REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 61 of 2016

SAMUEL KANYI NJUGUNA……..…….....APPELLANT

VERSUS

REPUBLIC …….…….…….....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case NO. 2418 of 2011 delivered by Hon. Ochoi, on 29th February 2016).

JUDGMENT

Background.

Samuel Kanyi Njuguna, the Appellant herein was charged alongside four others. Three counts were filed. He was the 4th accused and was charged in counts I and II. In count I he was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 8th July, 2011 alongside others, at Muthiga trading centre along the Nairobi-Nakuru highway in Nairobi within Nairobi County jointly with others not before the court while armed with dangerous weapons namely a pistol robbed Daniel Kipchirchir Boit of an orange Renault lorry registration number KAZ 156Z with its trailer registration number ZC 2638, a 2x20ft container serial numbers TCKU3671045 and MSKU3266068 containing 232 packages of LG home theater and 41 packages of automatic cutting and stitching machines, the items were all valued at Kshs. 8,953,802, and at or immediately before or immediately after the time of the robbery threatened to use actual violence against the complainant.

In count II, he was charged with attempted robbery with violence contrary to Section 297 of the Penal Code. The particulars of the offence were that on 8th July, 2011, alongside others, at Muthiga trading centre along the Nairobi-Nakuru highway in Nairobi within Nairobi County, jointly with others not before the court, while armed with a dangerous weapon namely a pistol attempted to rob Julius Kipngetich Bett of a lorry registration number KBH 216S and its trailer registration number ZD 1063, a container serial number MRKU0536131 containing 53 packages of chillers and accessories, all items valued at Kshs. 11,759,088/-, and at or immediately before or immediately after the time of the attempted robbery threatened to use actual violence against the said Julius Kipngetich Bett.

All the five accused persons were found guilty of the first count and were sentenced to suffer death. The Appellant was dissatisfied with his conviction against which he preferred the present appeal. In his grounds of appeal dated 20th March, 2017 he was dissatisfied that his right to a fair trial was violated in that he was denied prosecution witness statements, that the trial court shifted the burden of proof upon

him contrary to Section 150 of the Criminal procedure Act and Section 146 of the Evidence Act, that the entire trial was a nullity due to the failure to comply with Section 200(3) of the Criminal Procedure Code and finally that the offence was not proved beyond a reasonable doubt.

Submissions.

The Appellant relied on written submissions dated 20th March, 2017. On the issue of violation of his right to a fair trial, he submitted that the trial proceeded without him being furnished with witness statements despite severally requesting for them. This, he submitted, contravened Articles 25(c), 50(2)(b), (c) and (k) of the Constitution. In addition, he submitted that the trial substantially prejudiced him because he was not allowed to cross examine PW1 which infringed on his rights under Articles 25 and 50 of the Constitution and was in contravention of Section 150 of the Criminal procedure Code and Section 146 of the Evidence Act.

With regard to shifting the burden of proof, he submitted that the trial magistrate misdirected himself when he held that he failed to explain how the vehicle that was previously in his custody was found at the scene of crime. He emphasized that the burden of proof always lay with the prosecution to prove their case beyond a reasonable doubt; that an accused person can never be called to prove his innocence. His view was that he was convicted on the basis of weak circumstantial evidence. Accordingly, the conviction was not safe and urged that the appeal be upheld.

He went to submit that Section 200(3) of the Criminal procedure Code was not complied with when the succeeding magistrate took over the conduct of the trial. He made reference to when Hon. Kwena, SPM took over the trial. All the accused persons except himself were represented. The advocates to the other accused persons elected that the trial continues from where it had reached. Unfortunately, the learned trial magistrate did not ask him to also elect how he wished the trial should proceed; whether it would be heard de novo or be heard afresh. He submitted that he had a right to elect how the trial ought to have proceeded and the failure to accord him this right not only violated his right to a fair trial but rendered the trial a nullity. Amongst the cases cited to buttress the submission were; ***George Ngodhe Juma & ors v. Attorney General[2003] eKLR, Ndegwa v. Republic[1985] eKLR, Woolmington v. Director of Public Prosecution[1935] AC 462*** *and* ***Richard Charo Mole v. Republic.***

Learned State Counsel, Ms. Kimiri for the Respondent, in opposing the appeal submitted that although the Appellant was convicted based on circumstantial evidence, the same was strong enough and established the offence to the required standard. She submitted that there was no doubt that PW1 had lent him the motor vehicle that was used in the commission of the offence. The Appellant did not deny being in possession of the vehicle either in his defence or cross examination. Furthermore, both PW2 and PW4 implicated the Appellant. Ms. Kimiri submitted that although no one saw the Appellant commit the offence, his role of giving PW1's car to be used in the robbery made him a principal offender as defined under Section 20(1)(b) of the Penal Code. She insisted that the Appellant aided the perpetrators to escape using the vehicle in question. He could not therefore plead innocence. In any case, under Sections 107 and 109 of the Evidence Act, the burden of proof shifted to the Appellant to explain how the vehicle got to the scene of crime when he was the only person in its possession. His failure to discharge this burden pointed to his guilt.

With regard to compliance with section 200 of the criminal Procedure Code, counsel conceded that indeed the same was violated and that the Appellant was not accorded the right to elect how he wished the trial proceeds after a succeeding magistrate took over the conduct of the same. With regard to violation of the Appellant's right to a fair trial, she submitted that the record of proceedings clearly attested that the witness statements were furnished to him before the trial commenced. Further, she denied that the Appellant was not accorded the right to cross examine PW1. She submitted that the conviction was safe and urged that the appeal be dismissed.

Evidence.

It is well settled law that the first appellate court must reevaluate the evidence on record and make its

own conclusions. In doing so, it must take into consideration that it has neither heard nor seen the witnesses and give due regard for that. See: ***Okeno v. Republic[1972] EA 32.***

The prosecution's case was that the Appellant and four other robbers were along Kabete-Waiyaki Highway where they pretended they were on duty as traffic police officers. ***PW2, Daniel Kipchirchir Boit*** *was driving a truck registration No. KAZ 156Z. He left Mombasa on 8th July, 2011 and was destined for Kampala. He was transporting two containers of LG Home Theatre Units Model NT306SU together with a collegue,* ***PW3, Julius Kipngetich Bett*** *who was driving another truck behind him. PW2 was first stopped by two men dressed in police uniform. Three other men stood by and a salon car was parked about fifteen meters away. It was about 8.00 p.m. but he was able to get a view with the aid of head lights of his truck. One of the robbers told him that they had been looking for the truck. PW3 arrived shortly afterwards. The commanding robber asked two of the other robbers to escort the trucks to Kabete Police Station. An argument between PW2 and the lead robber ensued as PW2 protested his innocence. It is then that the other robber pulled a gun and warned that they were wasting time. The two were then pushed into the saloon car and driven towards the main road.*

As the car drove off, PW2 saw his truck also being driven away. PW2 and 3 then knew that their assailants were robbers and not police officers. As they tried to get control of the car, PW2 managed to bring it to a stop. He jumped off the car leaving PW3 still struggling with the robbers. As he ran to Kabete Police Station, a good Samaritan gave him a mobile phone and raised his employer. At the police station, he found PW3 had already arrived. Police officers accompanied them to the scene but they did not find the saloon car. They however recovered a gun which PW3 had hit off the hand of one of the robbers. The truck was recovered three kilometers from the scene and driven to Kabete Police Station. PW2 only remembered the alphabetical registration numbers of the saloon car as KBA. He and PW3 were asked to attend an identification parade at Central Police Station on 9th July, 2011 but the same did not take place as the suspects refused to participate in it.

The prosecution's further case was that PW1, Claire Wanjiku onwned motor vehicle registration No. KBA 386V Toyota Premio into which both PW2 and 3 were bundled during the robbery. She had left it in the custody of the Appellant on 7th July, 2011 when she travelled to Nakuru. On 10th July, 2011 she read on the Sunday Nation of a robbery at Kabete involving a truck and a Premio car. This did not attract her attention until her sister later called and informed her that she had read on the 'Taifa Leo' newspaper that her car had indeed been used in a robbery at Kabete. She later watched the story on Citizen Television. She positively identified the car and produced its ownership documents.

After the close of the prosecution case, the trial court ruled that a prima facie case had been established. The Appellant was accordingly put on his defence. He testified as DW3. He stated that he lived in lower Kabete where he worked as a casual labourer. His brief defence was that on 9th July, 2011 at around 10.00 a.m. he went to Kabete Police Station to record a statement regarding a vehicle that was left in his possession by a friend. He went back home after recording the statement. He was called later that day and asked to go back to the police station where he was arrested. On the next day he was informed that he had committed an offence and was charged accordingly.

Determination.

After considering the respective submissions and the evidence on record, I have crystalized the following issues for determination:

1. *Whether the provisions of Section 200(3) of the Criminal procedure Code was not complied with.*

2. *Whether the Appellant received a fair trial.*

3. *Whether the offence was proved beyond a reasonable doubt.*

With regard to compliance with Section 200(3) of the Criminal procedure code, the Appellant submitted that he was never informed of his right to elect whether the matter should start afresh and proceeds from where it had reached when both Hon. Kwena and Hon. Ochoi took over the conduct of the trial. This, he said, also offended the holding in the case of ***Bob Ayub****(supra) that,* ***"[t]he right under section 200 of the criminal procedure code was owed to the accused and not to his/her advocate…."*** *It is clear from the proceedings that when Hon. Kwena came on board, she indicated that the provisions of Section 200 were explained to the accused persons. However, the Appellant's answer was not recorded. The same case applied when Hon. Ochoi took over the matter which concludes that indeed Section 200 was not complied with. For clarity, the provision reads as under;*

> ***"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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

The provision places a mandatory obligation on the trial court to inform the accused that when a succeeding magistrate has taken over the conduct of the trial, he has a right to demand that any witnesses be resummoned or reheard. Respectively, the answer that an accused gives must be recorded. I do however disagree with the Appellant that an advocate cannot give the answer on behalf of an accused. An advocate is a representative of the accused and is deemed to act with the full instructions of his client. Therefore, he is mandated to speak for his client and can respond on behalf of an accused in this respect. All the same, in the present case, since the Appellant was not represented by an advocate, the learned magistrates who succeeded in the trial ought to have recorded his answer. The failure to do so vitiated the trial and rendered it a nullity. The defect can then only be cured by ordering a retrial.

It is now settled law that before a retrial can be ordered, the court must consider amongst other factors, whether the trial would result in a conviction, whether it serves the interest of justice, whether any prejudice would be occasioned to an accused and whether the retrial would aid the prosecution to close any gaps in their case. ***See Mwangi v Republic (1983) KLR, 522 citing Braganza V R (1957)EA, (CA)469 & Pyarwa Bussan v R (1960)EA 854.***

But before I make a decision on whether a retrial should be conducted, it is important that I address the issue of whether the Appellant was accorded a fair on the other grounds he submitted. He submitted that he was not furnished with witness statements before the trial commenced. He submitted that he applied for the same on 16th March, 2012 but no statements were furnished to him. But according to Miss Kimiri he was ready to proceed with the trial on this day which was an indication that he had the witness statements. However, the person who indicated was ready to proceed was a Mr. Shilenje advocate who was not the Appellant's counsel. On 4th July, 2012 when the matter came up for mention all the accused agreed to the next hearing date and the Appellant had no objection to the dates in question which is a logical indicator of his readiness to proceed. In an apparent admission that he was ready to proceed, the Appellant submitted that the only reason why he agreed that the matter should proceed was because it was about a year since he was remanded and he just wanted the matter to commence. The record shows that the Appellant did not subsequently apply for the statements which is a clearly proves that he was supplied with the statements when the rest of the accused were. This ground of appeal automatically fails.

His further submission was that he was not allowed to cross examine PW1. Ms. Kimiri submitted that no doubt PW1 was cross examined on 3rd July, 2013. I hold a similar view because the witness first testified on 10th April, 3013. After her evidence in chief, the prosecutor applied she be stepped down, which application the court allowed. The matter next came up for hearing on 2nd July, 21013. The prosecutor applied for adjournment because he had a meeting and the hearing was ordered for the following day. That is when a witness was called for cross examination. No other witness other than PW1 had previously testified. Furthermore, the only cross examination that took place was by the advocate representing the 1st and 2nd accused which comprised of two questions. The first question involved the filing of a complaint and the second about the witness' interest in the case which she stated was her car. Given the latter answer, and its correlation with PW1's evidence, there no better conclusion this court

can make than that it was PW1 who was being cross examined. The Appellant who was the 4th accused clearly told the court that he had no question for the witness. I therefore overrule the Appellant on his submission that he was not accorded an opportunity to cross examine PW1.

The Appellant's further submissions was that the trial court shifted the burden of proof by holding, inter alia, that he did not give a satisfactory explanation to explain the car's presence at the scene. Ms. Kimiri's on the other hand was of the view the court in so doing complied with the provisions of sections 107 and 109 of the Evidence Act. Section 107 of the Act provides that:

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

While Section 109 states that:

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

Ms. Kimiri's submission was that the Appellant failed to explain how the vehicle was at the scene both in cross-examination and in his defence. The trial magistrate seems to have followed a similar trail of thought in arriving at his conclusion. Under Section 107, the burden of proof shifts once the fact in question has been proved by the party who under Section 109 wishes to rely on it. In this case the fact in question is whether it was proved that the vehicle was at the scene of the crime. This assertion was advanced by the prosecution and so the burden of proving it lay squarely with them. But according to the learned trial magistrate since the car was used in the commission of the crime, the Appellant was enjoined to explain what it was doing at the scene of the crime. He gave an unsworn statement of defence that skirted around the issue of the car and how it came to be at the scene. He said that he got the car from PW1 and was operating it as a taxi. He then talked about how he was called to the police station to record a statement regarding the car. This defence statement cannot be deemed to have formed evidence since Section 151 of the Criminal Procedure Code requires that all evidence shall be taken under oath. I would discount the same and consider the defence in question as if the Appellant had exercised his common law right to remain silent as set out under Article 50(2)(i) of the Constitution.

The question then flowing from the foregoing is whether, if a retrial is ordered, there would be sufficient evidence to found a conviction. The test in my view would be whether the subject car was positively identified at the scene of crime carrying or helping the robbers to escape. PW2 and PW4 both testified to a blue car being at the locus in quo. They however did not clearly identify the blue car at the scene with PW2 testifying that he could remember only the alphabetical registration numbers as, KBA. PW4 identified ***"[t]he picture of the blue vehicle we were put in...".*** *He identified the picture and then gave the vehicle's registration number. It is clear that the witness viewed the registration number of the vehicle before he stated its registration number. That could not be deemed as positive identification. In fact, he answered to a leading question which meant that he had no idea of the registration number of the car he saw at the scene, if at all he did see any car. I accordingly conclude that that there lacked sufficient evidence linking the vehicle to the commission of the crime. I then hold that a retrial would not serve any purpose as it is not likely to result in a conviction.*

Of course there is no doubt that the complainant was robbed of a motor vehicle with violence by persons who were armed with a pistol. But the evidence on record failed to link the Appellant to the robbery. In the result, this appeal must succeed. I allow the same. I quash the conviction, set aside the death sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully set free.

DATED AND DELIVERED THIS 5TH DAY OF APRIL, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei for the Respondent.