REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
Criminal Appeal 341 of 2003

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.1814 of 2002 of the Snr. Resident Magistrate's Court at Kwale L.N. Mbatia, SRM)

SAID NGUTO MASILA ……….……………………………………….. APPELLANT

VERSUS

REPUBLIC ……….………………………………………………….. RESPONDENT

CONSOLIDATED WITH

ALI OMARI ABDULRAHMAN …………………………….………….. APPELLANT

VERSUS

REPUBLIC ……………………………………………………………... RESPONDENT

J U D G E M E N T

The two appeals herein were consolidated and heard together. In the lower court Saidi Machila, Saidi, was the first accused. His appeal is No.341/03. He is referred to as the first appellant and he was represented by Mr. Lijodi. The second accused in the lower court and the second appellant here, unrepresented, is Ali Omari (Ali), in Cr.A. 352/03. The two faced two counts under S.296(2) Penal Code in that on 4-8-2002 at about 2 a.m. at Diani Beach White house, Diani Kwale jointly with others not before court, armed with dangerous weapons (pangas), they robbed Grace Nduku of two television sets, SAGEM mobile phone, one torch, a charcoal iron, a pair of leather shoes etc valued at Sh.39,330/- and immediately before or after such robbery they threatened to use actual violence on the said Grace. This was count 2. The State conceded the appeals on this charge for reasons that will appear presently.

The State however supported conviction of the two appellants on count 1, together with the mandatory death sentence thereon. This charge read as follows: That on the 4/8/02 at Diani Beach Whitehouse, Kwale, these two appellants with others not before court while armed with dangerous weapons (pangas), robbed one Mwanahamisi Hussein of her property money amounting to Sh.10,000/- and immediately before or after such robbery threatened to use violence on Mwanahamisi. This complainant was PW.1 before the learned trial magistrate. After trial the appellants were convicted on both counts and sentenced. They appealed against both conviction and sentence.

Saidi's (appellant 1) 3 grounds of appeal were to the effect that a police corporal did prosecute him in the lower court contrary to section 85(2) Criminal Procedure Code. The second ground that did not appeal quite clear to us was that the lower court admitted and acted on similar fact of evidence. And that the learned trial magistrate did not properly weigh the complainant's (Mwanahamisi PW.1) statement to the police on the recognition of Saidi.

In his amended grounds of appeal Ali (appellant 2) said that the learned trial magistrate failed to give her an opportunity to finally submit; that the charge sheet was defective; that identification was not free from error and that there were probably more than one complainant. And lastly that the defence case threw a reasonable doubt on the prosecution case.

Mr. Lijodi started off by submitting that one P.C. Yegon and P.C. Said appeared as public prosecutors in the lower court on various dates e.g. 27.9.02, 14.11.02, 31.12.02. That that was in contravention of S. 85 (2) Criminal Procedure Code (see **ROY ELIREMA & ANR. VS. R. CR.A. 67/02)** That accordingly the proceedings in the lower court were a nullity. He maintained that even a date for mention only is as good as conducting the proceedings.

The counsel attempted to argue that the charge(s) against his client was defective in terms of S.137 Criminal Procedure Code e.g. that the charge sheet was not signed. We noted that the original charge sheet on record was signed and we should add that C/s 350 (2) Criminal Procedure Code Mr. Lijodi was in fact arguing a ground he had not filed and or sought and got leave of court to add on his grounds by way of amendment. But be that as it may.

Mr. Lijodi then moved to the ground of identification. In his ground 3 it appeared that it was recognition that was under attack. However in submissions it was heard that the complainant (Mwanahamisi PW.1) took part in the identification parade. But that because Peter Mutua (PW.2) did not do likewise, the parade was invalid. We did not quite easily follow the logic and the law on this point but there it was. That non-participation by Peter Mutua (PW.2) who was said to have been in the same house with PW.1 was termed illegal. At some state we were told that IP Magondu (PW.4) who conducted the identification parade was not aware that the investigating officer (one P.C. Nyambu PW.5) had taken the appellants out before the parade was conducted. And that if the witnesses had had sight of the suspects before the identification parade then the parade was worthless. And also that with identification by a single witness (PW.1) conviction was unsafe. Further, so Mr. Lijodi said, contradictions existed between the evidence of P.C. Nyambu (PW.5) and the evidence of PW. 1 and 4 (above).

