IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: COCKAR, C.J., AKIWUMI & SHAH, JJ.A.)

CRIMINAL APPEAL NO.116 OF 1995

BETWEEN

JOHANA NDUNGU…..……. APPELLANT

AND

REPUBLIC…….……. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Mr. Justice Oguk) dated 5th October, 1994,

IN

H.C.CR.A. NO.183 OF 1993)

JUDGEMENT OF THE COURT

The appellant, with 2 other co-accused, was charged before the Senior Resident Magistrate, Mombasa, with the offence of robbery contrary to section 296 (2) of the Penal Code. On 22nd April, 1993, all the three were convicted on the lesser offence of robbery contrary to section 296 (1) of the Penal Code and each was sentenced by the Mombasa Senior Resident Magistrate, Mr. J.R. Karanja, to 10 years' imprisonment with 15 strokes and police supervision order for 5 years. The High Court dismissed the appeal of each against conviction but reduced the sentence of each of them to 6 years' imprisonment with 3 strokes. The supervision order was confirmed.

The appellant who was the third accused before the trial court lodged an appeal in the Court of Appeal against conviction and sentence on 11th June, 1996, through his advocate Messrs. Khaminwa & Khaminwa. There are six grounds of appeal of which ones against sentence and the remaining five are against conviction which Mrs. Khaminwa argued together as one. These five grounds are all based on matters of mixed fact and law relating to absence of evidence to show that the appellant was present at the scene, his participation in the attack, of a common intention, of proper identification and of a wrongful finding that there was overwhelming evidence against the appellant. All these matters on which Mrs. Khaminwa addressed us are related to findings of fact and law made by the trial court and the first appellate court.

This is a second appeal which, under section 361(1) of Criminal Procedure Code, can lie to the Court of Appeal only on a matter of law and not on a matter of fact. However, on account of the circumstances which gave rise to the recording of conviction under section 296 (1) we allowed Mrs. Khaminwa to

address us on all her grounds of appeal including on facts. We ourselves also have perused the evidence carefully. We do not find any reason to differ from the concurrent findings of fact made by the trial court and the 1st appellate court. Very briefly the facts as found by the trial court and accepted by the 1st appellate court are that on the material day at about 7.oo a.m. in the morning the complainant, a tourist carrying two cameras, was taking photographs on the beach when the appellant with two others confronted him and robbed him of the 2 cameras. During the course of robbery the second accused who was armed with a knife threatened the complainant with it while the 1st accused who had a stick hit the complainant with it on the face, legs and ribs. Leaving the complainant bleeding profusely from the cut that was inflicted on his face and the three robbers fled with the cameras. However, soon afterwards the appellant and both his companions were arrested by some Kenya Navy men in the vicinity who had been alerted. Both the cameras were recovered as was also the knife that was used by one of the appellant's companion – the second accused.

Having found the above facts as proved this is what the trial magistrate said in his judgment:-

> "It is therefore found as a fact that the three accused are the persons who attacked and robbed the complainant of his two cameras. However, with regard to the circumstances of the case the offence was not that aggravated to warrant a capital robbery charge. Consequently, the court finds the three accused guilty of the lesser offence of robbery with violence under section 296 (1). They are convicted accordingly."

What caused the trial magistrate to bring a conviction under section 296 (1) and not under section 296 (2) of the Penal Code was his finding that (quote):

> "……. the offence was not that aggravated to warrant a capital robbery charge."

In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the

offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.

In this appeal the facts that are proved are as follows:

1. The appellant at the time of robbery as defined in S.295 of the Penal Code was a member of a gang of three, one of whom was armed with a knife and one other was armed with a stick. That finding alone was enough to convict him under sub-section (2) of section 296 of the Penal Code.

2. The appellant was in company with two other persons at the time of the said robbery. That finding again on its own was enough for a conviction under S.296 (2).

3. The complainant (victim) at the time of robbery was actually beaten and wounded by the gang of three of which the appellant was a member. That finding also on its own was enough to convict appellant under sub-section (2).

