody. They faulted the trial magistrate for failing to consider the fact that the alleged incident took place during the campaign period and therefore it could not be ruled out that the complaint against the appellants was lodged by the complainants pursuant to a grudge that resulted from political differences. The appellants were aggrieved that the trial magistrate had not considered all the circumstances of the case before he arrived at the erroneous decision convicting them.

At the hearing of the appeal, Mr. Oumo for the appellants amplified the grounds of appeal put forward by the appellants. He submitted that the second charge which the appellants were convicted was based on a defective charge. He submitted that the said charge did not specify the property that was allegedly robbed from the complainant. He further submitted that when the plea was taken before the trial magistrate the prosecutor who was present in court was an unqualified police officer of the rank of a sergeant. He therefore submitted that the subsequent proceedings which followed pursuant to the said unprocedural taking of plea were a nullity and therefore the conviction of the appellants ought to be set aside. He further submitted that the evidence which was adduced during the trial was at variance with the charge. This was because the names of the persons who allegedly robbed the complainants were not the names that appeared in the charge sheet. He argued that the prosecution had not proved its case on a charge of robbery with violence to the required standard of proof beyond reasonable doubt because the complainants had not told anyone, immediately after the alleged robbery, that they had been robbed of any property. In his view, the prosecution only established the offence of assault. He urged this court to consider the totality of the evidence adduced and re-evaluate it and allow the appeal.

Miss Opati for the State opposed the appeal. She submitted that the prosecution had established the ingredients necessary to prove the charge of robbery with violence to the required standard of proof. She submitted that P3 forms were produced which established that the complainants had been attacked during the robbery by persons whom they identified as appellants. She submitted that although the robbery took place at night, the complainants were able to identify the appellants by the head lights of their motor vehicle which were put on. She submitted that the defect in the second charge was not fatal to the proceedings because the appellants had not been prejudiced. She further submitted that the fact that an unqualified police prosecutor was present in court when the plea was taken, did not vitiate the proceedings that subsequently took place. This was because the plea was taken by the trial magistrate and the said unqualified police prosecutor played no role at all. She submitted that the mix-up in the names in the charge sheet and the names that were mentioned in the proceedings by the prosecution witnesses could have been a typographical error. She submitted that there was no doubt that the appellants were recognised by the complainants during the robbery as the appellants were known to the complainants prior to the said robbery incident. She urged this court to uphold the conviction of the appellants because the same was grounded on sound evidence of the prosecution witnesses. She further urged this court to dismiss the appeals.

The duty of this court as the first appellate court was set out in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

"***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination*** *(Pandya vs Republic [1957] E.A 336)* ***and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (****Shantilal M. Ruwala vs R.[1957] E.A 570****). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, see*** *Peters vs Sunday Post [1958] E.A 424****."***

In the present appeal, we have re-evaluated the evidence adduced before the trial magistrate and considered the rival submissions made before us by Mr. Oumo, the learned counsel for the appellants and by Miss Opati, the learned State counsel. The issue for determination by this court is whether the prosecution adduced sufficient evidence to enable this court uphold the convictions of the appellants on

the charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.**

We will first address the issues of law which were raised during the hearing of this appeal. It was submitted on behalf of the appellants that the proceedings before the trial magistrate were a nullity because when the plea was taken, the police prosecutor who was present before court was not qualified to prosecute criminal cases before a magistrate's court. No doubt the appellants' counsel was eluding to the decision by the Court of Appeal in **Eliremah vs Republic [2003] KLR 537** where it was held that a police officer of a rank lower than that of an assistant inspector of police was not competent to conduct proceedings before a magistrate's court. In the present case, the said unqualified police prosecutor was present when plea was taken. All the subsequent proceedings were prosecuted by a competent police officer.

We have considered the rival argument made on this point. We agree with the submission made by Miss Opati that the unqualified police prosecutor who was present when plea was taken did not participate in the proceedings as his role was passive. The appellants pleaded not guilty to the charge and were subsequently tried and convicted in a full trial. If the appellant had pleaded guilty to the charge, then we would not have hesitated to set aside the proceedings as being a nullity because the prosecutor would have been required to state the facts of the case. If he had done so, then he would have been in breach of the provision of **Section 85(2)** of the **Criminal Procedure Code**. We therefore find no merit with this ground of appeal and proceed to dismiss it.

A second ground raised by the appellants is that the second charge brought against them was defective. We will consider this aspect of the appeal together with the subsequent amendments which were applied for by the prosecution and allowed by the trial magistrate's court on the 16th August 2004, after six witnesses had testified. It is a mandatory requirement of the law that where a charge sheet is amended or is substituted, an accused person must take a fresh plea in respect of the amended charge or the substituted charge. The trial court is required to give an opportunity to an accused person to state whether he would wish to have the witnesses who had earlier testified to be recalled in view of the amendment or the substitution of the charge sheet. This was not done in the present case and in our view it rendered the proceedings subsequent thereto unsustainable in law. The rights of the appellants to a fair trial as envisaged by Section 77 of the Constitution of Kenya

breached. In this regard, the appellants are on firm ground when they complained that the charges brought against them were defective.

Another aspect of the appeal brought by the appellants is the fact that the evidence which was adduced by the prosecution witnesses referred to the appellants by other names other than the ones which were stated in the charge sheet. Although Miss Opati for the State submitted that the said variance in names could have been as a result of a mix-up, upon re-assessment of the evidence adduced before the trial magistrate it is clear that the witnesses were in no doubt that they were referring to persons whom they knew as '*Kamau*' and '*Ndirangu*' respectively. The names '*Kamau*' and '*Ndirangu*' do not appear in the charge sheet. The names of the appellants as appears in the charge sheet are Samuel Mureithi Gichini and Joseph Gichimu Gichini. It was apparent that PW1, John Mumbura Mwangi and PW2 Elijah Kamau Ndungu (*the complainants*) knew what they were talking about when they referred to the appellants as '*Kamau*' and '*Ndirangu.*' Their evidence was confirmed by PW5, Daniel Mwaura Kiarie, the Assistant chief of the sub-location where the appellants reside when he referred to one of the appellants as '*Ndirangu.*'

This was a legitimate complaint by the appellants. The charge sheet should always refer to an accused person by his actual names and the names by which he will be identified by the witnesses who will testify in court. In the present case, that was not done thus leading to confusion in the proceedings. The test to be applied by the court in determining whether the failure by the prosecution to provide the names of an accused person that he was referred to during the hearing of the case is whether such failure to mention the name in the charge sheet would prejudice the accused in the case. In the present case, we are of the view that although the prosecution failed to mention the alias names used by the appellants, such failure was not fatal to the prosecution's case because the complainants were apparently known to the appellants

prior to the alleged robbery incident. We will therefore disallow this ground of appeal.

This appeal will turn on the facts of this case. What are the facts of the case? PW1, John Mumbura Mwangi, PW2, Elijah Kamau Ndungu (*the complainants*) and PW3, Joseph Chege Maingi was travelling to Nairobi from Nyandarua District. They were ferrying farm produce in PW1's motor vehicle, a Canter, registration number KAN 693R. At about 9.00 p.m., as they were driving on a slippery road near Kagongo village, they saw three men walking on the said road. PW1 testified that the three men appeared drunk and refused to move away from the road. PW1 drove his vehicle and stopped a few metres away from the three men. According to PW1, one of the men walked past the side window of the front cabin of the motor vehicle and hit him using blunt and sharp objects. He recalled that he was pulled out of the vehicle and beaten by the men. He identified the persons who beat him up as the appellants. On his part, PW2 testified that he was beaten and robbed of his torch when the three men accosted them when PW1 stopped the motor vehicle. He testified that he was hit with a metal bar and stabbed with a knife on the neck. PW2 further testified that their assailants were armed with a rifle. The three witnesses testified that during the attack, they were able to repulse their assailants. They then drove the motor vehicle to a nearby shopping centre and made a report to PW5 Daniel Mwaura Kiarie, the area Assistant chief.

The complainants testified that as they were reporting the incident to PW5, they saw the appellants enter a bar. PW5 recalled that the complainants told him that they had been assaulted by the appellants. They did not mention to him that they had been robbed. In fact, the initial report made to the police by the complainants was to the effect that they had been assaulted. PW6, PC Geoffrey Mburu, the police officer who investigated the case, confirmed that the initial report which was made to the police related to the assault of the complainants by the appellants. In fact, the police issued the complainants with P3 forms which they took to PW4 John Mwangi Kariuki, a Clinical Officer based at Wanjohi Health Centre who confirmed that the complainants had been injured when they were assaulted with blunt objects. The testimony of PW4 discounted the allegations made by the complainants that they had been assaulted using sharp objects.

After their initial arrest, the appellants were released on bond by the police. PW1 was not impressed that the appellants had been released by the police. He complained to the OCS of Kipipiri Police Station and when he thought that the OCS was not assisting him, he made the report to the OCPD, Nyandarua District. It was pursuant to this subsequent report that the appellants were arrested on the 6th January 2003 and charged with the offences for which they were subsequently convicted. The appellants were arrested after they had presented themselves to the police station as per the conditions of their bond. When the appellants were put on their defence, they testified that they fought with the complainants due to political differences because they were on different political camps. It should be noted that the alleged incident took place on the 25th December 2002 which was three days before the National elections which took place during that year.

We have re-evaluated the totality of the evidence adduced before the trial magistrate and are of the view that the complainants were not candid when they made the subsequent report to the police that the had been robbed by the appellants. The complainants confirmed in their testimony that they had not initially informed the police that they had been robbed. In fact, PW5 was emphatic that the complainants did not tell them that they had been robbed by the appellants. PW6 confirmed that he was initially assigned to investigate an assault case that had been lodged by the complainants. It was pursuant to this report of the assault that the complainants were issued with P3 forms which were duly filled by PW4 and produced in evidence during trial.

We hold that the complainants hatched a conspiracy to have the appellants charged with the non bailable offence of robbery with violence due to their political differences. We are unable to fathom why, if the complainants were indeed robbed, they failed to indicate so to PW5 and to the police when they made their initial reports. We further hold that it was inconceivable that the appellants could have robbed the complainants and then saunter into a nearby bar where they were arrested a few minutes after the said robbery incident. We hold that there are many gaps in the story narrated by the complainants that raise doubt that they were indeed robbed by the appellants on that material night. The more credible explanation was the one which was offered by the appellants which was to the effect that they had fought

with the complainants during the heat of the political campaign period. The doubts raised in this case will of necessity be resolved in favour of the appellants.

The upshot of the above reasons is that we hold that the prosecution did not establish to the required standard of proof beyond reasonable doubt the guilt of the appellants on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellants are consequently acquitted of the two charges. They are hereby ordered released from prison and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 4th day of September 2007

D. MUSINGA

JUDGE

L. KIMARU

JUDGE