Before appellant 2 (Ali) argued his appeal, his application to amend grounds (already set out above) was argued and allowed. But he wanted to respond after hearing reply from the learned State Counsel.

The learned State Counsel conceded the appeal on Count 2 as stated earlier, on the basis that because the appellants were arrested for an offence other than what was laid in the 2 counts here, and that unlike PW.1 in count 1, the complainant in count 2 neither knew before nor could identify any of the robbers, an identification parade was necessary. Now that it was not conducted and no property stolen as per count 2 was recovered from any of the appellants, the prosecution case was weak. And that such weakness was manifested in the judgement of the learned trial magistrate who seemed to presume that merely because the robbery in count 1 took place at the same time with the one alleged in count 2, the appellants were therefore involved.

As for the count 1, learned State Counsel argued that the appellants were liable. That that was so because PW.1 not only saw Said (appellant 1) in her house, in lamp light and she later identified him at a parade, but also that she recognized Ali (appellant 2) an old school mate at Likoni Primary School. That with recognition the parade to identify him was not necessary. And that identification parade was carried out properly. As to the ground on an incompetent public prosecutor, the State submitted that no such a prosecutor led evidence in the lower court.

Ali (2nd appellant) responded that PW.1's claim that she recognized this appellant as "Maonjo," an old school mate, was of no value. That the attack put PW.1 under such shock and confusion that she could

not recognize any of her assailants. And that the prosecution was conducted by a person below the rank of assistant inspector of police thereby making the whole thing a nullity. And finally that he was not arrested with any of the items of property allegedly stolen from the complainant(s).

Beginning with the ground that some prosecutors in the lower court were not competent in accordance with S.85(2) Criminal Procedure Code, the Roy Elirema case was put before us. We are aware of it plus such other authorities that we have so far been able to lay our hands on from the Court of Appeal. We are not in doubt that if a public prosecutor does not hold the rank of assistant inspector of police (this rank does not seem to exist even under the Police Act) that prosecutor cannot conduct valid proceedings before any court. However in **Mombasa H.C.CR. APPEALS, KALE HAMED KALE & HAMIS ABDUL NOS. 577 AND 582 OF 2000** (consolidated) Mwera, Khaminwa JJ said something regarding what conducting proceedings means. Those two judges first reproduced the provision of law (s.85(2) Criminal Procedure Code) and then quoted the parts of the Roy Elirema case where the most learned Judges of Appeal had focused on what it means to conduct a case before any court by a public prosecutor. It needs no repeating the facts on the Roy Elirema case save to say that some two police corporals had conducted proceedings before the lower court, as well as an inspector of police. We reproduced this part of that case:

> ***"---------- in a criminal prosecution, there must be a prosecutor to discharge certain functions, which functions cannot be discharged by the court before whom the prosecution is being conducted. The proposition is inherent in the fact that in Kenya the administration of justice is operated on the "adversarial system" in which it is assumed that each party or side to the dispute knows best what its case is and can and must be expected or assumed to know best how to present its side of the case to the court."***

While concluding in the **Kale Ahmed and Hamisi case** that only mention of a case by prosecutor below the rank of assistant inspector could not vitiate the proceedings, it was said at pp 6:

> ***"We have gone into all this to justify our view here that in the present matter P.C. Kuranga did not conduct the prosecution case as envisaged by the law and in the manner the learned Judges of Appeal saw it in the Elirema case. There, like here, P.C. Kuranga appears on record so does I.P. Konde, as is in the cited case where Cpls. Kamotho and Gitau as well as I.P. Wambua were borne out. But the distinction lies in the fact that Cpls. Kamotho and Gitau actually conducted the prosecution's case by calling witnesses, examining them and even making submissions before the trial magistrate could rule on some aspects of the trial. That was not the case here. Here P.C. Kuranga merely appeared on mention dates and had the trial adjourned as and when on reasons given the trial magistrate was satisfied. He did not at any point assume to prosecute the case or purport to know best what the State's case was and thus put the same to the court. P.C. Kuranga performed what we term at least a routine chore to enable a case to be mentioned every 15 days before the trial dates. In our opinion such a role played by P.C. Kuranga was practical and necessary in the circumstances. In any case it cannot be said that by holding the fort to have a case in the lower court mentioned and adjourned, the appellants were prejudiced.***
>
> ***P.C. Kuranga did not prosecute the case against the appellants, as it were, to move the trial forward. After the said adjournments it was C.I. Konde who later resumed the prosecution and the trial moved forward."***

Then it was added (pp. 7)

> ***"From the foregoing to prosecute, a prosecutor must do things or act in a way against another in a crime or claim. This means the prosecutor must put forth material, in our adversarial system, which attacks the other's case -----. P.C. Kuranga appearing on record merely to facilitate an adjournment ---- did not constitute prosecuting the case against the appellants or purporting to do so at all. This officer did not take the plea, call witnesses, examine them etc. C.I. Konde properly prosecuted the case."***

With the above conclusion a retrial was refused and hearing of the appeals were ordered. The State had submitted that because P.C. Kuranga had appeared on mention dates, a fresh trial be undertaken.

In the present case we concur that P.C.s Yegon and Said facilitated the mentions while IP Mutangi did the prosecution. In **Roy Elirema** the Court of Appeal did not disapprove of this. We dismiss the appeals on this ground.\

The next point was that of identification. But before we get into that ground we have said that the learned State Counsel did concede the appeals on count 2. The prosecution case there was weak on this ground of identification. There ought to have been an identification parade by the complainant in that count (Grace Nduku). She did not know or identify or recognize her assailants. And thus only presuming that the appellants were people who robbed her (Grace) was a conclusion in error even much as a strong suspicion existed; and we too were left with the same impression. But that has never been a basis of conviction in a criminal prosecution. Conviction rests on proof beyond a reasonable doubt. Now back to identification in connection with count 1.

As we said earlier Mwanahamisi (PW.1) was the complainant there. Let us view her evidence on his aspect in our own way.

PW.1 was asleep at about 1.45 a.m. when raiders came to her house. They hit the door in. She had left her lamp on because of her small children. The robbers threatened to cut her with an axe unless she gave them money. So she took out Sh.10,000/- and gave them. The lamp was still on and for the 2 minutes that PW.1 was with the thieves, she noticed two people among them she had known before. The two appellants here. They wore dreadlocks. PW.1 knew Ali (2nd appellant). They had gone to Likoni Primary School together before. As for Saidi (appellant 2) , PW.1 used to see him in a nearly plot but he or they moved away. PW.1 (Mwanahamisi) said in evidence in chief that her old school make Ali is the one who demanded and she handed to him the Sh.10,000/- while Said held the axe on her head. She reported the matter. Later when police called her to identify anybody on a parade that was conducted PW.1 said that she picked out the two appellants even as they had shaved their dreadlocks. This witness maintained in cross examination by Saidi that she had been seeing him in the locality. That she gave the description of her attackers to the police, a thing the learned trial magistrate apparently verified on the spot, from the statement to police. That she did not see these men before she went to identify them on the parade. So for Said, PW.1 saw her during the robbery inside her house with the lamp on. He held an axe at her head and he wore dreadlocks. At the parade time, it has not been faulted some 12 days after the incident, PW.1 was able again to identify and pick him out.

As for Ali, he lived with PW.1 at Likoni and even went to the same primary school. She thus did not give the description of this appellant because she knew him well even by the nick name “Maonjo”. This appellant tried to pin some reason for a grudge between them by alleging that PW.1 once recruited him in drug-dealing and he lost some money – all which PW.1 denied. She denied fabricating her evidence of influencing the police to arrest him. Again it will be recalled that Ali was said to have demanded and received the Sh.10,000/- from PW.1 whilst the robbery was taking place inside her house with a lamp on.

Both appellants gave unsworn statements in defence. They denied taking part in the robbery adding that they were arrested differently, days after the event and they knew nothing of the crime.

The learned trial magistrate went over the evidence as we ourselves have done. She found that PW.1 identified the appellants positively. She proceeded to convict and sentence them. On our own review of the lower court record, we agree. The offence took place at night alright, but PW.1 said that her room was lit with a lamp. It was never extinguished. For two minutes she identified Saidi who once lived near her. She later identified him on a parade even when he had shaved off his dreadlocks. His role in the robbery was to hold an axe to PW.1’s head and threaten to split it. That should have been close enough. As for Ali, it was by recognition. They had gone to school together and when he demanded for the money, she gave it to him. She said that she knew Ali by the name of “Maonjo” and she thus saw no need to describe him to the police. Seemingly her statement to the police did not carry this name. But we could not see, if she was not saying the truth, and some credible testimony it was, why Ali attempted to unsuccessfully

allege bad blood between them.

As for the identification parade from which Saidi was picked up, it was carried out by I.P. Magondu (PW.4). We examined the parade report and detected no fault with it. Indeed none was suggested.

We find that although no stolen property was recovered and the appellants were arrested for another offence altogether, they were properly identified as the robbers of the night in question. The identifying witness was one (PW.1) but from the strong evidence laid we do not think the learned trial magistrate fell in error to convict on it. She did not have to warn herself when doing so at that time because she was looking at whoever other witnesses said regarding the two counts that she found the appellants guilty of. But after the State conceded appeals on count 2 as we have already said, we conclude that the learned trial magistrate made no mistake as regards count 1. Not on appreciating the evidence.

Both appellants seemed to say that the charge sheet was defective, but this was not highlighted or demonstrated in a manner that would have allowed us to scrutinize the subject. On our perusal of it, however we were satisfied that it was proper. It had the names of the accused against whom the named charge was brought, and the applicable provisions of law. Due particulars were set out with date, time and place, the victim, theft from her by threatening to injure her. That sounds pretty regular, if not a little so close to perfect. Lastly we go to the amended ground 1 by Ali which read:

> "1. That the learned trial magistrate erred in both law and fact in failing to give me an opportunity to give my final submission after the close for (sic) the prosecution case and the defence respectively. (see ROBERT FANALI AKHUYA VS. CR. APP. 40/02 C.A. KSU)

We should confess that a copy of the cited case was not placed before us even if it was referred to by appellant who was acting in person. Incidents are known when appellants have been able to furnish the court on appeal with authorities relied on, yes, but that was not the case here. Our limited research, constrained by the Court of Appeal decisions given to us for perusal, did not help much either. So we remained basically without the benefit of the above case. However, talking of <u>final submissions,</u> we are aware that such did not exist in law although the practice seems to hold so. What the law says in S. 213 Criminal Procedure Code and what appears to be close to what the appellant was putting forward, if we be correct in that assumption, is:

> ***"213. The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as the trial under this Code before the High Court."***

What we thought approximates to S.213 Criminal Procedure Code (in the lower court) is S.311 Criminal Procedure Code in the High Court:

> ***"311. If the accused person says that he does not intend to give or adduce evidence and the court considers that there is evidence that he committed the offence, the advocate for the prosecution shall then sum up the case against the accused person, and the court shall then call on the accused person personally or by his advocate to address the court on his own behalf."***

This address should be the one normally referred to as final submission. But that is done where the accused person does not intend to give or adduce evidence. Whichever way it may be looked at, the accused person will have declined to testify (on oath or otherwise) or to call witness to testify on his behalf. But in the present case Ali (2nd appellant) gave an unsworn statement in his defence. So he cannot fault the learned trial magistrate on not calling him to address the court finally. In any case the prosecution did not have final address either. We did not have benefit of the AKHUYA case (above) but we opine that with or without this final address, the test is: Was it a fair trial? Yes. It was.

All in all we arrived at the conclusion that the appeals on count 2 be and are allowed (on conviction and sentence) while the appeals against count 1 are dismissed in their entirety.

Judgment accordingly.

Delivered on 10th May 2005.

J.W. MWERA

JUDGE

D.K. MARAGA

JUDGE