REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 76A, 76B AND 76C OF 2017

KARATINA OLE PARSINTEI..............1ST APPELLANT

ELIUD NJOROGE GITHI....................2ND APPELLANT

GEORGE THAIRU GITAU...................3RD APPELLANT

VERSUS

REPUBLIC..RESPONDENT

[From the original conviction and sentence dated 13th September, 2013 in the Chief Magistrate's Court at Narok in CR. Case No. 749 of 2011, R. v. Karatina Ole Parsintei, Eliud Njoroge Githi and George Thairu Gitau]

JUDGEMENT

INTRODUCTION

1. The appellants have appealed against their conviction and sentence of death in respect of robbery with violence contrary to section 296 (2) of the Penal Code [Cap 60] Laws of Kenya.

2. The state has supported both the conviction and sentence.

3. The appellants were convicted on circumstantial evidence.

4. The appeal of each of the appellants will be considered individually and separately as shown herein below.

THE APPEAL OF KARATINA OLE PARSINTEI - BEING THE APPELLANT IN CRIMINAL APPEAL NO. 76A OF 2017

5. Mr. Kamwaro who initially appeared for the other co-appellants took over this appellant's appeal as well. Mr. Kamwaro raised six grounds in his petition of appeal in respect of all the three appellants. In ground one, he has faulted the trial court both in law and fact by contravening the mandatory provisions of section 200 of the Criminal Procedure Code (Cap. 75) Laws of Kenya. He has submitted that the provisions of that section are coached in mandatory terms. They require a succeeding magistrate to inform the accused of his right to recall all witnesses for cross examination. This is a protection accorded to an accused person. In support thereof, counsel cited *Anthony Musee Matinge v. Republic (no reference given)*, in which the court stressed the importance of complying with the provisions of section 200 in the following terms:

> *"....... The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in section 200 of the Criminal Procedure Code. The relevant part of which provides:- 200 (3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.*
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> *The above provisions of law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re-summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."*

6. Furthermore, counsel cited *Joseph Gituku Wangai and 5 others v. Republic (2005) eKLR,* in which the court also stressed the importance of complying with the provisions of section 200 of the Criminal Procedure Code [Cap 75] Laws of Kenya. The court in part pronounced itself in the following terms:

> *"I must take it in favour of the appellants that the fact there was no compliance with the said provisions. The provisions of section 200 (3) of the Criminal Procedure Code are meant for the protection of accused persons and they must be vigorously complied with. Failure to comply with the provisions is fatal to the prosecution case. See Mudoola v. Republic (1990) KLR 616 and Ndetwa v. Republic CA No. 125 of 1984. In both cases the appellate court found the violation of the statutory protection accorded to the appellants under the said section was fatal the principle being that the trial court being the best person to do so, should itself see, hear, assess and gauge the demeanour and credibility of witnesses in its judgement. In the instant case the preceding magistrate took the entire prosecution evidence and the succeeding one only heard the defence case. In the circumstances I declare the original trial was defective and that there was a mistrial, set aside the conviction and the sentences."*

7. The position in these three appeals is that the 1st appellant after being explained the provisions of section 200 (3) of the Criminal Procedure Code in Kiswahili language, informed the court that he wanted his case to proceed from the point where it had reached. This is what the appellant informed the then learned trial magistrate (Hon. W.N. Njage) on 8th August, 2012. Furthermore, on 25th March, 2013 the 1st appellant after being explained the provisions 200 (3) of the Criminal Procedure Code told the court that: *"I wish that the court proceeds from where the last magistrate stopped."*

8. As a result, the trial proceeded with the prosecution calling No. 46623 Cpl. Paul Kiilu (PW10), who was the investigating officer. The evidence of PW10 was that he learnt that this appellant had kept asking for the whereabouts of the deceased and only stopped asking for his whereabouts after it was discovered that the deceased was the victim of the robbery. PW10 further testified that this appellant was not in good terms with the deceased. The deceased was a step brother to the 1st appellant.

9. PW10 continued to testify that he arrested the 1st appellant on the strength of the reports given to him by family members of the deceased. The family members told him (PW10) that there was bad blood between the deceased and the 1st appellant. One such family member is Lempeyan Ole Shukuru Sampao (PW2). It was the evidence of PW2 that on the night of 27th July, 2011 at 8.30pm, he was heading home from Suswa as a pillion passenger on a motorcycle and he alighted after arriving at his destination. Thereafter, he decided to walk the rest of the distance to his home.

10. While en route, PW2 heard some people in the bush near a certain homestead. He testified that there was moonlight. He continued to testify that a person emerged from that bush and unleashed a knife. As a result, he also unleashed his Maasai sworn and demanded to know the identity of the person. This person introduced himself as Karatina (1st appellant). He confirmed his identity as a person he knew very well being a member of his family. The 1st appellant then told him that it was not PW.2 that he wanted. The 1st appellant then went back to the bush with PW2 walking home with his sword in his hand.

11. The following day PW2 proceeded to Naivasha at 6.30am and passed through his uncle's place. He eventually arrived in Naivasha where he spent the night. He then received a phone call informing him that the deceased had gone missing, but subsequently learnt that he had been found dead. He proceeded there and found his body in a dry river bed. The deceased was his brother. It was also his evidence that he had met the deceased at Embash.

12. In addition to the foregoing evidence, the prosecution called Alice Shukuru (PW4), who is the wife of Saitoti Shukuru (PW1). She testified that on 27th November, 2011 at about 9.00am, she was at home. The 1st appellant went past her home with his head covered and got into the bush near their home. At about 7.00pm the same day, the 1st appellant returned and asked for the whereabouts of the husband of PW2. In response PW4 told him that her husband was not at home. The 1st appellant then asked for the whereabouts of the deceased and he then concluded for himself that PW1 and the deceased and her husband had gone to Embash. The 1st appellant then asked her for tea. She told him that she did not have any tea. The 1st appellant then left.

13. The next day the deceased went to their home and borrowed her husband's motorcycle since his (the deceased) had broken down. PW4 testified that her husband (PW1) does not see eye to eye with the 1st appellant.

14. In his sworn defence evidence, the 1st appellant denied the charges against him. He testified that the deceased was his brother. He also testified that on 20th July, 2011 he was at Kiragarrien, attending to his matters. He further testified that Lempeyan Shukuru Sampao (PW2) was his uncle. He further testified that he had a grudge with PW2 because in September he differed with him over his successful harvest of maize. In short he set up the defence of alibi.

15. Based on this evidence, the learned trial magistrate convicted the 1st appellant on a charge of capital robbery. Mr. Kamwaro for the 1st appellant has faulted the conviction of the 1st appellant on the basis that the circumstantial evidence did not point to his guilt. In support thereof, he cited *Abanga alias Onyango v. Republic CR. A No. 32 of 1990 (UR),* in which that court pronounced itself as follows: *"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused. (iii) Those circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."*

16. This is a 1st appeal. As a 1st appeal court, I am required to reassess the entire evidence tendered at trial and make my own independent findings of fact, while deferring to findings of fact based on the demeanour of witnesses. I have done so. I find that the 1st appellant was convicted on circumstantial evidence. I further find that there is circumstantial evidence which casts suspicion on his conduct a day before the deceased met his death. For instance, he asked the wife of PW1 Alice Shukuru (PW4) the whereabouts of the deceased as well as that of

her husband. There is further evidence of Lempeyan Shukuru Sampao (PW2) that he found the 1st appellant in a bush from where he confronted PW2 with a knife. In response PW2 unleashed his maasai sword against him and demanded for his identification. The 1st appellant complied and the confrontation ended.

17. There is further evidence that the body of the deceased was found in a river bed in the bush where the co-appellants had alighted after being given a lift by Kipas Lengues (PW5). This set of circumstances raise strong suspicion against the 1st appellant. As pointed out by the Court of Appeal in *Sawe v. Republic (2003) KLR 364,* suspicion alone however strong cannot form the basis for a conviction based on circumstantial evidence.

18. In the light of the foregoing circumstances and the applicable law, I find that the chain of circumstantial evidence does not point to the guilt of the 1st appellant.

19. It therefore follows that the appeal against the 1st appellant is successful; with the result that his conviction and sentence are hereby quashed.

20. The 1st appellant is hereby set free unless otherwise held on other lawful warrants.

ELIUD NJOROGE GITHI - APPELLANT IN CRIMINAL APPEAL NO. 76 (B) OF 2017 AND GEORGE THAIRU GITAU APPELLANT IN CRIMINAL APPEAL NO. 76 (C) OF 2017

21. The appeals of these two appellants are different from that of the 1st appellant. These two appellants told the learned Senior Resident Magistrate (Hon. C. A. Nyakundi) that they wanted their cases to start afresh. Furthermore, they also told the third succeeding magistrate (Hon. T. A. Sitati) on 25th March, 2013 that they wanted their cases to start afresh in accordance with section 200 (3) of the Criminal Procedure Code. The learned magistrate overruled their application for the trial to begin *de novo.* Based on the authorities cited hereinabove, the trial court was wrong to refuse their trial from beginning afresh. I therefore agree with Mr. Kamwaro that the fair trial rights of the two appellants were violated.

22. By virtue of the violation of the fair trial righst of the two appellants, I hereby find that their trial was not satisfactory. Their appeals succeed on this ground alone with the result that their conviction and sentence are hereby quashed. I find it unnecessary to consider their other grounds of appeal.

23. The only issue that falls for consideration is whether or not I should order a retrial for these appellants.

24. In deciding whether a retrial should be ordered or not, the following principles of law are applicable. First, a retrial may only be ordered where the original trial was either illegal or unsatisfactory. Second, a retrial should not be ordered according to *Alloys v. Uganda (1972) EA 469* to give the prosecution an opportunity of filling gaps in their case. Third, a retrial should not be ordered unless it is shown from the record that on a proper consideration of the potentially admissible evidence, a conviction might result according to *Braganza v. R. (1957) EA 152 (CA).*

25. Applying the foregoing principles in the instant appeals, I find the following. First, there is potential admissible evidence that Eliud Njoroge Githu was in possession of the recently stolen motorcycle of the complainant. Furthermore, there is potentially admissible evidence that Kipas Lengues (PW5) gave a lift to both appellants who alighted and walked back to where the body of the deceased was found. There is further evidence of Chief Inspector Muiruri (PW8) that the two appellants were identified in two police identification parades conducted by PW5.

26. Furthermore, I find that a life was lost. From the evidence of Cpl. Paul Kiilu (PW10), the deceased was killed on a road and dragged into bed of a valley of a river using cable wires. There is further evidence of Dr. Allan Soita (PW6) that the cause of death of the deceased was due to a severe trauma head injury caused by a blunt object. His further evidence is that the right ear was chopped off.

27. I also find that the appellants have been in custody for slightly over seven (7) years.

28. After considering all these matters, I find that the interests of justice demand that a retrial should take place which I hereby order.

29. The two appellants should be charged in the court of the Chief Magistrate for their retrial to start *de novo* before any magistrate of competent jurisdiction excluding those who tried the two appellants.

Judgement delivered in open court at **Narok** this 2nd day of October , **2018** in the presence of MS. Maritim holding brief for Mr. Kamwaro for the appellants and Mr. Omwega for the State.

J. M. BWONWONGA

JUDGE

2/10/2018