REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 24 OF 2006

GEORGE GITONGA MWANGI .....……. APPELLANT

VERSUS

REPUBLIC ……..…..……...…… RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri

Criminal Case No. 3238 of 2004 dated 1st February 2006 by E. J. Osoro – S.R.M.)

J U D G M E N T

The appellant initially faced a charge of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that the appellant on the night of 3rd April 2004 at Thungithu Estate, Nanyuki in Laikipia District within Rift Valley Province, jointly with others not before court while armed with swords robbed **Akenga Keya** Kshs.800/= and immediately before or immediately after the time of such robbery wounded the said **Akenga Keya**. The appellant denied the charge and he was prosecuted.

In support of the charge the prosecution called a total of 7 witnesses. PW1 the complainant was a corporal at Laikipia Air base. His testimony was that he resided at Thungithu estate in Nanyuki. On 2.4.04 at around 10.30 p.m. he was in the company of **Mr. Munyu** (PW2) headed home. As they approached his gate two people suddenly emerged from the dark. One of them was the appellant whom he knew very well. The appellant then stabbed him with a knife repeatedly. PW1 further testified that he had known the appellant since the year 2003 when they had another case at Nanyuki law courts. Following the trial the appellant was however acquitted. PW1 said that when the appellant approached him he was pocketing but on reaching him he removed something from his pocket with which he stabbed him on the head, chest and twice on the back. He was able to identify the appellant as there was light from the adjacent security lights. He even asked the appellant by name whether he intended to kill him (PW1) and that the appellant responded in the affirmative. PW1 screamed and called his wife P.W.4 saying. "*Mama Ian Gitonga is killing me.*" P.W.4 and the neighbours responded to P.W.1's distress call and took him to base medical centre and was thereafter transferred to Forces Memorial Hospital – Nairobi for further treatment. P.W.1 testified that he also lost the lower right molar tooth and Kshs.800/= in the process. P.W.1 maintained that he positively identified his attacker with the aid of the security lights that were on throughout the incident.

P.W.2, **Wycliffe Munyu Boi** was on the material day in the company of P.W.1 walking home. He saw the appellant approach them with another man. The appellant had his hands in pockets. When he neared

PW1 he removed his hands from the pocket and stabbed P.W.1 severally. He screamed and ran away. PW2 told the court that he had known the appellant since the year 1993 – 1994 and he did not have any grudge against him. When PW2 returned to the scene he found P.W.1 lying down groaning in pain and bleeding profusely. On cross-examination P.W.2 told the court that he positively identified the appellant as the attacker from the light provided by the security lights nearby that were on.

P.W.3 **Dr. Newton Obillo** told the court that on 3rd April 2004 he was in his house at 11.30 p.m. when he was called to see a patient taken to the Base Medical Centre. He saw the patient who turned out to be the complainant. He had stab wounds to the chest and the scalp. His clothes were soaked in blood and his blood pressure was low. He had stab wounds caused by a sharp object. He assessed the degree of injury as grievous harm and filled the P3 form which was tendered in evidence. On cross examination P.W.3 told the court that he examined and treated P.W.1 on 3rd April 2004 at 11.30 p.m. and the injuries were less than an hour old.

P.W.4, one **Rose Kabanga Akenga** testified that on the material day she was in her house when she heard her husband P.W.1 calling her out saying *"Mama Ian Gitonga is killing me."* She rushed to the scene and saw two men running away. P.W.1 was lying down groaning and bleeding from the head, back and chest. P.W.1 was then rushed to Laikipia Air Base Medical Centre. She only saw the two attackers running away. She testified that P.W.1 lost Kshs.800/= in the process.

P.W.5 **Senior Sergeant Siocha** reported the matter to the police. He testified that **W.O.I Ndumia** telephoned him on 4th April 2004 at 2.50 a.m. and informed him that he had taken P.W.1 to Base Medical Centre. When he later visited P.W.1, he found him heavily sedated and on a drip. P.W.1 immediately informed him that the appellant is the one who had attacked him and robbed him of his Kshs.800/=. P.W.5 visited the scene of crime and saw blood stains at the spot where P.W.1 was attacked.

P.W.6 the arresting officer told the court that they arrested the appellant on a case of theft of water meters. Later he learnt that the appellant had assaulted an air force officer, the complainant.

P.W.7 visited P.W.1 in hospital in the company of P.W.5. He also visited the scene of attack and saw blood stains. He told the court that he later charged the appellant with the offence of robbery with violence. However he did not know how the appellant was later charged with attempted murder.

On being found to have a case to answer, the appellant elected to give sworn statement and called no witness. The appellant in his defence denied committing the offence. He told the court of an attack on him by 3 people on 31st March 2002 and suspected P.W.1 as one of the attackers. Thereafter P.W.1 had attempted to compensate him to withdraw the complaint but he had resisted. The appellant admitted that P.W.1 was never arrested as his pursuit of his complaint aforesaid bore no fruits. The appellant produced proceedings in Nanyuki criminal case No. 566 of 2002 in which he had been charged with 2 counts of robbery with violence and 1 count of assault causing actual bodily harm contrary to section 251 of the Penal Code. P.W.1 was one of the 3 complainants in the count of Robbery with violence as proof that there was bad blood between the two.

After careful examination and or appraisal of the evidence adduced by the prosecution, the defence and rival submissions, the learned magistrate found the appellant guilty of the lesser charge of causing grievous harm contrary to section 234 of the Penal Code and convicted him. Upon conviction, he sentenced him to life imprisonment.

Aggrieved by the conviction and sentence aforesaid the appellant lodged the instant appeal. In his home drawn petition of appeal, the appellant faults the learned magistrate for convicting him on evidence of identification/recognition that was probably mistaken, the prosecution evidence that was contradictory and insufficient, and rejecting his defence without assigning any reasons and finally that his trial was undertaken in breach of the law.

When the appeal came up for hearing, the appellant with the permission of the court tendered written submissions which I have carefully read and considered.

The appeal was opposed. **Mr. Orinda**, learned Senior Principal State Counsel submitted that the evidence tendered was sufficient. The appellant and the complainant were persons well known to each other. They had previous disputes. He identified the appellant during the attack. The light was clear though it was at night. The minor contradictions in the prosecution evidence were not fatal. Accordingly the conviction was safe. Injuries sustained were serious enough to warrant the life sentence imposed.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing witnesses and have to make due allowance for that – **Soki v/s Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2002) 1 KLR 756**.

To my mind this appeal will succeed or fail depending on my take on procedural irregularities committed by the learned magistrate during the trial.

The appellant was initially charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The charge was later substituted with one of attempted murder contrary to section 220(a) of the Penal Code. Subsequently original charge of robbery with violence was again restored. In amending and or substituting the charges as aforesaid the trial magistrate merely drew the appellant's attention to the amendment and or substitution thereof whereupon she records the appellant as saying "**I am ready with my submissions after the prosecutor closed their case."** Mark you this substitution was being done after the prosecution was just about to close their case. Indeed once PW8 who was on the stand under cross-examination was done with, the prosecution closed their case.

Under Section 214 (1) of the Criminal Procedure code, the trial magistrate was under a duty to read over the amended or substituted charge to the appellant and to ask the appellant whether he wanted to have the witnesses who had previously testified to be recalled to testify afresh or for further cross-examination. The proviso to section 214 (1) of the Criminal Procedure Code is in these terms:-

"*Provided that –*

(i) Where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge.

(ii) Where a charge is altered under this sub-section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

These two provisions are obviously for the protection of persons facing criminal trials and in paragraph (i) of the proviso, it is clear that a trial court has no option but to read the amended or substituted charge to an accused person. The expression employed in the proviso is that the court "*shall thereupon call upon the accused to plead to the altered charge."* In the circumstances of the present appeal much as the trial magistrate called upon the appellant to plead to the amended and or substituted charge she never pointed out to the appellant the proviso to the Section 214(1) of the criminal procedure code aforesaid. The language used therein is mandatory and must be complied with. The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh or to be further cross-examined by him. This is not a procedural failure such as failing to ask him to plead afresh. The right to hear the witnesses give evidence afresh on the amended or substituted charge, to cross-examine the witnesses further as stated by the court of appeal in he case of **Harrison Mirungu Njuguna v/s Republic, criminal appeal No. 90 of 2004** (UR) is a basic right going to the root of a fair trial and clearly it was the duty of the trial court to show in his record that she had informed the appellant of that right and to record further what the appellant said in answer to the information. The record does not show the election taken by the appellant on the issue. Ground 5 contained in the amended memorandum of appeal complained that:-

"*That the honourable court erred in law and in fact in not conducting the trial in respect of the laid down*

legal procedures."

There is merit in that complaint and I think that the proceedings in the magistrate's court were substantially defective therefor. Failure to inform the appellant of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the Criminal Procedure Code. Accordingly the appellant's trial was substantially defective and I must allow his appeal on that ground. The appeal is thus allowed and conviction set aside. Sentence imposed on the appellant too is set aside.

When an appeal is allowed on the ground that the trial was either defective or was a nullity, the usual order to make is one for retrial of the appellant on the same charge. Should I in the circumstances of the case, order a retrial?

I think that in all the circumstances of this case, a retrial would be unfair. The offence for which the appellant was convicted, took place on 23rd April 2004; that is more than five years ago. The trial of the appellant in the subordinate court lasted from 24th June 2004 to 1st February 2006 when the magistrate convicted and sentenced him. The appellant has thus been in continuous custody since 28th May 2004. Even assuming that the witnesses for the prosecution can still be traced to testify, I think it would be unfair to subject the appellant to further waiting in prison pending a new trial. Accordingly I decline to order a retrial and instead order that the appellant shall be released from prison forthwith unless he is held for some other lawful cause

Dated and delivered at Nyeri this 3rd day of June 2009

M. S. A. MAKHANDIA

JUDGE