



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 726 of 200

JOHN MUCHINA KIMEMIA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate

A. Lorot dated 6th December, 2006 in Criminal Case No.1478 of 2003 at Gatundu Law Courts)

JUDGEMENT

The appellant was charged, jointly with another, with assault causing actual bodily harm contrary to section 251 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that on 7th December, 2003 at Gatundu Market in Thika District, Central Province, the appellant unlawfully assaulted **Eunice Njeri Kamau**, thereby occasioning her actual bodily harm.

Trial commenced before Senior Resident Magistrate **Mrs. Mburu** on 12th September, 2005. The learned Magistrate heard the testimonies of PW1, PW2 and PW3; but as from 7th April 2006 this matter was now coming up before Resident Magistrate **A. Lorot** who subsequently wrote and delivered the judgment. It is not shown on the record that when the succeeding Magistrate heard PW4, any information was given to the appellant herein regarding his right to recall witness. The Court later went on to hear PW5 and PW6, after which the prosecution closed its case; and the learned Magistrate found that a *prima facie* case had been shown, and put the appellant herein to his defence.

Touching on the issue as to whether there could have been an irregularity in the trial process, the learned Magistrate thus stated, in the judgment:

“It is my duty to state here that this matter commenced before my predecessor, the *Hon. G.N. Mburu*, SRM, as she then was but who had left [the] judicial service. Five witnesses had already testified. After due compliance with section 200 CPC, the defence agreed to have the matter proceed from where it was last heard.

“I understand the limitations attendant [on] that. I am now obliged to [give] this judgment devoid of having heard the complainant and her witnesses testify. It is a task I shall surmount and will rely solely on the recorded evidence”.

After reviewing the recorded evidence, the learned Magistrate expressed his findings as follows:

“I find that the evidence against the 1st accused [appellant herein] is overwhelming, well corroborated and proven beyond any iota of [a] doubt. I convict the accused as charged....”

The learned Magistrate committed the Appellant to jail for life, on the finding that the appellant had doused the complainant with fuel and set her alight, with the consequence that the complainant was severely injured.

In the supplementary memorandum of appeal filed by *M/s. Naikuni, Ngaah and Co. Advocates*, it was contended that the trial Magistrate had erred in law and fact by not explaining to the appellant the content of s.200 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). Counsel also contested the sentence imposed as harsh and excessive.

Learned Counsel **Mr. Naikuni**, who urged the appellant’s case before me on 30th April, 2008 submitted that the most crucial evidence out of the testimonies of the six prosecution witnesses, was that of PW1 – but that this evidence was not credible.

Counsel submitted that s.7 of the Criminal Procedure Code creates three classes of Magistrates, and only a Magistrate of the first class (from Senior Resident Magistrate up to Chief Magistrate) could impose a sentence of life imprisonment; but that the Resident Magistrate (such as the one who rendered judgment in this case) falls in the second class and could not impose sentence beyond 14 years’ imprisonment, he urged that this was the tenor and effect of Schedule 1 to the Criminal Procedure Code. Consequently, counsel urged, the life- imprisonment sentence imposed by the trial Court had been without jurisdiction.

Mr. Naikuni called in aid the High Court decision (Kisumu – *Mwera, J*) in *Daniel Juma Onyango v. Republic* Criminal Appeal No. 43 of 2007 in which it had been held that a Subordinate Court should in principle not impose the maximum sentence allowed by law; the relevant passage in the judgement thus reads:

“Regarding the harshness/excessiveness of life in prison, the learned trial Magistrate considered the seriousness of the offence and all the circumstances of the case. She considered that the appellant did not deserve leniency. She was entitled to so find and she gave the maximum term under the law. It was a lawful sentence. However, it is a principle in sentencing that a trial Court give a term lower or lesser than the maximum, in order to allow room for the appellate court in case it is minded to increase sentence”.

On the basis of that persuasive authority, **Mr. Naikuni** submitted that “ends of justice require that the lower Court should always give room for the appellate Court to give maximum sentence”.

Learned counsel then submitted that the trial Magistrate, though taking over the hearing from another judicial officer, made no record which showed compliance with the terms of s.200 of the Criminal Procedure Code – on the right of an accused person to *re-summon witnesses* who have already testified.

On this point, learned respondent’s counsel, **Mrs. Gakobo** was in agreement. She submitted that the proceedings were in consequence, irregular; and that the later Court had no opportunity to observe the demeanour of the prosecution witnesses – a fact which was likely to prejudice the appellant herein. **Mrs. Gakobo** conceded to the appeal, on the procedural defect, but urged that the offence in question was so serious, that a retrial should be ordered.

Learned counsel submitted that the testimony of PW1 was direct evidence and was, in this regard, the best evidence which the Court should not overlook. Counsel urged that the evidence on record indicates that a retrial would probably end up in conviction. Although, just as counsel for the appellant urged, there was some contradiction apparent in the prosecution evidence, the respondent’s counsel submitted, the same was of no materiality. PW4 (the doctor) had examined the complainant following the criminal incident, and found her to have suffered permanent injuries, and she had been held in hospital for some five

months, for treatment, following the incident. **Mrs. Gakobo** urged that the interests of justice spoke in favour of a retrial; that grievous harm had been occasioned to the complainant; that the appellant who had been in jail for barely two years, was unlikely to be prejudiced by the duration that might be taken in fresh trial. Counsel stated that all the witnesses who had testified at the original trial are likely to be available.

Mr. Naikuni, however, contested the case being made for a retrial: because the same evidence would be restated even though “it is full of hearsay”. He urged that the appellant be presumed to be innocent, even in the face of basic facts such as that the complainant suffered serious burns, and was hospitalized for five months following the incident.

It is quite clear to me that the judgment and the proceedings in the lower Court must be set aside – because s.200 of the Criminal Procedure Code had not been complied with at the time one judicial officer took over from another. From the word of both counsel in this matter, the testimony of the complainant was all-important; yet it is that testimony which the respondent’s counsel founds her case on, and also the same testimony which the appellant’s counsel impeaches as founded on hearsay. The difference between those two positions can only be resolved on the merits; and the merits are ingrained in an assessment of veracity, based on the judicial perception from the Bench. So the learned Magistrate taking the proceedings ought to have *seen and heard the complainant*, and such other witnesses as the appellant may have wanted to have recalled. The failure to comply with the terms of s.200 of the Criminal Procedure Code, in my opinion, resulted in an apparent prejudice to the appellant’s case.

The only question left is whether or not a retrial is to be ordered – a matter which rests on the discretion of the Court. Such discretion is to be exercised according to certain legal principles, which are well defined in judicial precedent.

In **Pascal Clement Braganza v. R.** [1957] E.A. 152 the Court of Appeal for Eastern Africa (**Briggs, J.A.** at p.152) thus held:

“We accept the principle that retrial should not be ordered unless the Court is of opinion that on a proper consideration of the admissible, or potentially admissible, evidence, a conviction might result”.

And in **Ahmed Ali Dharamsi Sumar v. Republic** [1964] E.A. 481 the same Court held (at p. 483, *per Duffus, J.A.*) as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the Court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the Magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial”.

The Court must consider the special circumstances of each case, and endeavour to arrive at a determination which coincides with the ends of justice.

In this particular case I take into account the proven fact that the complainant was grievously hurt, in a way that may well have completely changed her hopes in life, and indeed, even her lease-of-life prospects; the fact, of which I will take judicial notice, that an injury so occasioned did offend the society’s good taste; the fact that the prosecution did have some very considerable evidence turning against the appellant herein; the fact that the appellant has only been in prison for a relatively short period of time; and the fact, as given by learned counsel for the respondent, that witnesses will be available if a retrial is ordered. Taking these situations into account, I would exercise my judicial discretion to order a retrial.

I will make orders as follows:

- (1) The proceedings and judgement of the trial Court, in so far as they relate to the appellant herein, are hereby vacated.**
- (2) A retrial shall take place before a Magistrate other than the one who previously heard the matter.**
- (3) This matter shall be listed for mention and retrial directions before the most senior Magistrate at Gatundu Law Courts, on Thursday, 16th October, 2008.**
- (4) The appellant shall continue to be held in prison custody.**
- (5) Production order shall issue in accordance with the terms of order No. 3 herein.**

DATED and DELIVERED at Nairobi this 1st day of October, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Appellant: Mr. Naikuni

For the Respondent: Mrs. Gakobo