But instead of finding the appellant guilt under sub-section (2) of the section the trial magistrate made a further finding that (to quote again) "… the offence was not aggravated to warrant a capital robbery charge." The word "aggravated" is not used anywhere in sub-section (2) of the section. That clearly was an introduction of a qualifying factor of which there is no mention in the sub-section – not even an iota of hint to warrant the type of interpretation put by the trial magistrate. It constitutes a grave misdirection on a point of law. Unfortunately the judge of the 1st appellate court over-looked this misdirection.

Powers of the Court of Appeal with regard to a second appeal on a point of law against a decision of the High Court in its appellate jurisdiction are spelt out in section 361 of the Criminal Procedure Code of which sub-section 92) reads as follows:

> "S.361. (2) On any such appeal, the Court of Appeal may, if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its judgment or order thereon, to the first appellate court or to the sub-ordinate court for determination whether or not by way of re-hearing, with such directions as the Court of Appeal may think necessary."

The court raised the implication of the above quoted section for Mrs. Khaminwa to address us thereon and adjourned the hearing of the appeal to the following day at the advocate's request to give her time to do the necessary research. The following day Mrs. Khaminwa applied for leave to withdraw the appeal which we rejected and reserved the reasons for doing so which we now give.

Withdrawal of a criminal appeal is governed by rule 67 of the Court of Appeal rules which reads:

> "R.67.(1) An appeal may be withdrawn at any time before hearing by notice in writing to the Registrar signed by the appellant, and upon such notice being given the appeal shall be deemed to have been dismissed.
>
> 2. When any appeal is withdrawn, the Registrar shall forthwith notify the respondent and the registrar of the superior court.

Sub rule (3) provides for restoration of an appeal withdrawn under this rule.

Under sub rule (1) it is clear that a criminal appeal may be withdrawn at any time before hearing by notice in writing to the Registrar. Mrs. Khaminwa conceded that no such notice in writing had been given to the Registrar by the time when the hearing of the appeal commenced. Mrs. Khaminwa stated that after the appeal, now part heard, was adjourned the appellant had decided to withdraw the appeal and that in fact the requisite notice had already been went to the Registrar although it had not by then reached

the court file. Her interpretation of the words "before hearing" was "before conclusion of the hearing".

We do not agree with that interpretation of a very simple expression in English. If that was the intention it would not have posed any drafting problems for those responsible for these rules to inset the word "conclusion of" or "final disposal of" between the words "before" and "hearing". Nowhere is it stated in the rule that a criminal appeal maybe withdrawn after the commencement of the hearing of the appeal. We must accept the rule as it is and attribute ordinary meaning to the words used therein.

As there is no rule in the Court of Appeal rules which provides for the withdrawal of a criminal appeal after its hearing has commenced we rejected Mrs. Khaminwa's application to withdraw the appeal which she made during the course of its hearing after we had drawn her attention to the provisions of S.361(2) of the Criminal Procedure Code and invited her to address us thereon. The hearing was then adjourned to 18th September, 1996, - 9.30 a.m. to give ample time to the appellant's advocate to prepare her submissions in respect of the relevant provisions of S.361 (2) of the Criminal Procedure Code. On 18th September, 1996, at Nairobi session of the Court of Appeal the Principal State Counsel Mr. Gacivih did not appear and the part-heard appeal was adjourned to 24th October, 1996 at Nairobi.

At the resumed hearing Dr. Khaminwa himself argued the appeal. Submissions made by Dr. Khaminwa were that as the State had not taken any steps by way of filing an appeal before the High Court or the Court of Appeal, the appellant if convicted under section 296(2) and given the mandatory death sentence for the first time would have no recourse to any further appeal and that would be against natural justice. It would also be contrary to the principle of double jeopardy that is the appellant would suffer two sentences. Finally, Mr. Khaminwa also drew attention to the fact that the provisions of all the sub-sections of S.361 had given a discretion to the Court of Appeal as to the course of action to take. Dr. Khaminwa once again stressed that it would be morally wrong to sentence the appellant to death at this stage. In his view the trial court had not made any error on a point of law. It had merely attempted to use an impressive expression when it used the term "…… the offence was not that aggravated to warrant a capital charge."

