IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, AKIWUMI & PALL, JJ.A.)

CRIMINAL APPEAL NO. 45 OF 1997

BETWEEN

RASHID MWINYI NGUISA..... APPELLANT

SADIK MATANO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa and Justice Waki) dated 18th December, 1996

in

H.C.CR.A. NOS. 172 & 173 OF 1995)

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JUDGMENT OF THE COURT

This appeal raises two issues namely whether the evidence given at the trial was sufficient to establish the guilt of the appellants beyond all reasonable doubt and secondly, whether the superior court had the power in the exercise of its appellate jurisdiction, to alter the finding of the subordinate court by convicting the appellants of a more serious offence than that found to have been committed by them by the subordinate court, and to alter the nature of the sentences imposed on the appellants namely imprisonment to one of death sentences.

The appellants were charged before the learned Senior Resident Magistrate on three counts of robbery with violence contrary to section 296(2) of the Penal Code, which upon conviction therefor, attracts the mandatory sentence of death. The second appellant in the alternative, was also charged with handling stolen goods.

The backdrop to the charges is briefly that at about 9.30 in the morning of 31st December, 1994, the taxi in which four English tourists were travelling to their beach hotel, came to a stop when it had a puncture. Whilst the tourists were waiting for another taxi, a group of young men five, in number, and armed with knives, descended upon them and as they backed away, the youths took away their bags from the taxi and ran off with them. Thereafter, the tourists were driven in the taxi with the punctured tyre, to the nearest police station where they reported the robbery which had lasted some ten minutes.

Two days later, the police found in the room where the second appellant was sleeping and which was in the same house in which the first appellant also lived, some of the things which had been stolen from the tourists on 31st December, 1994. These included clothes, golf balls, socks, shorts, books, binoculars, a track suit, a hair drier, other personal items and the black leather bag in which these things had all been kept. These and the black leather bag were all identified by the tourists as theirs and produced in evidence at the trial.

The first appellant was identified at an identification parade which was held on 3rd January, 1995, by one of the tourists, Stephen Salmon, as one of those who had robbed them at knife point. At the trial, Stephen Salmon gave evidence to that effect, but was not cross examined by the first appellant. The second appellant was also identified at one of the identification parades held that day, by another one of the tourists, Anthony Beal, as one of the youths who had robbed them at knife point. In cross examination by the second appellant at the trial, Anthony Beal said that he remembered the second appellant particularly as he was armed with two knives during the robbery.

In his defence, the first appellant in an unsworn statement, denied the charges against him. He, however, explained that he had only been sent by the second appellant and some other persons to sell for them some second hand clothing which were contained in the very black leather bag which was subsequently found in the second appellant's room and which had been produced in evidence. The second appellant in his somewhat longwinded and unclear defence, affirmed that some people had left with him, some second hand clothes for the first appellant which the first appellant had subsequently collected. The same people had also unsuccessfully tried to sell him an electric iron. Afterwards, a fight ensued between these people and the first appellant because the first appellant would not give them the money for the second hand clothes which he had sold for them. Later they were all arrested and taken away by the police.

In his judgment, the learned magistrate had no difficulty in accepting the evidence for the prosecution as summarized above. He also rejected the unsworn statement of the first appellant and the evidence of the second appellant "as untruthful". Referring to the appellants, the learned magistrate then went on to find as follows:-

> "Court finds that 1st and 2nd accused jointly with others not before court did participate in the perpetration of the offences. 1st and 2nd accused are facing a capital robbery which carries a mandatory death sentence as it is alleged they used personal violence on the complainants. However, court notes that though the accused were armed with knives and did threaten the complainants, they did not actually resort to using them and no one suffered any injury. For this reason court finds it appropriate to reduce the charge from one under section 296(2) to one of simple robbery under section 296(1).".

The appellants were each then sentenced to ten years imprisonment plus five stroke of the cane, on each of the three reduced offences to run concurrently, and thereafter, to be under police supervision for five years.

The appellants appealed to the High Court against the foregoing convictions and sentences. The main ground argued in the appeal was that the appellants had not been properly identified. The first appellant, it was submitted, had been identified by only one of the tourists at an identification parade which had not been properly conducted and who had also not been able to identify the others who had robbed the tourists. What is more, no knife or any of the recovered stolen items were found in the first appellant's possession. With respect to the second appellant, it was also submitted that the identification parade had not been properly conducted. As regards the stolen items that were found in his room, the second appellant submitted that the learned magistrate failed to consider his explanation of how he had come to be in possession of them. In respect of both appellants, it was submitted that their dock identification by the taxi driver should be treated with caution.

In their judgment, the two learned judges of the High Court who heard the appellants' first appeal, placed no reliance on he dock identification of the appellants by the taxi driver. They, however, concluded that the identification parades whereat, the appellants had been identified, had been properly conducted and

also, that apart from this, the recent possession of some of the stolen goods by the appellants in respect of which, they had given no satisfactory account, was sufficient evidence to establish that they had stolen them from the tourists. The learned judges having also accepted as the learned magistrate did, that the appellants were armed with knives during the robbery - although the particulars of the charges were that at or immediately before or after the robbery, they used actual violence on the tourists involved - found that the appellants were because of that, guilty of the charges of robbery with violence under section 296(2) of the Penal Code with which they had been charged. They dismissed the appellants' appeal and purporting to comply with the decision of this court in Johana Ndungu v Republic Criminal Appeal No. 116 of 1995, (unreported), altered the finding of the learned magistrate to one that the appellants were guilty of robbery with violence under section 296(2) of the Penal Code and altered the nature of the sentence imposed on them, to one of death which is the mandatory sentence upon conviction on a charge of robbery with violence.

It is this dismissal of the appellants' first appeal and the altering of the finding and sentence of the subordinate court by the High Court which has prompted the second appeal now before us. As regards the crucial issue of identification which has been raised in this appeal, we see no reason to differ from the concurrent findings of the High Court and the subordinate court that the appellants had been properly identified at properly conducted identification parades by persons who had had ample opportunity to observe them and in conducive circumstances that would enable them to recognize the appellants if they were to see them again.

Before turning to the statutory provisions which define the powers of the High Court when exercising its criminal appellate jurisdiction, it would be desirable to consider the Ndungu case which seems to have instigated the High Court's decision. The pertinent part of the judgment in the Ndungu case which we must first note was orbiter, and secondly, dealt rather with the statutory provisions concerning the powers of this Court in exercise of its appellate jurisdiction in criminal matter and only marginally with those of the High Court, is as follows:-

> "The existence of a grave anomaly has been disclosed on the imposition of the sentence of death in respect of various offences. When a High Court tries a case of murder and on a misdirection on a point of law acquits the accused on the charge of murder and convicts him on the lesser charge of manslaughter there is no way for the Court of Appeal to correct that error by substituting conviction for manslaughter with that for murder as originally charged. No appeal lies on an acquittal on a charge of murder and even on an appeal against conviction for the lesser offence the Court of Appeal has no jurisdiction to substitute a conviction for murder in place of manslaughter and impose a sentence of death. Yet if, in consequence of an error on a point of law, a subordinate court acquits an accused charged with a capital offence under section 296(2) of the Penal Code and in place thereof convicts him on the lesser charge under section 296(1) then on an appeal by the accused on a point of law he has to face the possibility of his conviction being substituted by one under section 296(2) with the mandatory sentence of death. That anomaly has to be looked into and rectified unless the legislature has reasons of its own for the anomaly to continue.".

Now to the statutory provisions that lay down the powers of the High Court when exercising its appellate jurisdiction in criminal cases. These are contained in PART XI - APPEALS of the Criminal Procedure Code under the sub heading `Appeals from Subordinate Courts' and in section 354 thereof, which has the following side note: `Powers of High Court'. Having regard to the decision of the High Court which is the subject of the appeal before us, the pertinent part of this section which comes into play after the High Court has heard submissions made by or on behalf of an appellant and the respondent and the appellant's reply thereto, is the following:-

> "(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -
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> (i)reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial; or

(ii)altering the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence; or

(iii)with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;".

The foregoing provisions to our mind, are in the given circumstances of this appeal, the only ones which the High Court could apply when exercising its appellate jurisdiction. These are also quite independent of what the High Court and for that matter any court, may do when exercising its original jurisdiction in a criminal trial. For instance, the power to convict in a trial for an offence other than the one charged, is provided for elsewhere in sections 179 - 191 of the Criminal Procedure Code and which cannot affect the appellate powers conferred on the High Court. We shall deal in more detail with these sections later on in this judgment.

In our view, what the High Court did falls within the provisions of section 354 (3) (a) (iii) of the Criminal Procedure Code in that "... altering the finding", it altered "the nature of the sentence" by finding the appellants guilty of robbery with violence and sentencing them to death. The evidence which the learned magistrate himself, had accepted, could only have led to the decision arrived at by the High Court. He found that the appellants were part of a group of youths who, all armed with knives which would only have been intended to threaten the tourists that they would be stabbed if they offered any resistance, robbed them of their bags. These facts constitute robbery as defined under section 295 of the Penal Code. But since the appellants were at the time, also armed with knives which are dangerous as well as offensive instruments and were in the company of more than one person, this made the offence in either case, one of robbery with violence. Either being armed with knives or being in the company of more than one person at the time of the robbery is enough even if no personal violence was actually used on the tourists, to make the offence one of robbery with violence. The learned magistrate therefore, misdirected himself by convicting the appellants of the lesser offence of robbery under section 296(1) of the Penal Code for the simple reason as we have already noted, that:-

"though the accused were armed with knives and did threaten the complainants, they did not actually resort to using them and no one suffered any injury.".

If the High Court had the power as we think it did, to alter the finding and the nature of the sentence, could it do so where the particulars of the offences as charged namely, that in the course of the robbery the appellants used actual violence, were different from those proved? If we accept as we do the concurrent finding of the learned magistrate and the High Court that the appellants were at the time of the robbery armed with knives and were in the company of others, more than one in number, then the learned magistrate could have lawfully found the appellants guilty of robbery with violence. We cannot therefore fault the finding of the High Court as the omission to state in the particulars of the charges that the appellants were armed with dangerous and offensive instruments that is to say, knives, or that they were in the company of others, would in the particular circumstances of the case, not occasion a failure of justice (See section 382 of the Criminal Procedure Code).

But before we conclude this judgment, we must consider the other cases of this court other than the Ndungu case, which have dealt more directly with the powers of the High Court in the exercise of its appellate jurisdiction in criminal matters. These are Raphael Oyendi Omusinde v Republic Criminal Appeal No. 23 of 1991 (unreported) and Amos Ondiso Oraro, Musyoki Munyoki, Philip Kivindui & James Muthui v Republic Criminal Appeal No. 34 of 1997 (unreported) which applied the decision in the former case.

In the Omusinde case which dealt in great detail with the issue, the subordinate court in accordance with the provisions of section 179 of the Criminal Procedure Code, convicted the appellant in that case who had been charged with attempted robbery with violence, of the lesser offence of attempted simple robbery on the ground that only the facts in support of that offence and not the more serious offence charged, had been established. On appeal to the High Court, that court acting in pursuance of the provisions of section 354 (3)(a)(ii) of the Criminal Procedure Code, and being of the view that the evidence produced at the

trial in the subordinate court, had established that the more serious offence had been committed, dismissed the appeal, convicted the appellant on that more serious offence and "increased" the sentence of imprisonment passed on him to one of death. What the High Court did with regard to the sentence, was really altering the nature of it and it would seem that it would have been more appropriate to have invoked the provisions of section 354 (3)(a)(iii) of the Criminal Procedure Code.

On the second appeal to this court in the Omusinde case, it was held that since the appellant had in pursuance of section 179 of the Criminal Procedure Code which was the only section under which this could be done, been convicted of a minor cognate offence to that with which he had been charged, nothing more could be done about that, not even on an appeal to the High Court, and that what the High Court should have done, was to have ordered a retrial under the provisions of section 354 (3)(a)(i) of the Criminal Procedure Code.

Before we go any further, the relevant part of the judgment in the Omusinde case must be set down. It is as follows:

"In altering the finding in an appeal against conviction and substituting therefor a conviction for an offence other than that charged, the High Court in its appellate jurisdiction can only act within the provisions of sections 179 to 191, both inclusive, of the Criminal Procedure Code: and for the offence of attempted robbery contrary to section 297(2) of the Penal Code with which the appellant was charged, such alteration and substitution are only possible under section 179, supra. Under the latter section, the substituted conviction can only be for a minor and cognate offence to that charged.

The trial magistrate in the instant appeal convicted the appellant for the offence of attempted robbery contrary to section 297(1) of the Penal Code instead of the aggravated offence under subsection (2) of the same section. He did this by invoking the provisions of section 179 as is mentioned above after giving reasons for doing so. The first appellate judges were unimpressed by these reasons and therefore substituted this conviction with one for the aggravated offence under subsection (2), supra. This was outside the operation of section 179 of the Criminal Procedure Code. Under this section, the High Court in its appellate jurisdiction only has power to substitute a conviction for a minor offence which is of a cognate nature and not for a more serious offence - see the case of Ouma v. Republic, [1969] E.A. 398. In this regard therefore, the first appellate judges were clearly in error. The solution to the problem before them lay in sub-paragraph (i) and not sub-paragraph (ii) of section 354 (3)(a), supra. The second ground of complaint in this appeal must therefore succeed. Accordingly, the appellant's substituted conviction for the offence of attempted robbery contrary to section 297 (2) of the Penal Code is quashed and the mandatory death sentence flowing therefrom is set aside.".

It would seem then that where a subordinate court had found a person guilty of say simple robbery when charged with robbery with violence, the provisions of subsection (3)(a)(ii) and (iii) of section 354 of the Criminal Procedure Code would be useless; but then we ask ourselves why were these provisions ever enacted at all, and when will they ever apply? And is it not ironical that similar powers given to this court have been exercised and continue to be exercised in similar circumstances such as in the Ndungu and Muthui cases and in the case of Joseph Boit Kembi & Samuel Ruto Kiptoo v Republic (U.R.) Criminal Appeal No. 7 of 1995 (unreported)?

A section of the Criminal Procedure Code which was not considered in the Omusinde and Muthui cases and which we now venture to say, would have led to a different conclusion than was reached in them, is section 191 of the Criminal Procedure Code. This section which has this side note `Construction of sections 179 to 190' is as follows:

> **"191.** The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179.".

In short, this means that apart from recognizing that section 179 sets out the general principle of law

applicable in a trial with respect to convictions for offences other than those charged, and that this general principle shall apply as such, notwithstanding that sections 180 - 190 deal with special cases in a trial such as conviction for the attempt to commit an offence when the charge is for the commission of the substantive offence, and convictions for minor offences when the charges are for rape, incest or defilement of girls etc, section 179 of the Criminal Procedure Code cannot be in derogation of any of the appellate powers of the High Court contained in section 354 (3)(a) of the same Code. As we stated earlier in this judgment, this section of the Criminal Procedure Code which deals with the powers of the High Court when hearing a criminal appeal, is independent of and unaffected by section 179 of the Criminal Procedure Code which deals only with what might be done at a trial of a criminal case and comes under PART IV - PROVISIONS RELATING TO ALL CRIMINAL INVESTIGATIONS of the Criminal Procedure Code. PART IV consists of various sub headings dealing with matters ranging from the investigation of a crime to the end of its trial and a cursory glance at what these sub headings deal with, would leave no one in any doubt that they are confined to powers exercisable by any trial court and have got nothing to do with the appellate powers of the High Court which are to be found in PART XI of the Criminal Procedure Code. So that if the High Court tries a man on a charge of murder and at the end of the trial that court thinks that the evidence supports the lesser charge of manslaughter, it would be perfectly legal for the court to convict for manslaughter though the accused person was never charged with that offence. That, in our view, is what section 179 is all about. But when a person is tried for manslaughter and the High Court thinks the evidence supports the more serious charge of murder, it would be illegal to convict for murder because that offence though cognate to manslaughter is not minor to it. Section 179 of the Criminal Procedure Code would not support that kind of thing. Again, when a magistrate tries a man on a capital charge of robbery with violence under section 296 (2) of the Penal Code and at the end of the evidence the magistrate thinks that only a lesser charge of simple robbery under section 296 (1) of the Penal Code is proved, the magistrate would be entitled to convict under the latter section though the accused was tried under section 296 (2). But the fact remains that the accused person was charged and tried under section 296 (2) and if the magistrate wrongly convicts under section 296 (1), it would, in our view, be perfectly lawful for the High Court in its appellate jurisdiction, to substitute the correct conviction. For in that event, the High Court would merely be doing what the magistrate could have lawfully done, namely, to record a conviction on the charge brought under section 296 (2) which was what the accused person was charged with and tried for before him. That, in our view, is why the High Court under section 354 (3) (a) (iii) of the Criminal Procedure Code may:

> "... altering the finding, alter the nature of the sentence.".

And now a word about the Ouma case referred to in the foregoing extract from the judgment in the Omusinde case, as the authority for the proposition that because of the provisions of section 179 of the Criminal Procedure Code, the High Court in its appellate jurisdiction can only substitute a conviction for a minor offence which is of a cognate nature and not for a more serious offence that was originally preferred. We fear that the Ouma case is no authority for that proposition. In the Ouma case the matter had gone to the High Court not at all by way of an appeal. Ouma had been found guilty of stealing and convicted for it. When it came to passing sentence, the District Magistrate felt that because of Ouma's very many previous convictions, the maximum sentence that he could impose on Ouma would be inadequate. He therefore committed Ouma to the High Court for sentencing which was part of the trial, and not an appeal to the High Court, and which he may do under the provisions of section 221 of the Criminal Procedure Code. The High Court sentenced Ouma to seven years imprisonment. But in order to do this, the High Court judge altered Ouma's conviction on the offence with which he had been charged to a more serious one. The predecessor to this court held in the Ouma case quite correctly, that as the matter before the High Court was a trial, all that the High Court could do was to convict Ouma of the offence he had been charged with or of a minor offence of a cognate nature but not of a more serious offence. The Ouma decision in no way dealt with the appellate jurisdiction of the High Court and in our view, is irrelevant to the present appeal and was irrelevant to the issues involved in the Omusinde case.

The legal points raised in the instant appeal that the High Court in its appellate jurisdiction had no power to convict the appellants on the more serious offence than that on which they had been convicted by the learned magistrate and to alter the nature of the sentence passed on them by the learned magistrate, fail.

In the result, the appeal by the appellants is hereby dismissed.

Dated and delivered at Mombasa this 4th day of September, 1997.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.