



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 17 OF 2018[ROBBERY WITH VIOLENCE]

PAUL MANGA IMOKOLAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence imposed by Hon. James O. Ong'ondo, Principal Magistrate's in Siaya Principal Magistrate's Court Criminal Case No. 170 of 2016 delivered on 26/2/2018)

JUDGMENT

1. The Appellant **Paul Manga Imokola** was convicted of two counts of **Robbery with Violence Contrary to Section 296(2) of the Penal Code**. He was also convicted of the offence of being in possession of a Firearm without a **Firearm Licence Contrary to Section 4A of the Firearms Act**.
2. The conviction of the appellant on 26.2.2017 followed a full trial of his case by Hon. J.O. Ong'ondo, Principal Magistrate vide Siaya Principal Magistrate's Court Criminal case No. 170 of 2016.
3. Following the conviction of the appellant, the appellant herein was sentenced to suffer death on both counts of Robbery with Violence and on the count of being found in possession of a firearm without a firearm licensee, the appellant was sentenced to serve 7 years imprisonment. The second death sentence and the prison term sentence of 7 years were ordered to be held in abeyance.
4. The trial of the appellant begun in Bondo Principal Magistrate's Court vide Bondo Principal Magistrate's Criminal Case No. 840 of 2015. The appellant took plea before the said court and from the onset, he resisted being tried by the Bondo Principal Magistrate's Hon. M. Obiero and on 10.2.2016 Hon. Obiero transferred the case to Siaya Principal Magistrate's Court and ordered that the same be mentioned before the Principal Magistrate at Siaya for further action on 24.2.2015. On 29.2.2016 Hon. Hazel Wandere, Principal Magistrate, Siaya mentioned the matter and directed for Production Order to issue and mention on 1.3.2016 for further Orders.
5. The hearing begun on 5.5.2016 before Hon Hazel Wandere but after the case was substantially heard, the appellant resisted the trial before Hon. Hazel Wandere and claimed that before transfer of his case from Bondo Principal Magistrate's Court to Siaya Principal Magistrate's Court, Hon. Wandere had declined to accept the file for undisclosed reasons. He claimed that she was impartial throughout the trial process, refused to release him on bond without valid reasons which was unjust and that she had refused to hear the case further claiming that her hand was tired and that she had directed that the appellant gets legal representation. He then claimed that she had forced him to proceed with his case without an advocate to represent her. The trial magistrate explained that none of the advocates practicing in Siaya were willing to take up **probono** work for robbery with violence cases.
6. The trial magistrate disqualified herself from hearing the case vide ruling of 15/9/2016 and directed the file to be placed before the Judge for directions on 20/9/2016. The High Court opened a file vide Siaya High Court Miscellaneous Criminal Application Number 83 of 2016 but on 10/7/2017 the appellant herein applied to withdraw his complaint for transfer of the case from Hon Wandere's court on account that the trial magistrate against whom the appellant had complained, had since been transferred out of station hence the Learned Judge ordered that the matter be heard by Principal Magistrate, Siaya Law Courts.
7. That is how Hon. James O. Ong'ondo, Principal Magistrate, Siaya Law Courts came to take over the trial of the appellant from where Hon. H. Wandere had left it on 11.7.2017 and on 13.9.2017, directions were given complying with **Section 200 of the Criminal Procedure Code**. The trial Magistrate heard the case from witness number 6, 7 and the defence case after which he convicted the appellant and sentenced him as stated above.
8. Aggrieved by the Judgment, Conviction and Sentence, the appellant filed this appeal on 28.2.2018. He later filed Supplementary grounds of Appeal dated 17.12.2019 which he submitted on vide his written submissions dated 17.12.2019.

9. In ground 11 of the Supplementary grounds of appeal, the appellant faulted the trial magistrate at Bondo Principal Magistrate's Court for transferring the appellant's case to Siaya Principal Magistrate's Court without Notice and the Order from the Superior Court, basing on malicious grounds.

10. In my humble view, that ground of appeal should dispose of this appeal. This is because the ground attacks the jurisdiction of the trial court at Siaya Principal Magistrate's court to hear and determine the case against the appellant. And as jurisdiction is everything, and goes to the very heart of a matter before court without which a court of Law Acts in vain. See the **Owners of Motor Vessel "Lilian S" Vs. Caltex Oil (K) (1989) KLR 1** (Nyarangi - J.A.) where the Court of Appeal stated:

"I think that it is reasonably plain that a question of Jurisdiction has to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. The next question is where does jurisdiction of a court or tribunal come from? The supreme Court of Kenya in **Samuel Kamau Macharia Vs. Kenya Commercial Bank and 2 Others, C.APP No. 2 of 2011** restated the obvious as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of Law can only exercise jurisdiction as conferred by the Constitution or other written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law."

