REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, COCKAR & AKIWUMI, JJ.A.

CRIMINAL APPEAL NO. 110 OF 1991

BETWEEN

PIUS OLIMA

MZIRAI H. SABAYA ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

Appeal from a judgment of the High Court of Kenya at
Nairobi (Justices Porter & Mbaluto) dated 23rd
October, 1991
in
H.C.CR.A. NOS. 1332 & 280 OF 1990 AND 1991 RESPECTIVELY)
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**JUDGMENT OF THE COURT**

The first and second appellants in this appeal were respectively, at the time when they were charged with the offences of corruption in respect of which they were convicted by the learned senior resident magistrate, the resident magistrate and court clerk at the Voi Law Courts. Prior to their conviction, they had been arraigned before another magistrate. But the related trial had been discontinued when, after seven prosecution witnesses had testified, a nolle prosequi was then entered by the Attorney General. In the course of the trial before the learned senior resident magistrate, counsel appearing for the appellants withdrew from representing the appellants when the learned senior resident magistrate refused to grant an adjournment sought by them.

The appellants did not object to their counsel's application and the learned senior resident magistrate then being of the view that the appellants had colluded with their counsel in the letters' withdrawal, with the intention of delaying the hearing of the case, curiously went on as he said "for the interest of justice", to cancel the bail/bonds of the appellants and to remand them in custody. It does not therefore come as a surprise that thereafter, the appellants refused to take any further part in the proceedings and applied to the learned senior resident magistrate went on with the hearing of the case, in which the appellants refused to take any further part.

Briefly, the evidence that was then led on behalf of the prosecution was that the 1st appellant before

whom one Harish Wason together with his wife had been jointly charged with an offence under the Employment Act, had solicited a bribe of KShs.10,000/= from Harish Wason in order not to proceed with the case against his wife. Harish Wason, having reported the 1st appellant's conduct to the police, a trap was laid for the 1st appellant. Harish Wason was wired up by the police with a hidden cassette recorder and who also gave him an envelope which was supposed to contain the KShs.10,000/=. Harish Wason then went to see the 1st appellant in his chambers and told him that he had brought what he had asked for.The 1st appellant, however, called in the 2nd appellant and asked Harish Wason to hand over the money to the 2nd appellant who would keep it for him. Harish Wason and the 2nd appellant then left the 1st appellant's chambers and went into the court room where Harish Wason handed over the envelope supposed to contain the money, to the 2nd appellant. Subsequently, Harish Wason having been requested to do so by the 1st appellant, brought his wife into the latter's chambers where Harish Wason confirmed that he had given the money to the 2nd appellant. All the incriminating conversations that took place between Harish Wason and the 1st and 2nd appellants and Harish Wason, his wife and the 1st appellant were recorded by Harish Wason and subsequently transcribed.The recording was played in the course of the trial and the transcription admitted in evidence. Admitted also in evidence was the inquiry statement made by the 2nd appellant in which he admitted receiving the envelope containing the money from Harish Wason for the 1st appellant but that after subsequently finding out that some of the currency notes in the envelope were fake notes, he had so informed the 1st appellant and had kept the envelope and its contents were recovered. This is the summary of the evidence, uncontradicted because the appellants had refused as already noted, to take part in the proceedings, upon which, the learned senior resident magistrate believing it as establishing the guilt of the appellants beyond reasonable doubt, convicted the appellants as charged and sentenced the 1st appellant to seven and six years imprisonment to run concurrently and the 2nd appellant to three years imprisonment.

Against these convictions and sentences the appellants appealed to the High Court constituted by a bench of two judges, which quashed the convictions and set aside the sentences. The High Court then ordered without "doubt or hesitation", a retrial. By this time, the appellants had served nearly a year of their respective sentences. It is against the order of retrial that the appellants have now appealed to this Court. But before going into this, it is necessary to consider the judgment of the High Court to discover the reasons for the order of retrial it made. There were several grounds of appeal filed before the High Court, but the main ground was that strenuously pressed was that the learned senior resident magistrate erred in law in refusing to grant the adjournment sought by the appellants' counsel on 23rd October, 1990, thus leaving them with no choice but to withdraw from representing the appellants and so denying the appellants the right to be represented by counsel of their own choice and the right to have their defence adequately presented.The High Court devoted 18 pages of its judgment to this issue and having considered the law and authorities and cited to it, came to the following conclusions as the basis for its order already referred to:-

"There is no doubt whatever in our minds, as there was none in the mind of the Learned Trial Magistrate that there

> was a strong prima facie case shown by the prosecution. But it has to be remembered that the evidence before the court was not subject to cross-examination and the learned Trial Magistrate was not assisted by the submissions of counsel on behalf of the accused. To say what would have happened if the prosecution had not had such free rein would be a complete and total guess, in which we are not going to indulge.

It will be obvious from what we have said above that we do not think that the appellants can be said to have had a fair trial,

> either on the basis of the technical reasons we have set out, or upon the basis of an objective test, that is whether justice has manifestly been seen to have been done in this case from the point of view of the appellants and the man in the street. We do not think that we could justify a decision on the facts of this case..And we also stress that we have quoted from the case law in this judgment to try to establish the correct principles to be considered. Each case must be decided on its own facts on the basis of those principles.

It is with particular regret that we make the order we are going to make in this case; the matter, as we have already

> said, was of the gravest import and the greatest public interest. There already has been one part trial: and now the trial we have considered has proved to have been of no effect. Witnesses are once again going to have to rehearse all the events before the court, and we regret that.
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> .....
> .....
> .....

