REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 453 of 2002

(From original conviction and sentence in Criminal Case No. 9586 of 2001 of the

Chief Magistrate's Court at Makadara – Mrs. Kimingi, PM)

JOHN KAMAU NJOROGE …….....…….…… APPLICANT

VERSUS

REPUBLIC …….....…….……. RESPONDENT

JUDGMENT

The Appellant ***JOHN KAMAU NJOROGE*** was convicted by the Principal Magistrate's Court at Makadara Law Courts for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. Being aggrieved by the conviction and sentence, he lodged the instant Appeal. In his amended "***memorandum grounds of Appeal"*** the Appellant faults his conviction by the trial Magistrate on the following grounds.

1. **THAT** the Learned trial Magistrate erred in both law and fact in relying on the evidence of PW1 and PW2 to convict the him when the said evidence left a lot to be desired.

2. **THAT** the Learned Magistrate erred in law and fact while convicting the Appellant on an unproved charge.

3. **THAT** the Learned trial Magistrate erred in law and facts in rejecting the Appellant's defence.

The facts giving rise to the Prosecution case were that on 3rd May, 2001 at about 9 p. m., PW1 was walking home at Githurai 45 when he was accosted by two people one of whom he claimed was the Appellant. The Appellant was brandishing a Somali sword whilst the other had a knife. The Appellant then ordered PW1 to give "***chai ya wazee".*** When he resisted he was forcefully searched and robbed of Kshs.300/=, post office card and a leather jacket. In the process PW1 managed to escape and ran back whilst screaming. The Appellant and his accomplice pursued him for a short distance and then turned back. PW1 then opted to chase after them whilst still screaming. Soon thereafter he heard gunshots from the direction the two had run towards. He then saw Police officers chase after the Appellant and his accomplice. The Appellant jumped into a compound where there was a building under construction. Moments later the Police officer fished the Appellant from the premises whom PW1 immediately identified as having been one of the robbers. He had in his possession a Simi. His accomplice however managed to elude the Police dragnet. The evidence of PW1 was that where the robbery was committed, there was sufficient electricity light and thus he was able to positively identify the Appellant. Further it is the case of PW1 that from the time of the robbery until the Appellant was chased and arrested he never lost sight of him.

When put on his defence, the Appellant in a detailed unsworn statement stated that he was a resident of Githurai. On the material date, he had bought Ugali and fish after closing his work and was on his way home when he neared a chang'aa den. He then heard gunshots and in a bid to save his life he ran into a building under construction from where he was arrested. He was then charged for an offence he did not commit.

Having considered the entire evidence on record, the Learned Magistrate came to the conclusion that the Appellant was guilty as charged. The Learned Magistrate stated thus:-

"……***The Court frinds that the Complainant was firm and consistent in his evidence which is corroborated by that of PW2 who arrested the accused. The Prosecution case in that the accused robbed the Complainant of the items stated and he was sported by PW2 as he escaped with the Complainant chasing after him and another….. the Court find PW1 and PW2 to be witnesses of truth and accept their evidence as evidence of truth. The Court find no merit in the defence of the accused which the Court rejects…… The Court has no doubt at all that the accused committed the offence before Court……."***

In support of Appeal, the Appellant tendered written submissions which we have carefully read and considered.

The State through Miss Wafula, Learned State Counsel opposed the Appeal. To the Learned State Counsel, the Appellant was properly convicted as he was positively identified at the scene of crime. Counsel maintained that the Appellant never left the sight of the Complainant until he entered a building from where he was arrested by PW2, a Police officer. Contrary to the defence by the Appellant that he was arrested after he had bought Ugali and fish, when arrested the Appellant neither had the ugali nor fish. Instead he had a Simi. On the Appellant's submission that the charge sheet described the weapon used in the robbery as a knife whereas in the trial it was described as a Simi, Counsel submitted that the mis-description did not render the charge defective. As for the Appellant's submission that during the trial the Coram of the court was occasionally recorded as "***Coram as before"*** and that in the circumstances it was not possible to tell whether a qualified Prosecutor prosecuted the case, Counsel replied that the Appellant was not prejudiced at all by the said omission

As we sat down to deliberate on this Appeal, it dawned on us that this Appeal could be determined on one issue only: the proceedings of 28th March, 2003. On that day the coram of the Court was reflected as follows:-

"***28/3/2002***

Coram as before

Accused in custody present

P. C. Wanjohi for Pros"

The said P. C. Wanjohi applied for adjournment to enable him to obtain records of the Appellant who had already been convicted for purposes of sentencing. The request for adjournment was turned down by the trial Magistrate whereupon P. C. Wanjohi applied to Court to have the Appellant treated as a first offender. In so doing P. C. Wanjohi who is a Constable actively participated in the proceedings as a Prosecutor. This therefore is a case where part of the Prosecution was conducted by a Police Constable who is not authorized prosecutor in terms of Section 85 (2) as read together with section 88 of the Criminal Procedure Code as well as on the authority of ***ELIREMA & ANOTHER VS REPUBLIC (2003) KLR, 537.*** In the premises the conviction and sentence of the Appellant was a nullity and we saw declare.

We appreciate that none of the parties to this Appeal noted this omission and made submissions in respect thereof. We therefore do not have the benefit of the various positions if any taken by the parties

in this appeal on the issue. However the issue is critical as it goes to the jurisdiction. We believe that on the material before us, we are able to deal with the issue and make a determination thereof without having to wait to be addressed on the same by each of the parties herein. After all, we are the first Appellate Court and on the authority of ***OKENO VS RPEUBLIC (1972) EA 32***, it is our duty to reconsider the evidence, evaluate it ourselves and draw our own conclusion but making allowance of the fact that the trial Court had advantage for hearing and seeing the witnesses. This will be of critical importance when we come to consider whether an order for retrial should be made in the circumstances of this case.

Having found that an unqualified Prosecutor participated on the proceedings in the subordinate Court contrary to the express provisions of Section 85 (2) read together with Section 88 of the Criminal Procedure Code and on the authority of ***ELIREMA (Supra)*** we hold that the proceedings of the subordinate Court were a nullity.

Should we order a retrial? In the case of ***PIUS OLIMA & ANOTHER VS REPUBLIC, CRIMINAL APPEAL NO 110 OF 1991 (unreported)*** the Court of Appeal laid down the circumstances under which an Appellate Court will order a retrial. In its Judgment the Court stated:-

"……***Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are AHMED SUMAR VS REPUBLIC (1964) EA 481, MANJI VS REPUBLIC (1966) EA 343, MUYIMBA AND OTHERS REPUBLIC, (1971) EA 221. The Principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interest of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case…..***"

We may also add as stated in the case of ***RATILAL SHAH VS REPUBLIC (1958) EA3*** and re-echoed in the case of ***MWANGI VS REPUBLIC (1983) KLR 522,*** that a retrial should not be ordered unless the Court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result.

The above condition that must be satisfied are conjunctive and not disjunctive and one of them which must be present is that the trial in the subordinate Court must be defective. (See the Judgment of A. M. Akiwumi in ***JACKSON MUTHARIA MWAURA alias KAMANDE & ANOTHER VS REPUBLIC, CRIMINAL APPEAL NUMBER 58 OF 1988 (unreported) .*** In the instant case we have already found that the trial in the subordinate court was defective.

The Appellant was convicted on 14th March, 2002. Before then he had been in custody from 3rd May, 2001. So that the Appellant has been in continuous custody for over 5 years. In those circumstances we do not think that the interest of justice will be best served by an order of retrial. Indeed we are even unable to tell whether the witnesses would be traced without unreasonable delay if a retrial is ordered.

Regarding the evidence adduced at the trial, we note that the conviction of the Appellant was predicated upon purported visual identification of the Appellant by the two witnesses – PW1 and PW2. PW1 claimed that where he was robbed there was light emanating from neighbouring houses. However no inquiries were made by the Court or evidence led by the Prosecution to show the intensity of the light and, its source in relation to the Appellant. Similarly there were no inquiries made regarding the period under which PW1 kept the Appellant under observation as to be able to identify him subsequently. See ***REPUBLIC VS TURNBULL (1976) 3 ALL ER 519.*** Failure to make those mandatory inquiries renders the identification of the Appellant unsafe and not free from possibility of mistake.

PW1 also stated that from the time of the robbery upto the time the Appellant jumped into a compound with a building under construction, he never lost sight of the Appellant. In a way PW1 was saying that there was no break in the chain from time he was robbed until the Appellant was chased and arrested. It has been held that:-

"…..***The identification of a person who took part in the alleged offence and was chased from the***

scene of crime to the place where he was arrested is ofcourse strong evidence of identification and if all links in the chain are sound it may be safely relied upon……"

See ***ALI RAMADHAN VS REPUBLIC CRIMINAL APPEAL NUMBER 79 OF 1985 (unreported).*** Was this the case here? We do not think so. First there was a break in the chain when in the process of giving out his leather jacket PW1:-

"…… ***sneaked away and ran towards where I had come from as I screamed…."***

In running away, he had given his back to the assailants and could not therefore have been seeing the Appellant and or his accomplice. The second break in the chain was when the Appellant, allegedly as he was being pursued, jumped into a compound where there was a building under construction. There was no light in the compound. Consequently PW1 lost sight of the appellant again. There is evidence that where the Appellant was arrested, there was a chang'aa den nearby and there were people partaking of the stuff. Ordinarily, such illicit drinkers tend to be weary of the Police and in the event of gunshots as it happened in the instant case, they would probably want to scamper so that they are not arrested. In those circumstances, the possibility that the Appellant could have been a victim of mistaken identity cannot be ruled out.

For these reasons, we allow the Appeal and set aside both conviction and sentence. We decline to order a retrial with the consequence that the Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 2nd day of November, 2006.

……

LESIIT

JUDGE

……

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Wafula for State

Erick/Tabitha: Court clerks

……

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE