REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 137 OF 2017

FRANCIS KIPNGETIC KIPROP……...……...……..APPELLANT

VERSES

REPUBLIC……..…..RESPONDENT

JUDGMENT

The appellant was convicted for the charge of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death on 18th October 2012. The particulars of the charge were that Francis Kipngetich Kiprop on the 19th July, 2011, at Kaplelach village in Koibatek District within Baringo County jointly with another not before court, being armed with offensive weapons namely stones robbed Kennedy Kipruto of Ksh.4200 and at or immediately after the time of such robbery wounded the said Kennedy Kipruto.

The evidence adduced before the court was as follows:

1.Kennedy Kipruto (PW1), a resident of Kiplombe and a farmer said that he left home on 19th July 2011 at 10.00 a.m. for Kaplelach in Kiplombe to buy maize. On his way home, he met two men who emerged from the bush. He identified the men as Kipngetich, the accused and Kiprotich. The accused who was at 10 meters away ordered him to stop and when he sought to know the reason for the order, the accused threw a stone which hit his right eye. Kiprotich then hit him on the back of his head and he fell down and the said Kiprotich stepped on his back. He raised alarm and Christopher with whom he had gone to seek maize but with whom he had parted about 150 metres back came to his rescue. The accused and Kiprotich took Ksh.4200/- from my left shirt pocket. He lost consciousness and regained memory after 3 days in hospital at Eldama Ravine and was admitted at Nakuru Provincial General Hospital for two days. He recorded a statement at the police station; and took P3 form to Eldama Ravine Hospital **(MFI-1).** He said that he knew the accused from Kiplombe and had no grudge against the accused whom he knew before the incident having seen him severally at Kiplombe.

2. Christopher Kiprotich Labat (PW2), a resident of Kiplombe and a farmer testified that on the 19th July, 2011, Kennedy, the complainant (PW1) went to his home seeking to find out who had maize to sell. They did not find the seller and so they parted ways he going to Kapsokwo Centre and the complainant returning home. He then heard a scream and ran back to find two men had attacked the complainant. He tried to hold one of them, Kipngetich, the accused, but he ran away and they threw stones at him from about seven metres away and they said they had gone for arrows. The witness left the complainant on the ground and ran to seek to help. He met Mariko and asked him to go help the complainant while he went to call the Complainant's brother Wilson. He got some men and they went back and Mariko told him that he had helped the complainant and

taken him to the Centre. The witness said the complainant was bleeding from the ear, nose and mouth and had an injury on the eye. He said he knew the accused who was his neighbour. On cross-examination, he responded "I found you beat[ing] someone. I found you with Kiprotich. You threw stones at me."

3. Jeremiah Kibiwot Yator (PW3), a resident of Kiplombe and a farmer said that on 19th July, 2011, at 6.00 p.m he was at home when he was called by Christopher PW2 who told him that his brother was injured seriously by Kipngetich and Kiprotich. He ran to the scene and he met Kipkemoi and Kibet who told him that his brother had been seriously injured. He found him near home lying down and bleeding from the left ear, right eye and head. On the following day we took him to Esageri (Health Centre) then to Eldama Ravine District Hospital where he was admitted for 6 days, and later to Nakuru Provincial Provisional General Hospital. He made a report on 25th July, 2011 before going to Nakuru and subsequently recorded statements. He identified Kipngetich in court. The accused did not put any question to the witness in cross-examination.

4. PC Vincent Sang (PW4) No. 42718 Investigating officer stationed at Eldama Ravine Police station testified that on 25th July, 2011, at 1.30 p.m. Jeremiah Kibiwot (PW3) made a report of the incident on 19th July, 2011 when the complainant was injured by two people – the accused and his brother who was still at large. The witness said the complainant had told him that the accused and another had injured him on the face and that he had lost Ksh.4,200/-. He said that he had given the complainant a Police Form P3. He said that the complainant was later referred by Eldama ravine Hospital to Nakuru or Moi Referral Hospital and a head scan was done at Crater X-ray clinic on 27th July 2011. The witness said that the accused and his brother had gone underground until 29th October 2011 when he was arrested for another offence and on PW3 getting information of his arrest sent complainant to the station who identified the accused leading to the present charges. The witness said that the money Ksh.4200 was not recovered and no weapon was recovered.