12. Magistrate's Courts are subordinate Courts established under **Article 169 of the Constitution** and at **Article 169(2), Parliament** is given power to enact legislation conferring Jurisdiction, functions and Powers on the subordinate Courts established Under **Article 169 clause (1). Vide Act No. 26 of 2015**, the National Assembly enacted the **Magistrate's Courts Act to give effect to Articles 23 (2) and 169 (1) (a) and (2) of the Constitution**, to confer Jurisdiction, functions and power on the Magistrates Courts, to provide for the Procedure of the Magistrates Courts, to provide for the procedure of the Magistrates Courts and for connected purposes.

13. **Section 5 of the Magistrates Courts Act** provides that a Magistrates Court shall be subordinate to the High Court and shall be duly constituted when presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Resident Magistrate.

14. **Section 6 of the Act provides** for the Criminal Jurisdiction of a Magistrates Court and States:

"A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by:-

a. The Criminal Procedure Code (Cap 75); or

b. Any other written Law."

15. Under Section 66 of the Act on General authority of Courts:

"Every Court has authority to cause to be brought before it any person who is within the local limits of its Jurisdiction and is charged with an offence committed in Kenya, or which according to Law, may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its Jurisdiction."

16. Under Section 67 of the same Act:

"Where a person accused of, having committed an offence within Kenya has escaped or removed from the province or district within which the offence was committed and is found within another province or district, the Court within whose Jurisdiction he is found shall cause him to be brought before it, and shall, unless authorized to proceed in the case, send him in custody to the Court within whose Jurisdiction the offence is alleged to have been committed or require him to give Security for his surrender to that Court there to answer the charge and be dealt with according to the law."

17. The above provisions set out clear Jurisdiction of the Magistrate Courts in Criminal cases. A person shall be tried in a court where the offence was committed but if he commits an offence in one jurisdiction and escapes to another jurisdiction, he shall be made to appear in the nearest court where he is arrested from and unless authorized to try the suspect, the court shall cause the person to be taken to the court in whose jurisdiction the offence was committed.

18. In the instant case, the charge sheet is clear that the offences for which the appellant was charged and convicted were committed within Siaya County and Ugwena Village within Usenge Sub-Location, Bondo Sub-County. It is for that reason that the Appellant was arraigned before Bondo Principal Magistrate's Court for plea and trial as that is the Court in whose local Jurisdiction the offences were allegedly committed.

19. Therefore, when the appellant resisted being tried by the Bondo Principal Magistrate's Court, for whatever reasons whether genuine or not and the trial Magistrate who had jurisdiction to try him was not comfortable hearing the case, he had the following options:

1. Place the file before another Magistrate who had competent jurisdiction to try the appellant at Bondo Law Courts; if there was no other such Magistrate with competent jurisdiction;
2. Inform the accused person to apply to the High Court for transfer of his case from Bondo Principal Magistrate's Court to another Court of competent Jurisdiction or
3. Write to the High Court for directions or requesting that the file be transferred from that Court to another Court of competent Jurisdiction.

20. The above scenarios are clearly stipulated in Section 81 of the Criminal Procedure Code which provides:

“81(1) whenever it is made to appear to the High Court-

- a. that a fair and impartial trial cannot be heard in any Criminal Court subordinate to thereto; or
- b. that some question of Law of unusual difficulty is likely, to arise; or
- c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence or
- d. that an Order under this Section will tend to the general convenience of the parties or witnesses or
- e. that such an Order is expedient for the ends of Justice or is required by any provision of this Code, it may Order:-
 - i) that an offence be tried by a Court not empowered under the preceding Sections of this Part but in other respects competent to try the offence;
 - ii) that a particular Criminal case or class of cases be transferred from a Criminal Court subordinate to its authority to any other Criminal Court of equal or Superior Jurisdiction;
 - iii) that an accused be committed for trial to itself.

(2) The High Court may act on the report of the Lower Court, or on application of a Party interested, or on its own initiative.”

21. In the present case, the appellant asked the Principal Magistrate's Court at Bondo not to hear his case and did so very contemptuously and without apologies. To be precise, right from the onset the appellant refused to be tried by the Principal Magistrate's Court at Bondo. The Prosecution had indicated on 23.9.2015 that the accused had been suspected of committing another offence (**Robbery with Violence**) at Bungoma and that they had a crucial exhibit which they wished to release to the Bungoma Court case. When the case came up for hearing on 28.10.2015 at Bondo, and there were six witnesses present, the accused said that he was not ready to proceed because he had no faith in the trial Court which had refused to grant him cash bail, that the court had refused to reduce bond terms and refused to return to him his identity card, ATM Card, Phone and wallet. The trial Magistrate rejected the application to disqualify himself from hearing the case and on 10.2.2016 the appellant refused to be tried by the said Court and contemptuously made disparaging remarks against that Court as a result of which he was convicted for contempt in the face of the Court and was sentenced to serve 2 years imprisonment on the same date.

22. It was after convicting the appellant for contempt of Court that the trial Magistrate at Bondo relieved himself of the matter and transferred it to Siaya Principal Magistrate's Court for trial.

23. On arrival at Siaya Principal Magistrate's Court, the appellant still resisted Hon. Hazel Wandere who finally started hearing the case but along the way, and after 5 witnesses had testified, the appellant filed an application to the High Court seeking to have the learned trial Magistrate at Siaya disqualify herself from hearing his case.

24. Lucky enough for the appellant, the 'unfavourable' learned Magistrate was transferred from the station while the application for transfer of the case from her court was still pending in the High Court before Hon Justice J.A. Makau hence, the appellant withdrew his application in the High Court which directed that the matter now proceeds for hearing before Hon Wandere's successor, Hon James O. Ong'ondo. The latter Magistrate proceeded to hear the remaining witnesses and defence and concluded the trial and convicted and sentenced the appellant hence this appeal.

25. From the trial Court record, the appellant had another capital Robbery case pending at Bungoma Chief Magistrate's Court.

26. Having laid bare the factual background of this case and legal position, it is clear that the trial Court with local and competent Jurisdiction to hear and determine the appellant's case was Bondo Principal Magistrate's Court which transferred the case to Siaya Principal Magistrate's Court, a Court of concurrent Jurisdiction.

27. The question then is whether the Magistrate's Court at Bondo had the jurisdiction to transfer a criminal case to another Magistrate's Court of Concurrent jurisdiction at Siaya.

28. Only the High Court has Jurisdiction, under the provisions of **Section 81 of the Criminal Procedure Code**, to transfer a Criminal Case from one subordinate Court to another, or to itself, for hearing and final determination.

29. Therefore albeit trial at the wrong place is not fatal to the criminal trial where no prejudice is seen to have been occasioned, the main issue here is not necessarily the place of trial but the jurisdiction to transfer the case from one jurisdiction to the other. (see section 380 of the Criminal Procedure Code).

30. The High Court is also empowered **Under Article 165(b) and (f) of the Constitution to supervise subordinate Courts** and all bodies, authorities or tribunals exercising Judicial or quasi-Judicial authority and to call for any record or proceedings from such subordinate Courts, bodies authorities or tribunals.

31. It follows that in the absence of the Order of the High Court transferring Bondo Principal Magistrate's Court Criminal Case No. 840/2015 to Siaya Principal Magistrate's Court, Bondo Principal Magistrate's Court acted devoid of jurisdiction and similarly, the receiving Court being Siaya Principal Magistrate's Court acted without Jurisdiction when it received, heard and determined the appellant's case transferred to it by another subordinate Court of concurrent Jurisdiction.

32. Accordingly, the trial of the appellant by Siaya Principal Magistrate's Court was without Jurisdiction and in vain.

33. For that reason, I need not delve into the merits or demerits of the appeal herein. I proceed and quash the conviction of the appellant on all 2 counts of **Robbery with Violence and one (1) count of being found in possession of a firearm without a firearm licence**. I further proceed and set aside the twin sentences of death for the two counts of robbery with violence and 7 years imprisonment imposed on the appellant by the Siaya Principal Magistrate's Court.

34. However, as the offences for which the appellant was charged are serious and although the appellant has been in remand custody for some time, I observe that he had another capital Robbery case in Bungoma Chief Magistrate's Court.

35. Therefore, in the Public interest, I order for retrial of the appellant at Bondo Principal Magistrate's Court, for the same offences for which he was convicted without Jurisdiction. Mention on 12/10/2020 before Bondo Principal Magistrate's Court for further directions.

36. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th day of October, 2020

R.E. ABURILI

JUDGE

Delivered in the Open Court in the presence of:

Mr. Okachi, Senior Principal Prosecution Counsel for the Respondent

Appellant in person absent as the network connection for Kisumu Maximum Prison is lost [Registry to notify the appellant through prisons authorities by email]

CA: Brenda