REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 36 OF 2017

ERICK OMONDI MBOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Chief Magistrate's Court

at Kisumu (Hon. T. Obutu SPM) dated the16th June 2017 in Kisumu CMCRC No. 185 of 2016)

JUDGMENT

1. The Appellant, **ERICK OMONDI MBOYA,** was convicted for the offence of **ROBBERY WITH VIOLENCE** Contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.**

2. He was then sentenced to suffer death as by law prescribed.

3. Being dissatisfied with the conviction and the sentence, the Appellant lodged an appeal at the High Court. This judgment is in relation to the said appeal.

4. The first point which he raised was that the trial court did not accord him a fair trial. That contention was premised on the provisions of **Article 50(2)** of the **Constitution of the Republic of Kenya,** which stipulates thus;

> ***"Every accused person has the right to a fair trial, which includes the right –***
>
> ***(a) …….***
>
> ***(b) to be informed of the charge with sufficient detail to answer it."***

5. In this case the plea was taken by the court on 6th May 2016. The record of the proceedings shows the following, as having transpired on that date;

> ***"6/5/2016***
>
> ***T. Obutu – PM***
>
> ***Prosecutor – Chelagat***
>
> ***Court Assistant – Sidera***
>
> ***Interpretation – Kiswahili***
>
> ***Accused – Not guilty***
>
> ***Alternative Count – It is not true.***
>
> ***Court: Plea of not guilty entered.***

Accused may be released on bond of

Kshs.300,000/= plus a surety of the similar

amount.

Hearing – 22/6/2016 in Court No. 2.

Mention on 20/5/2016.

Mention statement to Issue.

T. Obutu

Principal Magistrate."

6. A perusal of that record does not enable any person to ascertain whether or not the charge was read out to the Appellant.

7. But assuming that Appellant cannot have been saying that he was "Not guilty" unless a charge had been read out to him, that would still beg the question as to whether or not the accused had been informed of the charge in sufficient detail.

8. In the case of **EPHANTUS KAMAU & ANOTHER Vs REPUBLIC, CRIMINAL APPEAL NO. 170 OF 2011**, the High Court sitting at Eldoret handled an appeal which arose from a conviction which was the culmination of a trial that had began with a plea that mirrors that which is in the record before me.

9. In that case, the court noted that pursuant to Section 207(1) of the **Criminal Procedure Code;**

"The substance of the charge shall be stated to the

accused person by the court and he shall be asked

whether he pleads not guilty, guilty or guilty subject

to a plea agreement."

10. In the light of that statutory provision, the court went on to state as follows:-

"It was not enough that the trial court merely entered the reply that was given by the Appellants, without indicating on the record, what they were responding to. The learned Magistrate ought to have indicated on the record that the charge had been read to them and all its elements explained to the persons in a language which they understood, after which they had responded 'it is not true'. That omission was a gross error."

Why did that court come to the conclusion that the omission was such a gross error? This is the explanation tendered by the said court;

"The proper taking of a plea is the genesis and core foundation of a fair trial. It informs an accused person of what he is charged with. It informs him of the elements constituting the charge. Before this information is given to him, he is not in a position to make an informed decision by either affirming or denying the content of the charge.

The fact that the trial court failed to record in the court file, that the charge was read and explained to them, vitiated the Appellant's fundamental rights to a fair trial as envisaged by Article 50(2)(b), which is the right 'to be informed of the charge, with sufficient detail to answer to it.'

It is then trite that the trial ought not to have commenced."

11. I can do no better than to reiterate those words.

12. The fact that the prosecution case was merited does not give the court a licence to ignore the requirements for procedural due process. It is in the safeguard of the fair trial values that justice is not only done but is seen to have been done.

13. If the court were to lay emphasis on only substantive justice whilst either disregarding or outrightly trashing procedural due process, it may be difficult for the society to appreciate that he who would not have due regard for systems designed to offer protection of fundamental rights could deliver justice.

14. It must always be borne in mind that pursuant to **Article 19(3)(a)** of the **Constitution of the Republic of Kenya**;

> ***"(3) The rights and fundamental freedoms in the Bill of* Rights –**
>
> ***(a) belong to each and every individual and are not granted by the State."***

15. The right to a fair trial is one such fundamental right.

16. Pursuant to **Article 25 (c)** of the **Constitution,** the right to a fair trial is an absolute right, and it cannot be limited.