Accordingly we would quash the convictions in this case and set aside the sentences: but we have doubt or

> hesitation whatever in ordering a retrial. The matter is to be mentioned before the Chief Magistrate on 28th October, 1991 for allocation for retrial before a different Magistrate of competent jurisdiction."

It is clear from the above excerpts from the judgment of the High Court that it was of the view with which we agree, that the prosecution had established a strong prima facie case against the appellants. It also appears from the judgment of the High Court that it took into consideration not only the fact that there had already been "one part trial" but also the fact that the order for a retrial arising out of the defective nature of the one sided trial before the learned senior resident magistrate, would involve the appellants being tried all over again.But the High Court concluded that the gravity of the offences with which the appellants were charged and the great public interest involved were such that regrettable as it may be, justice would be done if in the peculiar circumstances of the case, the convictions were quashed and sentences set aside and a retrial ordered. It is also evident from the observations of the High Court that it took into consideration as indeed it should, not only the doing of justice to the appellants but also to the State.

Mr. Onyango Otieno, learned counsel for the appellants, argued before us the general grounds that the order of retrial would be prejudicial to the appellants and that the High Court erred in law and laboured under a misconception of the facts and circumstances of the matter in question, in making the order of retrial that it did.In support of his argument, Mr. Onyango Otieno pressed that since the learned senior resident magistrate had himself made it impossible for the appellants to receive a fair trial at his hands, the retrial would cause injustice to the appellants. Furthermore, the High Court gave no reasons for making its order for a retrial in the particular circumstances of the case, where a part trial had previously taken place and where the appellants had served nearly twelve months in prison, and that this was because the High Court had not considered the injustice that would be caused to the appellants by its order of retrial.

Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

What we now therefore have to determine is whether in the particular circumstances of the case before us, the interests of justice justify a retrial and whether or not injustice would be done to the appellants if the order of retrial is maintained. The High Court in its judgment, rightly observed with respect to the evidence before the learned senior resident magistrate and the offences with which the appellants were charged, that:-

"There is no doubt whatsoever in our minds, as there was none in the mind of the learned trial magistrate

that

> there was a strong prima facie case shown by the prosecution .....

But here is a case which is of the greatest interest and importance to the State and to the public involving a serious charge

> of corruption against a senior resident magistrate at a time when corruption in such areas was a matter of public comment and concern as it is now."

These observations with which we agree,demonstrate that the interests of justice in the particular circumstances of the instant case and having regard to the defective trial, justify the order of retrial. But will the retrial cause no prejudice or injustice to the appellants? The High Court did give in our view, a fair consideration of this point. As is clear from the excerpts of its judgment set out hereinbefore, the High Court considered the fact that a retrial would involve the appellants having to go through the ordeal of another trial. It is also implicit, this having been raised as appears from the record of the proceedings of the High Court, that at the time of the hearing of the appeal before it, the appellants had already served twelve months' imprisonment. The High Court must have taken this into consideration. What is more, the sentences already served will no doubt be taken into account if the appellants were to be convicted after the retrial.

It is true that thee trial before the learned senior resident magistrate was defective, indeed not a trial at all, but as already observed, the learned senior resident magistrate and the High Court found that a strong prima facie case exists that the appellants have committed the offences with which they were charged. Justice, it is well settled, works both ways; there must be justice to accused person as well as justice to the State. We have no doubt from our reading of the entire judgment of the High Court, that all these considerations though all of them were not specifically stated as reasons, were taken into account by the High Court when, in the particular circumstances of the case before it, it came with regret, to the obvious conclusion that no injustice or prejudice would be meted out to the appellants if an order for retrial were, as indeed it was, to be made. We, our part, are also of the view that in the particular circumstances of the case, no injustice would be suffered by the appellants by the ordering of the retrial and agree with the High Court in this respect.

Before we conclude, however, there is the case of Wilson Otieno and Another v Republic, Criminal Appeal No. 55 of 1987 (unreported) decided by this Court, which learned counsel for the appellants drew to our attention in support of his argument that, the appellants having already served twelve months imprisonment, the order of retrial would cause prejudice and injustice to them and should therefore be set aside , since in the Otieno case this court set aside an order of retrial even though only one month of the sentence passed had been served. But this is not the reason why this court refused to support the order of retrial made by the High Court in the Otieno case. This Court, as is clear from its judgment in the Otieno case, held that an order for retrial may only be made where the original trial was, in the first place, as in the case before us, illegal or defective and not as in the Otieno case, where the High Court when hearing the appeal, was faced with a "gibberish and utterly incomprehensible record". The appeal in the Otieno case was allowed by this Court with no retrial ordered, because:-

"It was the record of the magistrate which turned out to be

> defective in the sense that it is "gibberish and utterly incomprehensible"

and not the trial itself.

A further point raised by the Otieno case is the view expressed by this Court in its judgment in that case, that where a retrial is ordered, the proper order that should be made is not to quash but to set aside the conviction since the merits of the conviction have not been gone into. The quashing of the conviction could lead to a successful plea of autre fois acquit. But this is not a matter for our consideration in the present appeal before us as there is no appeal against the quashing of the conviction of the appellants.

In the result, the appeal against the order of retrial by the High Court fails and it is hereby dismissed.

**Dated and delivered at Nairobi this 7th day of December, 1993.**

J. E. GICHERU

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JUDGE OF APPEAL

A. M. COCKAR

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR