



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Criminal Appeal 24, 25 & 27 of 2005**

**JACOB W. MUYALE**

**IBRAHIM MAULIDI.....APPELLANTS**

**JOHN KILO WAFULA**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against the convictions and sentences in Eldoret C.M. Cr. C. No. 3850 of 2002  
26.4.2005 by F. N. Muchemi Miss (C.M.).**

**JUDGMENT**

Kamal Armitlal Shah is a wholesaler in Eldoret, a business which he has operated since 1980. On 2/4/2002, as he made his way to the bank, at about 2.45 p.m., while in the company of his driver Birgen and his accountant, they were confronted by three people, one of who pointed a pistol at him, while the other pointed at the accountant who was seated on the rear right side of the vehicle. They were all asked to disembark and Shah was asked for a box, which contained money. As he disembarked from the vehicle, he threw the box at his assailants. One of their assailants picked the box while still pointing the gun at him, and he passed it on to the other assailant, after which the three escaped in a motor vehicle, taking the box, which contained a sum of Shs. 291,000/- with them.

Jackson Asiago Ndiangugu, John Kilo Wafula, Ibrahim Maulidi, Jacob Wasike Muyale and Jane Mweni were arrested on 8/4/2002 in connection with the said robbery, and were jointly charged accordingly under section 296 (2) of the Penal Code as the 1<sup>st</sup> to 5<sup>th</sup> accused respectively.

The 1<sup>st</sup> to 4<sup>th</sup> accused were also jointly charged with the offences of robbery with violence against David Kihumbi Macharia, who had been robbed of his motor vehicle soon after the robbery in the 1<sup>st</sup> count.

The 2<sup>nd</sup> and 1<sup>st</sup> accused were also individually charged with two offences each of being in possession of prohibited weapons without a firearm certificate contrary to section 4 (3) of the Firearms Act Cap 114 of the Laws of Kenya.

The 3<sup>rd</sup> and 5<sup>th</sup> accused were jointly charged with two offences of being in possession of prohibited

weapon without a firearm certificate contrary to section 4 (3) of the Firearms Act.

Each pleaded not guilty to the charges that faced him or her, and the trial proceeded to a full hearing. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused, were acquitted under section 210 of the Criminal Procedure Code, of the charges in count 1. The fate of the 5<sup>th</sup> accused is not clear.

The four accused were also acquitted of the charge that faced them in count II. The 2<sup>nd</sup> accused was placed on his defence in counts III and IV, while the court found that the charges against the 1<sup>st</sup> accused in counts V & VI could not stand as he had already been tried of the same offences prior thereto therefore. The two charges were thus set aside. The 3<sup>rd</sup> and 5<sup>th</sup> accused were placed on their defences in counts VII and VIII.

At the conclusion of the case against the four, Muyale was found guilty of robbery with violence in Count 1 and he was sentenced to suffer death. As noted earlier, the fate of Mweni is not clear. Wafula was convicted of both the charges of possession of firearms without a licence and he was sentenced to serve 10 and 5 years imprisonment respectively, which sentences were to run concurrently. Though Mweni was acquitted of both charges of being in possession of firearms without licences, Maulidi, her co-accused was however convicted in both instances and sentenced to serve 7 and 5 years imprisonment respectively, which sentences were to run concurrently.

Muyale, Maulidi and Wafula who are dissatisfied with the convictions and sentences, have preferred their appeals which we consolidated for purposes of hearing and determination. We shall henceforth refer to them as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively.

They base their petitions on several grounds but mainly that, they were not positively identified; that the evidence, which was adduced for the prosecution was not only contradictory but that it lacked corroboration and also that the 2<sup>nd</sup> appellant was not given a chance to cross-examine his co-accused who had incriminated him.

The State concedes to the appeal, and it was Miss Oundo's submission that the learned trial Magistrate, who took over the case from another Magistrate, erred when she failed to offer the accused persons an opportunity to have the prosecution witnesses recalled and reheard. She however urged the court to order a retrial.

We are inclined to accept Miss Oundo's submission as it is clear that the learned trial Magistrate failed to comply with the requirements of section 200 (3) of the Criminal Procedure Code, and in our opinion, the issue for our consideration at this stage is whether, having conceded to the appeal, the State's request for a retrial should be allowed.

We have considered the submissions by all counsel on record.

We are alive to the legal position that a court can order a retrial where the trial is declared a nullity due to a mistake of the trial court. In our opinion, at this level, we need to be convinced that were it not for the mistake on the part of the trial Magistrate, the prosecution had a very clear and watertight case against the accused persons, for it is trite that a retrial should not be ordered to give the prosecution an opportunity to fill in gaps, or to look for additional evidence in an attempt to prove its case to the required standard.

A review of the evidence on record shows that the identification of the appellants in Count 1 was doubtful for not only did the prosecution fail to call the second identifying person (Birgen) but, the trial Magistrate failed to take cognisance of the fact that it was highly probable that 1<sup>st</sup> appellant was picked at the identification parade by PW1 who was not very sure whether a scar which he claimed to have noticed was on the appellants' face or on his hand. This state of uncertainty, coupled with the fact that PW1 had not indicated that particular aspect of his assailants' physical details at the time when he reported the matter at the first instance, raises doubts in our minds. But that is not all, for we do note that PW1 recorded a second statement after attending the identification parade. The fact that PW1 recorded that

second statement after the parade should have sent warning signals to the trial Magistrate, and in our view the only logical conclusion, should have been that the identification had been interfered with and that it could not, in the circumstances have been positive.

Needless to say, the circumstances under which Birgen, identified 1<sup>st</sup> appellant were also very interesting to say the least, for when the parade officer (PW5), called upon Birgen to identify their assailants, he told him to go ahead and identify them "if there were any persons who had offended him" (underlining ours). We feel that these words were improper and should never be used in an identification parade, as the words were vague. They should have been specific to the particular incident. In our view, the parade officer should have been more specific. But it is also interesting to note that Birgen who was a material witness was never called to testify, an omission which proved fatal for the prosecution for it meant that the evidence of PW1 was not corroborated at all.

We therefore find that not only was the evidence contradictory, but that it lacked corroboration.

In our humble opinion the evidence was very weak to found a conviction and we see no reason why we should order a retrial.

We do in the circumstances allow this appeal, set aside the convictions and quash the sentences.

The three appellants should be released forthwith unless otherwise held in lawful custody.

Dated and delivered at Eldoret this 11<sup>th</sup> day of May 2006.

**JEANNE GACHECHE**

**MOHAMMED IBRAHIM**

**Judge**

**Judge**

Delivered in the presence of:

Miss Oundo for the State

Mr. Miyienda for the 1<sup>st</sup> accused and holding brief for Mr. Obudho & Kigamwa for the other 2 appellants