5. Rachel Aegwo Cherop (PW5) the clinical officer in charge of Eldama Ravine District Hospital testified that she had on 11th August 2011 filled P3 form **(MFI-1)** for Kennedy Kipruto, and that he had blood stained clothes, he was assaulted by two people on the head occipital region on right lateral eye, lost consciousness, looked confused sick and in pain. **On** Examination she found severe bleeding in lateral right eye swollen on same side; bleeding from the left ear, nostril and mouth. From Esageri health centre, the complainant had been admitted at Eldama Ravine District Hospital for 6 days and later referred to Nakuru for further examination. X-ray was done on skull fracture on right wall of the orbit. **-Exhibit 2 (MFI-2**). **X-ray (MFI- 3)**, C-T scan results had haemorrhagic contusion on right parental lobe **-Exhibit 4 (MFI- 4).** He was referred to Nakuru for follow up by a Neuron Surgeon. The witness had assessed the degree of injury assessed as grievous harm - P3 **Exhibit 1.** PW5 was cross-examined by accused and she said that the complainant had not informed who injured him.

6. When put on his defence, the accused, Francis Kipngetich Kiprop, (DW1) testified that he was a resident at Kiplombe, and that on 25th May, 2011 he had gone to his father where he was working where he plants potatoes and that he had been there until 3rd August 2011. He returned home on 12th October, 2011 for a family meeting. On the 14th October, 2011, he dug a well. On 22nd October 2011 after having worked till 2.00 p.m. he went to Tich Centre until 6.00 p.m. where he was arrested by two police officers and taken to the police station and subsequently charged before the court and denied charges. On cross examination DW1 said he was arrested on the 22nd October, 2011 by two AP officers. In July 2011, he was at his father's farm planting potatoes being helped by Samson and Kipkemei and that he would call his father to give evidence. He does not know PW1, PW2 and PW3 and that onn 19th July, 2011, he was at Kipkelion.

In its Judgment the trial court delivered found the appellant guilty of the offence as follows:

"The issue for determination is whether the accused committed Robbery. The evidence of PW1 is

corroborated by the evidence of PW2 both of whom saw the accused committing the offence . This evidence is overwhelming and was not watered down in cross examination and the defendant who in his evidence only alleged alibi and is not corroborated. The evidence of PW3, 4 and 5 do confirm the injuries sustained due to the act of the accused. The accused did not raise any substantial evidence to controvert the prosecution evidence. I find alibi by the accused unbelievable and dismiss the same. In the light of the forgoing I find the Prosecution has established the offence against the accused beyond reasonable doubt and convict the accused under section 215 of the Criminal Procedure Code."

The appellant appealed citing grounds as follows:

Grounds of Appeal

1. That the trial magistrate erred in both law and fact by convicting the accused without considering that there was secret identification at the police station, yet the complainant claims to have known the assailant, he could have recognized him rather than identifying him at the police station.

2. That the trial magistrate erred in both law and fact by convicting me while relying on prosecution case not proved beyond reasonable doubt as the complainant did not know how he took money at his first report was that of assault.

3. That the trial magistrate erred in both law and fact by convicting the accused while denying him the right to recall witness in contrary to Section 150 of the Criminal Procedure Code.

4. That the trial magistrate erred in both law and fact by convicting the accused without considering that he informed the court that the complainant wanted to withdraw the case as provided by Section 204 of the Criminal Procedure Code.

5. That the trial magistrate erred in both law and fact by convicting me without complying with the provisions of Section 211 of the Criminal Procedure Code.

SUBMISSIONS

The Prosecution's case which was based on recognition by identification was not proved beyond reasonable doubt by the prosecution evidence and consequently prayed that his appeal be allowed, the conviction quashed the sentence of death set aside.

The Prosecution opposed the appeal and filed written submissions in which it was urged as follows:

1. The appellant was properly identified by recognition by PW1 at about 10:00 a.m. in the morning. He identified his assailants by name as Kipngetich and Kiprotich. He testified that he knew the accused as he used to see the accused at Kiplombe.

2. PW2 also identified the appellant as he tried to hold the appellant and that he was his neighbour, when cross examined by appellant he said he found the accused with Kiprotich. The statements of PW1 and PW2 are well corroborated

3. PW3 states he was called by PW2 that PW1 had been injured by the accused and Kiprotich; he identifies the appellant by name.

4. PW4 testified that initial report was made by PW3 who informed PW1 that the accused had been arrested; PW1 went to the police station to state that he had been attacked by the appellant and his brother. Prosecution submits that the identification at the police by PW1 was not in secret, it was to confirm the accused arrest to the investigating officer.

5. The identification was not by single witness, the mode of identification was by recognition and

the circumstance under which it was done was favourable. It was unnecessary to have an identification parade conducted as the accused was well known to the accused and his witnesses.

6. The prosecution proved the ingredients of the offense or robbery with violence contrary to section 296 (2) of the Penal Code. The complainant was attacked by two people and they used actual violence on him. PW5 assessed the degree of injury as grievous harm. The complainant did not see who took the money Ksh. 4200 which was in his left shirt pocket. The appellant and his co-accused had a common intention when they attacked PW1. Trial magistrate was correct in applying the provisions of section 21 of the Penal Code in finding the appellant and one Kiprotich still at large shared a common purpose.

7. The appellant made application under section 150 of the Criminal Procedure Code to have PW1 and PW2 recalled. The prosecution objected to the application as they had closed the case. However, it is not indicated in the proceedings if the magistrate ruled or under Section 326 of Criminal Procedure Code reserved her ruling for later.

8. The stated reason by the appellant for recalling the witnesses was that he had not known how to do the case when he was unwell. From the proceedings on trial court on 23rd May 2012 and on 6th June 2012 appellant did not proceed with his defence, he stated that he was unwell. He did not indicate that he was unwell during the prosecution's case. Prosecution submits that the application was intended to delay the case. The failure by the trial court to rule on the said application was not prejudicial to the accused as he was given the opportunity to defend himself.

9. The law under Section 176 of the Criminal Procedure Code does allow the parties to reconcile and proceed to withdraw a criminal case under Section 204 of the Criminal Procedure Code however there is a caveat that the offense must not be a felony. Robbery with violence is a felony as such a capital offence and punishable by death sentence.

10. Furthermore, prosecution submits that the complainant is the state through the Director of Public Prosecutions and that any form of reconciliation should include the Prosecution. Under Article 159 (2) (c) of the Constitution of Kenya 2010, the courts are encouraged to allow parties practise Alternative Dispute Resolution. However, Section 176 of the Criminal Procedure Code limits the use of Alternative Dispute Resolutions to misdemeanour offences. Prosecution relies on the case of ***Republic v Noor Mohamed* (2016) eKLR**, Lesiit, J. in his ruling stated:

> ***'From the reading of the aforementioned statutory provisions, it is quite evident that the application of alternative dispute resolution mechanisms in criminal proceedings was intended to be very limited. The Judicature Act in fact only envisages the use of African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in criminal matters, it is limited to misdemeanours and not on felonies'***

11. Trial magistrate complied with section 211 of the Criminal Procedural Code. The trial magistrate ruled that the accused has a case to answer and should comply with section 211 of the Criminal Procedure Code. The appellant gave a sworn statement and told the court the complainant wanted to withdraw the case. He gave a sworn statement and was cross-examined by the prosecution.

Determination

This court as a first appellate court has a duty in accordance with the principle in *Okeno v. R* (1972) EA 32 to consider the evidence presented before the trial court. However, for reason of the orders proposed to be made in this appeal, the Court shall not analyse the evidence. The court has however studied the proceedings of the trial court in considering the complaints raised by the appellant as to the conduct of the trial. There is a general issue whether the trial was defective in view of irregularities identified by the

appellant in his grounds of appeal.

Whether section 211 CPC complied with

On the 18th April 2012 when the trial court delivered its ruling that the accused had a case to answer, the record clearly shows that the court warned itself of the need to comply with section 211 of the Criminal Procedure Code as follows:

> ***"Court: Ruling: Accused has a case to answer and is to comply with section 211 of the Criminal Procedure Code. "***

The appellate court has no basis for assuming that the trial court did not explain to the accused his rights under section 211 of CPC, although the fact of explaining to the accused of the accused's rights is not recorded. In addition no prejudice is shown to have been suffered by the accused who proceeded to give his defence in a sworn statement followed by cross-examination by the Prosecution.

Whether Chief's Letter to Court lawful

Following his being put on his defence, in the ruling on case to answer on 18th April 2012, the accused indicated no doubt in response to the manner of presentation of his defence pursuant to section 211 of the CPC as follows:

> ***"Accused: Sworn statement. Complainant wants to withdraw the case."***

The Court then made an order that-

> ***"Court: Chief – Kibon of Esageri location to give a report on the accused. Mention on 25.4.2012."***

On 25th April, 2012, the court ordered the area chief to give a report of the accused. The prosecution contacted Chief of Kiplombe Location. The **Comments from Area Chief** Mrs. Rodah Rotich, Chief Kiplombe Location, Eldama Ravine by **Letter Dated 24th, April, 2011, addressed to OCS Eldama Ravine Police station** were that the accused has been a threat to the community and has several cases (assault case); that he does not respond to summons by the police; and that the Community was at peace since his arrest.

Upon seeing the Chief's letter, the trial court directed that the trial proceeds to hearing as follows:

> ***"Court: sees the letter form the area Chief Kiplombe Location which is negative. Accused's case is to proceed.***
>
> ***Defence hearing on 23.5.2012.***
>
> ***M. Kasera***
>
> ***Principal Magistrate***
>
> ***25.4.2012"***

There is no basis in law for receiving communication by correspondence, whether as evidence in the criminal trial or as a prerequisite to permitting the reconciliation or withdrawal of charges under section 176 or 204 of CPC, respectively, as the case may be. The dangers of such a letter by the Chief are obvious as the court may be prejudiced against the accused because of the "negative" comments on him given unsworn by the Chief in a communication to the Court on which the Chief is not subjected to cross-examination as to the truth of its contents. Evidence in a criminal trial must in accordance with section

151 of the Criminal Procedure Code be given on oath or affirmation except where in cases of children of tender years evidence may be taken unsworn under section 19 of the Oaths and Statutory Declaration Act. Section 151 of the CPC provides as follows:

> ***"151. Evidence to be given on oath***
>
> *Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.***"**

The appellate Court cannot rule out the possibility that the trial court was influenced by the negative report on the accused's character from the Chief. Therein lies an irregularity in the trial procedure make it defective.

Whether failure to rule on application for recall fatal to conviction

On the 23rd May 2012 when the case came up for defence hearing, the accused said that he was not ready to proceed and he was unwell, and the prosecution did not oppose the adjournment and the hearing was adjourned to 26.6.2012. On the 26th June 2012, the accused again said he was unwell and prayed for another hearing date. The hearing was adjourned to the 16th August 2017 ad the Court ordered that he be taken to hospital. On the 16th August 2012, the accused sought the recall of the key witnesses complainant and his companion. The record shows the accused's application for recall and response by the Prosecutor as follows:

> *"Accused: I pray that PW1 and PW2 to be recalled. I had not known how to do my case when I was unwell.*
>
> *Prosecutor: I object to this application. We had closed our case. We cannot reopen our case."*

Unfortunately, the Court did not make a decision on the accused's application as the record shows that the Court proceeded to take the Defence testimony immediately giving credence to the complaint of prejudice on the part of the accused that he was forced to proceed with the hearing of the case without a ruling on his application for recall. Section 150 of the Criminal Procedure Code allows for recall of witnesses in the following terms:

> ***150. Power to summon witnesses, or examine person present***
>
> *A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness,* ***or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> *Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."*

The trial court did not consider and rule on the application for recall of witnesses, and this court is not able to speculate what its reasons for refusal of the application. I can only observe that the ground of having been unwell at the time when the two witnesses testified offered for application for recall is not wholly unreasonable. The objection by the Prosecution that it had already closed its case is without merit because as held in *Juma Ali. v. R* (1964) EA 461 the Court may recall a prosecution witness for further cross-examination even after the close of the defence case.

There is no indication that the accused closed his defence case as he had indicated on cross-examination

that he would call his father to give evidence for the defence. The record shows that the court gave a judgment date for 13th September 2012 immediately after the cross-examination by the prosecution. On 13th September 2012, Judgment was delivered in the absence of the accused whom the prosecution said had escaped from custody. On 28th September 2012, the accused having arrested the day before, the Judgment was reserved for 18th October 2012 when Judgment was read in the presence of the accused and thereafter sentence of death passed on the accused.

Although no prejudice may be shown as the Judgment was delivered a second time in his presence, the delivery of Judgment in the absence of an accused person is irregular proceeding although curable under section 382 of the CPC. It may exemplify the Court's haste in concluding the trial as to be symptomatic of the complaint of prejudice by the accused. Section 168 of the CPC provides as follows:

> *"**168. Mode of delivering judgment***
>
> *(1) The judgment in every trial in a criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of the judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time, of which notice shall be given to the parties and their advocates, if any:*
>
> *Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence.*
>
> ***(2) The accused person shall, if in custody, be brought before the court, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of a fine only or he is acquitted.***
>
> *(3) No judgment delivered by a court shall be invalid by reason only of the absence of a party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their advocates, or any of them, the notice of the day and place.*
>
> *(4) Nothing in this section shall limit in any way the provisions of section 382."*

Of greater concern to the court is that the Court apparently closed the case for the defence and set a judgment date without establishing from the accused that he wished to close his case and had abandoned his earlier indication to call his father to testify in his defence. This is a clear breach of the right to fair trial by adducing evidence in his defence under Article 50 (2) (k) which provides as follows:

> *"(2) Every accused person has the right to a fair trial, which includes the right—*
>
> *(k) to adduce and challenge evidence;"*

On the basis of the irregularities of procedure discussed above, I find that the appellant's right to a fair trial was violated, and the trial must be declared a nullity.

Retrial or not

Where a trial is vitiated by irregularities as here, the court must declare the trial a nullity or mistrial and the question arises whether a retrial ought to be ordered. As held in by the Court of Appeal in ***Muiruri v. R*** [2003] KLR 552 generally whether a retrial should be ordered or not must depend on the circumstances of the case. In ***Opicho v. R*** [2009] KLR 369, the Court of Appeal said:

> *"'In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a*

conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

*That was stated in **Fatehaji Manji v. The Republic** [1966] EA 343. In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of admissible or potentially admissible evidence, a conviction might result; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See **Muiruri v. Republic** (2003) KLR 552, **Mwangi v. Republic** (1983) KLR 522, and **Bernard Lolimo Ekimat v. Republic**, Criminal Appeal No. 152 of 2004 (UR)."*

The accused was arrested and arraigned in Court on 24th November 2011. There was, however, no indication in this case that the witnesses and the exhibits which were only Medical examination P3 form and other treatment documents are not available for retrial. The interest of justice lie in the prosecution and punishment of the appellant, if guilty of the serious crime of robbery with violence, as a deterrence measure.

The appellate court does not make any findings on the merits of the case on the evidence presented before the trial court as that may prejudice the retrial. However, without prejudice to the retrial court, the Court considers that the test for retrial whether on a proper consideration of admissible or potentially admissible evidence, a conviction might result, is positive.

Orders

Accordingly, for the reasons set out above, the Court quashes and sets aside the conviction and sentence of the appellant for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and directs that the appellant be retried by a competent court at the Eldama Ravine Principal Magistrate's Court differently constituted. The Court directs that the appellant be presented before the Principal Magistrate at Eldama Ravine for directions as to retrial within seven (7) days.

DATED AND DELIVERED THIS 14TH DAY OF JULY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person

Ms. Kipchumba Kenei for DPP