Mr. Gicivih, the Principal State Counsel , conceded that despite being entitled to do so the Republic had not filed an appeal to the High Court but submitted that the Court of Appeal on 2nd appeal under S.361(2) and (4) had virtually unlimited powers to rectify errors committed by the trial court and the 1st appellate court. He strongly argued that it was the duty of the Court of Appeal to rectify such errors committed by the sub-ordinate courts otherwise the latter would continue committing them.

Dr. Khaminwa had cited a number of authorities but none was relevant to the particular issue before us. However, there are two cases which we feel we must comment on. In Walter Awinyo Amolo v. Republic (1991) KAR the appellant had been charged with a capital offence of attempted robbery under section 297(2) of the Penal Code. Facts showed that the offence under section 297(2) had been proved yet the magistrate for no reason had found him guilty under section 297(1) and sentenced him to 13 years' imprisonment. The judges merely commented that it was not clear to them why the magistrate had found it fit to find him guilty of the lesser offence. However, it is clear that what had occupied the learned judges' minds in that appeal was the reduction of the sentence of 13 years' imprisonment to 7 years' imprisonment by the 1st appellate court judge on the ground that he "felt inclined" to reduce the sentence. In consequence they merely examined the powers of the Court of Appeal under S.361(1) of the Criminal Procedure Code. They did not at all consider S.361(2) or (4) of the Criminal Procedure Code.

In Wilson Washington Otieno v. Republic & Samuel Onyango Ochieng v. Republic [1989] 2 KAR the Court of Appeal had inter alia held that a retrial would only be ordered where the original trial was either illegal or defective. In the appeal before us the original trial was neither illegal nor defective. So it is not possible that in the event of the conviction being set aside for it to be substituted by an order for a re-trial.

As stated earlier Mr. Gacivith conceded that the Attorney General had not appealed against conviction to the High Court. Thereafter the Attorney General had no right of appeal to the Court of Appeal. We would, however, point out at this stage that S.361 specifically deals with second appeals. It is therefore,

pre-supposed that a party which is the appellant on a second appeal must be the accused only and not the Attorney General. S.361(1) has clearly laid down that a party to an appeal from a subordinate court may appeal against a decision of the High Court in its appellate jurisdiction on a matter of law. The memorandum of appeal includes grounds based on matters of law. It, therefore, matters not as far as this court is concerned, that the Attorney General did not file a cross-appeal before the High Court to correct the error committed by the magistrate on a point of law which the High Court completely over-looked.

We agree with Mr. Gacivih that there was no fear of the appellant facing a double jeopardy with regard to his serving the prison sentence imposed by the first appellate court and the possibility of his having to serve a death sentence if imposed by the Court of Appeal for the same offence. He was serving a prison sentence which was imposed on him. If he had been sentenced to death by the magistrate he still would have remained in prison custody pending the final disposal of his appeal by the Court of Appeal. So it can not be said in any way that he was in danger of being sentenced to death after he had served a substantial part of his prison sentence. We agree with that.

As regards Dr. Khaminwa's submission that a sentence of death must be passed at a stage where it is appealable we agree that if the magistrate had found the appellant guilty under section 296(2) of the Penal Code and passed the mandatory sentence of death then the appellant would have had two oppportunities to appeal – one to the High Court and the other to the Court of Appeal. Now he has none. Another factor which we have to deal with is that the Court of Appeal has a discretion as to the options before it. We agree with Mr. Gacivih that unless strong directions are sent to the sub-ordinate trial courts and the judges of the 1st appellate court they will continue at their whim to tamper with the strict application of law and thereby make a mockery of the purpose for which S.296 (2) was introduced in the Penal Code.

If proved facts show that robbery under section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under section 296(1) when the proved facts show that the charge under section 296(2) has been proved. The same message also goes to the judges of the 1st appellate court who, because their judgments are binding authorities for the sub-ordinate courts to follow, have a duty to give correct guidance in strict accordance to law.

