REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Criminal Appeal 58B of 2006

UCHU DIMA BIDHU……..……..……...……..APPELLANT

VERSUS

REPUBLIC……..…..……RESPONDENT

JUDGMENT

On 10th December, 2004 the appellant herein, Uchu Dima Bidhu, was convicted on two counts of robbery with violence contrary to section 296(2) of the Penal Code, two counts of rape contrary to section 140 of the Penal Code and one count of burglary contrary to section 251 of the Penal Code. He had been charged and tried *(together with one David Mwangi Wachira, who has since died)* before the honourable Principal Magistrate's Court, Nyahururu where seven prosecution witnesses testified against him. The appellant was sentenced to suffer death in respect of the two convictions under section 296(2). For the rape charges, he was sentenced to 10 years imprisonment while he was sentenced to 5 years imprisonment for the burglary charge with an order that the prison terms do run concurrently.

Aggrieved by both the conviction and sentence the appellant filed this appeal citing four main grounds, to wit;

1) That he was not positively identified as one of the persons who committed the offences herein, the circumstances under which he was identified having not been conducive for positive identification.

2) That the identification parade at which he was picked out as a suspect was irregularly conducted.

3) That the learned trial magistrate erred in law and fact when convicting the appellant despite the fact that the provisions of section 85(2) of the Criminal Procedure Code were contravened during the trial.

4) That his defence of alibi was rejected without any reasons being given for so doing.

The appellant filed written submissions to support his appeal. The State, represented by the learned State Counsel Mr. Mugambi, conceded the appeal on the grounds that the prosecution's case was at times conducted by a prosecutor who was not qualified to do so, contrary to section 85(2) of the Criminal Procedure Code. The learned State Counsel invited us to examine the proceedings of 7th April 2003, when the appellant's plea on a substituted charge was taken and to note that the prosecution was represented by one Sergeant Migwi, an officer below the rank of an assistant Inspector of Police.

Section 85(2) of the Criminal Procedure Code provides, quite clearly that only Police Officers of a rank above an Assistant Inspector of Police or an advocate of the High Court, appointed by the Attorney General, have the legal capacity to represent the State as public prosecutors. This position was restated in the celebrated case of ELIREMA & ANOTHER –vs- REPUBLIC [2003] KLR 537. Failure to adhere to the provisions of section 85(2) of the Criminal Procedure Code renders the proceedings a nullity with the result that any conviction and sentence arising from such proceedings cannot be sustained.

Our examination of the proceedings of the trial court clearly shows that a Sergeant Migwi prosecuted the prosecution's case on 7th April 2003 when the plea on a substituted charge was taken and the entire evidence of PW1 recorded. He appeared as prosecutor again on 30th April 2003 and during further mentions of the case on 23rd September 2003, 22nd October 2003 and 24th October 2003. Another Sergeant by the name Maina attended as prosecutor on 22nd November 2003. The rest of the prosecution's case was led by a Police Inspector called Muriuki.

On the above ground we accept the State's decision to concede to the appeal and must declare the proceedings of the trial court a nullity, quash the conviction and set aside the sentence. This notwithstanding, we are, however mandated to review the entire

evidence adduced at the trial in order to decide whether a retrial should be ordered. Before going into that however, we have noted that the conviction on the two counts of rape cannot be upheld, firstly, because they were based on defective charges. The appellant and his co-accused were stated in count IV of the charge sheet to have had unlawful carnal knowledge of JNM on 13th January 2003 "*jointly with others not before court*" something which is not naturally or otherwise possible. It is the same scenario in Count V of the charge sheet where it is said, again that the appellant with his co-accused and "*jointly with others not before court*" had unlawful carnal knowledge of LMM.

A second reason why the appellant's conviction in respect of the rape charge in count IV cannot stand is that the victim, who testified as PW4, clearly exonerated the appellant in her evidence in chief where she stated that:

"***The one who raped me is not in court. It is the 2nd accused who raped my daughter."***

PW4's daughter, who testified as PW5 stated in her evidence in chief that she was raped by one of the thugs but did not identify which one. Her mother on the other hand stated that it was the appellant who did so. Four victims in the robbery incidents herein all testified. The 1st complainant, BNK testified that he was attacked around midnight on the 20th of December 2002 as he walked home from visiting his father. He was in the company of his wife (PW2) who ran away as he was being attacked. They had caught up with the appellant and his two accomplices as they walked ahead of the couple. Their attackers turned on him and in the process the appellant hit the complainant on the back with a rungu. The thugs stole from him two umbrellas, a torch, a watch, Shs 280/=, his driving licence and a jacket, before ordering him to run home very fast. One of the umbrellas was later recovered among items found with the appellant and his co-accused when they were arrested in a house they both shared. PW1 had been able to see his attackers clearly with the help of torches that they shone during the attack. In addition there was broad moonlight that night. PW1 testified that he had told the thugs where he lived. When he and PW2 arrived home that night, they found their house had been burgled and several articles stolen therefrom.

The complainant in the second robbery incident testified as PW3. He stated how on the night of 13th January 2003, at about 2200 hours, three men, two armed with guns and one with a panga, forcefully gained entry into his home as he and his family had just retired to bed. The thugs said they were in no hurry and ordered his wife to cook food for them and to serve them, which she did. They ate then proceeded to steal a radio, a torch, a thermos *(flask),* two travelling bags and Shs 300/= before leaving at about 12.05 a. m.

JNM (PW4), PW3's wife, testified that the attackers invaded their home armed with guns and forced their way in. They threatened to kill their victims and also forced PW4 and one of her daughters to cook and serve them food. They demanded that a chicken be slaughtered, which they ate with ugali. In the process they raped the two women and stole a radio, two travelling bags, a thermos flask, a watch, a panga and a clothes drying line. She saw the robbers clearly during the two hour period she was with them while cooking and serving them with food. There was a full moon outside where two of the robbers stayed as they waited for the food. A lantern lamp was also burning and the fire with which she cooked also illuminated the kitchen where the thugs kept going to ask her to hurry up with the cooking. Having seen them clearly, therefore, PW4 was able to recognise the appellant as one of the robbers when she was called to identify suspects at a parade conducted later on for the purpose.

The daughter of PW3 and PW4 testified as PW5 and corroborated the testimony of both her parents as regards the robbery incident. She testified also that she was raped by one of the thugs whom she did not identify. The mother stated it was the appellant who did it. PW6 PC Chris Mwenda testified that the appellant and his co-accused were brought to him at Ndaragwa Police Station by members of the public alongside stolen goods recovered from the house that the two were sharing. Some of the items were identified by their victims as their property which had been stolen in the robbery incidents. The appellant's defence was that he was arrested at a bar at the instigation of an administration policeman he had differed with. The defence bears no weight at all and was in our view rightly rejected by the trial court. The appellant did not challenge the prosecution's evidence that various goods exhibited before court were recovered from his house. Neither did he challenge PW4's testimony that he was among the thugs who terrorized her family for two hours and that he is the one who raped PW5.

We find that the evidence adduced before the trial court was such that, had the proceedings not been tainted by irregularities, a reasonable tribunal would have, based on that evidence, arrived at a conviction. For that reason we are of the considered view that a retrial ought to take place in respect of the robbery with violence charge.

Consequently, we hereby quash the conviction and set aside the sentences on all counts. We acquit the appellant on count 4 and 5 but order a retrial in respect of counts 1, 2 and 3. The trial will be before a different magistrate and the appellant shall remain in custody.

Dated signed and delivered at Nakuru this 10th day of July 2009

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**