



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 29 OF 2013

BERNARD OMONDI MUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1319 of 2008 of the Principal Magistrate's Court at Bondo – P.W. Mutua -PM)

J U D G M E N T

The appellant herein was charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code.

The particulars are that on the 24th day of October 2008 at Kaelija village in Bondo District within Nyanza Province, while armed with a dangerous weapon namely an axe robbed Kennedy Omondi Nandi one motorcycle make TVS max 100v, engine No. 063F81127299 chesis No. Md623fb358186757G valued at Kshs. 82,000/= and immediately after or immediately before the said robbery wounded the said Kennedy Omondi Nandi.

The appellant was convicted and sentenced to death hence this appeal. The appellant has filed several grounds of appeal which we have perused. He has equally filed well elaborate written submissions which we have had the advantage of sifting through.

Our attention was drawn to ground 6 of the petition where the appellant contends that despite having no confidence in the court the said court went ahead to try and convict him.

We have analysed all the other grounds as well but we are of the opinion that the 6th ground need to be determined as a matter of priority as the rest inches upon it.

We note that on 10-11-2010 the learned Senior Resident Magistrate Mr. Mutua took over from his colleague Mr. E.S. Olwande who had gone on transfer. After explaining to the appellant the provisions of section 200 (3) of the Criminal Procedure Code the appellant argued that the matter do proceed in dholuo.

On 1-12-2010 the prosecution was ready with two witnesses. The appellant said:

“I have no faith in the court. I pray that the court disqualifies itself”. The court indicated as follows:

“Since accused has raised a complainant, this court disqualifies itself. The other magistrate in the court do not have jurisdiction. The matter is transferred to Kisumu Law Courts for further directions. Mention before the Chief Magistrate in Kisumu on 6-12-2010”. At Kisumu the Senior

Principal Magistrate made the following remarks on 14-12-2010 in the absence of the parties.

“Court record show that on 11-12-2010 the accused person merely stated that “ I have no faith in the court”, he assaigned no reason at all. That is not enough reason for the court to disqualify itself. This file be referred to Bondo SRM Court for hearing”.

Honourable P.W. Mutua the Principal Magistrate took over case again and on 28-11-2012 the appellant raised the same issue and said:

“ I am not ready to proceed. I am not willing to proceed before this court”.

The court posed the question why? It went on to say:

“ The accused remains quiet and remains unwilling he is removed from the cells. The accused has refused to have the case heard. Under the constitution the court can proceed in the absence of the accused if it becomes difficult for him to be present. In this case the accused has become violent. His presence is dispensed with. Matter to proceed”.

Indeed the matter proceeded in the absence of the appellant on that day and on 17-1-2013 when the investigating testified. This went on even on the day of the judgment.

We have endeavored to reproduce the proceedings in this section as it shall determine our way forward in this appeal. In the first instance it was proper for the trial court to have referred the matter to the Chief Magistrate Kisumu as there was no colleague at the station, Bondo, senior enough to have handled the matter. The problem however was when the file reached Kisumu. The learned Senior Principal Magistrate Mr. Owino handled the matter and sent it back to Bondo to be finalised. According to him he saw no sufficient reason to warrant the file to be handled by another magistrate.

This obviously was wrong. Mr. Owino did not have the capacity to handle the matter as he was of concurrent jurisdiction with Mr. Mutua. This was the preserve of the high court. Infact by handling the matter he sat on appeal in respect to Mr. Mutua's orders. Equally, he handled the matter in the absence of the parties which was erroneous. If anything it would have been prudent to call the parties, hear their views and make any appropriate decision whether it was administratively right or wrong. In short, Mr. Owino assumed the powers of the high court under the provisions of section 364 of the Criminal Procedure Code.

On the other hand Mr. Mutua should have noted this anomaly when he received the file again. Having disqualified himself, it was incumbent upon him not to have touched the matter but find a solution may be administratively from the high court Kisumu.

As regards the refusal by the appellant to participate in the proceedings, the trial court rightfully applied itself to the law. It is trite law and practice that where a litigant becomes uncooperative and violent and refuses for no apparent reason to participate in the proceedings, the trial should proceed his absence notwithstanding.

However, on the subsequent days it would have been incumbent upon the court to listen to the appellant. In other words on 17-1-2013 and in particular on the date of judgment there was need to have the appellant participate. In any case if the appellant would have raised any complainant again or be uncooperative the court would still have applied the same procedure as before. Consequently, it is very difficult to know what would have happened to the proceedings had he been allowed to participate on the subsequent days. Clearly the appellants complaint was legitimate.

In the premises we think that there was a miscarriage of justice when the trial courts failed to observe the cardinal rules of natural justice. Mr. Mutua did violate his own order of disqualifying himself when he came back to the matter again. We think without speculating any other reasons that the appellant was right when refusing the proceedings to be heard before the said learned magistrate.

Without considering the other grounds raised in the petition we are of the opinion that ground 6 alone is significant to dispose this appeal. What are then our options? They are basically two namely to allow the appeal or to order a retrial.

We have perused the proceedings and we are of the considered opinion that this matter ought to be tried again. The evidence on the face of it strongly supports the charge and ought to be tested again. We further note that we must consider the prejudice that the appellant would suffer as a consequence of retrial. From the record again we note that the appellant contributed immensely to the delay and the long winding of this case. He made several applications for adjournments which the trial court bent backwards so much to accommodate him.

Considering the nature of the charge and the consequences which shall befall the appellant should he be convicted we think that proper cause of justice ought to be pursued. We are alive also to the fact that the prosecution shall work hard to get its witnesses again which is not a mean task.

Both scales of justice ought to be balanced. Our balancing therefore is to the effect that both sides ought to face each other in court again.

The appeal is therefore allowed to the extent that the matter be heard afresh before another trial magistrate at Bondo with competent jurisdiction.

Dated, signed and delivered at Kisumu this 14th day of July, 2014.

H.K. CHEMITEI

A.O. MUCHELULE

JUDGE

JUDGE