The task of the Court of Appeal in Criminal Appeal No.7 of 1995 Joseph Boit Kembi & Samuel Ruto Kiptoo V. Republic (U.R) which was also referred to us was somewhat simpler because in that case the trial magistrate had convicted both the appellants of robbery under section 296(2) of the Penal Code but instead of imposing the mandatory death sentence he imposed on each a sentence of 10 years' imprisonment with ten strokes and a police supervision order for 5 years after release. The judge of the 1st appellate court under the erroneous belief that the appellants had been convicted under S.296(1) had (quote) "after careful analysis of the evidence before the trial magistrate" proceeded to dismiss the appeals in their entirety. The Court of Appeal in a majority decision (Gicheru & Tunoi, JJ.A.) substituted the proper mandatory sentence of death in place of the unlawful sentence of imprisonment that had been imposed by the trial magistrate and confirmed by the judge. In that appeal Shah, J.A. while dissenting on the passing of sentence of death at that stage, because of absence of warning to the appellants, prior to the hearing, of the probable devastating consequences, did, however,, agree with Gicheru and Tunoi, JJ.A. that the only sentence upon conviction under section 296(2) was that of death.

The present appeal which involves the setting aside of the judgment and not merely the sentence has to be considered under the provisions of S.361(2) which as Dr. Khaminwa pointed out has provided options with regard to what the Court of Appeal can do. These options are:

a. We make the order which the trial court or the 1st Appellate Court could have made and that is we set aside the conviction under section 296(1) and enter conviction under section 296(2). In that event we must follow what the Court of Appeal did in the Criminal Case of Joseph Boit Kembi and Samuel Ruto Kiptoo in Criminal Appeal No. 7/1995 (supra) that is the imposing of the mandatory sentence of death is now inevitable, or

b. We remit the case with our judgment to either of the lower courts for determination, whether or not by way of rehearing, with appropriate directions. This course is not feasible because we do not have any grounds on which to give any directions. The trial was conducted properly. The only possible sentence is mandatory and not one which could give either of the two lower courts a discretion like when imposing a prison sentence. We have to reject this course.

We agree with Dr. Khaminwa that if the magistrate had not erred following his misdirection in law and had convicted the appellant under section 296(2) of the Penal Code and had thereafter imposed the mandatory sentence of death the appellant would have had a right to appeal against conviction on a capital offence on two occasions and against the sentence at least on one occasion. However, there is no substance in this submission because as far as the sentence is concerned it is mandatory. The appeal against conviction would have rested on facts and there are not only two concurrent findings of fact but, as we stated earlier, because of the gravity of the nature of this appeal, we took care once again to satisfy ourselves that the concurrent findings of fact by the lower courts were based on sound evidence. We found ourselves in complete agreement with the lower courts on their findings of fact. The evidence for a conviction under section 296(2) was clear and credible. In our view no prejudice or injustice is being caused to the appellant merely because he will have no right of appeal at this stage against his first conviction and mandatory sentence of death under section 296(2) of the Penal Code.

Having considered all the relevant issues raised in this appeal we have no alternative but to ensure that we do not let an unlawful conviction stand. The conviction under section 296(1) entered by the trial court and confirmed by the 1st appellate court and the sentence of imprisonment and strokes imposed by the 1st appellate court are now set aside and substituted by a conviction under section 296(2) of the Penal Code for the offence for which the appellant had been charged and the mandatory sentence of death is now imposed.

Having had this opportunity of carefully examining the provisions of the various sub-sections of section 361 of the Criminal Procedure Code we are constrained to make the following observations obitur dictum.

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 but 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 o flaw, a sub-ordinate 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. The anomaly has to be looked into and rectified unless the legislature has reasons of its own for the anomaly to continue.

It is not the judicial function nor the practice of this court to make any recommendations in the way the High Court is enjoined to do under section 332 of the Criminal Procedure Code. Nor is the recommendation we now propose to make be understood or to be cited as a precedent. But in view of the anomaly pointed out above and the peculiar circumstances pertaining to this particular appeal it is directed that a copy of this judgment be forwarded to the Attorney General for him to take steps to have it placed before the committee which advises H.E. the President of his prerogative of mercy.

Dated and delivered at Mombasa this day of 20th day of November 1996

A.M. COCKAR

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CHIEF JUSTICE

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL