REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 7 OF 2018

SALIM KAMAU HAMISI..........................APPELLANT.

VERSUS

REPUBLIC..RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Makadara Criminal Case No. 2122 of 2013 delivered by Hon. Nyaga, CM on 7th October, 2017)

JUDGMENT

1. The Appellant herein was the 2nd accused having been charged alongside three others with the offence of attempted robbery with violence. It was alleged that on the 10th day of August, 2012 at California in Nairobi county jointly with others not before court while armed with dangerous weapons namely pistols attempted to rob Asman Bin Abbas Kshs. 10,000/= and at the time of such attempted robbery used actual violence to the said Asman Bin Abbas.

2. It is important at the earliest to note that the Appellant was initially charged in **Makadara Criminal Case No. 4957 of 2012** alongside one Kennedy Njoroge Alias Billy. He was the 2nd accused in this trial. Both pleaded not guilty on 14th March, 2013. Initially, only the 1staccused , Kennedy Njoroge alias Billy was charged, taking plea on 25th September, 2012 before the charge sheet was substituted after amendment on 14th March, 2013 to accommodate the Appellant.

3. Earlier, **Makadara Cr. Case No. 2122 of 20123** had been filed in which the accused persons were Hassan Ramadhan Omar and Abdul Karuo Jambi alias Bobo/Duly.

4. On 4th July, 2013, an application to consolidate both files Cr. Case No. 2122 of 2012 and 4957 of 2012 was made. This is the date on which that everything went wrong. The prosecution had drawn a new charge to accommodate all the four accused. They were required to take plea afresh in accordance with **Section 207(1) of the Criminal Procedure Code.**

5. The first step in taking a plea entails the reading of the charge(s) to an accused in a language he/she understands. The court must record that the charge has been read to the accused and the language used accordingly. It must also record the language in which the accused answers to the charges.

6. A look at the Record of Appeal clearly attests that this crucial procedure was not followed. Strictly speaking, it was not indicated whether the substance of the charge had been read to all the accused persons in a language they understood and that they had understood it before pleading not guilty. For clarity purposes, I shall duplicate the proceedings as follows:

> **“ Swahili**
>
> **Accused 1 – not true**
>
> **Accused 2 – not true**
>
> **Accused 3 – not true**
>
> **Accused 4 – not true**

Court

Plea of not guilty entered for accused. Each accused released on a cash bail of Kshs. 50,000/=. The matter to be heard on 19/7/2013.

Hon. t. Okello

SPM

4.7.13"

7. No doubt a plea of not guilty was not entered. But it is unknown what they were pleading to. Clearly, they were not informed of the charges that were facing them before they were called to plead as provided under **Section 207(1)** of the **Criminal Procedure Code**. As the plea taking procedure was violated, any subsequent trial was a nullity. This is in view of the fact that the right to a fair trial under Article 50 of the Constitution is not derogable. Its sanctity must be observed by all and sundry and to the letter. In total disregard of this tenet, the trial court violated Article 50(2) (b) which provides that:

"every accused person has the right to a fair trial which includes the right –

(b) to be informed of the charge, with sufficient detail to answer it."

8. It is gainsaid that the trial being a nullity beats logic for this court to go into great length to re-evaluate the evidence. Once a retrial is rendered a nullity, the only recourse available is to order a retrial. **<u>See Vasha njee Liladhan v Rex [1946] 13 EACA, 150.</u>**

9. But a retrial is ousted if certain conditions are not met, including but not limited to a consideration that it will result in a conviction. A retrial must not be aimed at enabling the prosecution to fill up gaps in their case. It must not prejudice an Appellant. All the same, each case depends on its circumstances but the broad principle is that it must serve the interests of justice**. <u>See Opicho v Republic [2009] KLR, 369, Ekimait v Republic (2005)1 KLR, 182.</u>**

10. In the present case, with respect to the strength of the prosecution case, the evidence of PW1, 2, 3 and 4 was that the assailants attempted to snatch a cash box at Classic Hotel but they had to run away after one of the robbers shot at PW1, the complainant. PW1 and 2 testified that they attended an identification parade in which they identified the Appellant. No identification parade forms were adduced nor did the officer who conducted the parade testify. In addition, amongst the members of the parade, only the Appellant had a visible wound on the face rendering it possible to single him out.

11. It follows that the identification parade did not meet the requirements under the Force Standing Orders. Therefore, the purported identification in the parade was not full-proof evidence of a positive identification of the Appellant to warrant a conviction.

12. Be that as it may, it was the evidence of PW1, 2, 3 and 4 that they recognized the Appellant in the incident PW1, 2 and 3 were candid that the Appellant was known as Bithy. As such, a conviction would likely obtain an account of identification by recognition.

13. On proof of the elements of the offence, sufficient evidence was adduced by PW4, Phillis Wambui who narrated how she was accosted by a gang of three men brandishing a gun and demanding that she opens the cash box. In the confusion, one of the gang members shot at PW1. Dr. Shako produced a medical examination form (P3 Form) as evidence that PW1 sustained injuries. This clearly showed the use of force. It was by grace of God that PW1 was not fatally injured. I add that the robbers were more than one in number and their intention was to steal money. Thus, the elements of the offence of attempted robbery with violence under **Section 297(2)** were established.

14. My view is that the circumstances of the case were grave as they threatened the life of a human being. Therefore, notwithstanding that death penalty is no longer mandatory sentence, the interests of justice demand that a retrial be conducted. After all, the Appellant has been in remand for only five years. Justice would be best served if a final verdict is arrived at through the process of a fair trial.

15. In the result, this appeal partly succeeds. I quash the conviction and set aside the death sentence. I order that a retrial be concluded. The Appellant shall be escorted to Shauri Moyo Police Station not later than 23rd October, 2018 for purposes of preparing him to take plea by 25th October, 2018 at Makadara Law Courts. The original record of proceedings shall forthwith be remitted back to the Law Courts. It is so ordered.

DATED and **DELIVERED** this **15th** day of **October, 2018**

G.W. NGENYE-MACHARIA

<u>JUDGE</u>

<u>In the presence of:</u>

1. Appellant present in person.

2.Miss Atina for the Respondent.