17. If any further emphasis was required, it may be found in **Article 20(2)** of the **Constitution** which provides that;

> ***"Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."***

18. I understand that to mean that in respect to fundamental rights and freedoms, it is not enough for any person to be told that the court or any state organ had taken steps that were generally in line with the constitutional provisions. If the steps taken fell short of what was required, the said steps would be unable to grant to the subject, the opportunity to enjoy his rights and fundamental freedoms to the greatest extent consistent with the nature of such right or fundamental freedom.

19. The trial of an accused person starts with the taking of the plea, and it ends with sentencing, if the accused was convicted. Therefore, from the time the plea is taken, until either the accused is acquitted or is convicted and sentenced, the court should ensure that fair trial procedures are safeguarded.

20. In this case, the Appellant did put up an alibi defence.

21. The learned trial magistrate noted, in his judgment, that the alibi defence was first raised at the stage of the defence hearing.

22. It is correct that the Appellant did not advance his alibi defence until he was put to his defence.

23. The Appellant submitted that he cannot be faulted for not putting forward his alibi defence from a much earlier stage of the trial because the substance and elements of the charge were not given to him when he was taking plea.

24. The substance and elements of a charge would include;

> **(a) Name of the accused;**
>
> **(b) The date when the offence was committed;**
>
> **(c) The time when the offence was committed;**
>
> **(d) The place where the offence was committed;**
>
> **(e) The ingredients of the offence e.g. in a case of Robbery with Violence the charge should specify if the accused was alone or with other persons; and if the accused was or was not armed; or if any force was used;**
>
> **(f) The particulars of the items which were stolen or damaged, (if any);**
>
> **(g) The name of the Complainant, in respect to each count;**
>
> **(h) The relevant statutory provisions.**

25. This list is not exhaustive, and it is also flexible, depending on the nature of the criminal offence which the accused is alleged to have committed.

26. In the circumstances, I find some merit in the Appellant's contention that he could not have been expected to specify that he was not at the scene of crime on the date and at the time when the offence was committed, yet it was not until later that the prosecution witnesses gave evidence, that revealed the substance and elements of the charge.

27. I pause here to point out that even when an accused person raises a defence of alibi at the stage when the trial court had put him to his defence, that would not, of itself, be reason enough to reject such defence.

28. Pursuant to the provisions of **Section 212** as read with **Section 309** of the **Criminal Procedure Code**, the prosecution may be allowed by the court to adduce evidence to rebut any new matter which the accused adduces when putting forward his defence.

29. In this case, the Appellant has asked me to order for a retrial.

30. I have given careful consideration to the evidence tendered by the prosecution, as well as the Appellant's defence, and I have come to the conclusion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result.

31. In the circumstances, I find that the interests of justice would be best served if a retrial was ordered.

32. In my considered view, the Appellant would be unlikely to suffer any prejudice if he were to be retried.

33. The error that has given rise to the decision herein was not attributed to the prosecution. It was an error of omission, which was wholly attributable to the trial court.

34. I hold the considered view that the retrial of the Appellant would not constitute an opportunity for the prosecution to fill up any gaps in the evidence which was adduced during the first trial.

35. In the light of the fact that the Appellant will be retried, I have consciously made the decision to desist from carrying out a detailed analysis, in this judgment, of the evidence which was adduced at the first trial. I am alive to the fact that when an accused person was due for retrial, any detailed analysis of evidence which had been produced at the earlier trial, would be prejudicial to either the prosecution or the accused.

36. A detailed analysis of evidence, if conducted by an Appellate court when that court was about to order for a retrial, would also probably interfere with the independence of the court which would preside over the retrial.

37. The incident giving rise to this case took place in April 2016, which is just over two years ago. Therefore, I find that the probability of the witnesses being available to testify at a trial, was good.

38. In the result, I set aside the conviction and the sentence handed down against the Appellant, and I order that he shall undergo a retrial.

39. The said retrial shall be presided over by any other court of competent jurisdiction, other than Hon. Thomas Obutu Atanga SPM.

40. In order to facilitate the expeditious handling of the case, I direct that the case be fixed for Mention before the learned Chief Magistrate on 11th July 2018.

DATED, SIGNED and **DELIVERED** at **KISUMU** this **5th** day of **July** 2018.

FRED A. OCHIENG

JUDGE