REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 428 OF 1985

SAMMY MACHARIA RUHI & 13 OTHERS .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeals from the Chief Magistrate's Court at Nairobi, HH Buch Esq)

JUDGMENT

All the fourteen appellants (who will also be referred to as accused) were convicted on count 1 with the offence of unlawfully and jointly converting to their own use a motor vehicle, the property of University of Nairobi, contrary to section 294 of the Penal Code. Each was sentenced to a term of 6 months' imprisonment.

Accused Nos 12 and 13 were convicted on counts 2 and 4 respectively of being in possession of *cannabis sativa* (bhang) contrary to section 10(2) as read with section 18 (2) of the Dangerous Drugs Act (cap 245). Each was sentenced to 6 months' imprisonment to run consecutively to the sentence on count 1.

Accused No 12 was also convicted of driving a motor vehicle on a public road without a valid driving licence contrary to section 30(1) of the Traffic Act (cap 403) punishable by section 41 of the said laws and was sentenced on count 1 only.

All the appellants except accused No 3 had filed petitions of appeal in person within the prescribed period. Supplementary petitions of appeal in respect of each of these 13 appellants were subsequently filed by Messrs Simiyu Wetangula and company on June 7, 1985.

Accused No 3 had filed an appeal on May 28, 1985 which was rejected by this court. With leave of court his petition of appeal was also filed by the advocates.

We have perused the grounds of appeal in the petitions filed by the accused personally. We find that the grounds of appeal contained therein are substantially the same as those contained in the supplementary petitions filed by the advocates. Mr Nowrojee who argued the appeal on behalf of all the appellants said that they would refer principally to the supplementary petitions but where necessary would refer to the petitions filed in person. Mr Nowrojee argued the appeals broadly on the following grounds:

1. That the Chief Magistrate's actions had left the appellants unrepresented and deprived them of the benefit of the services of their advocates.
2. That the accused are jointly charged under count one with converting to their own use a motor vehicle but that the offence of conversion was not disclosed on the evidence nor were the appellants identified as joint perpetrators in the act of conversion.

3. That the opening address by the Attorney-General contained irrelevant and prejudicial matters.
4. That the sentence was manifestly excessive. The prosecutor had expressed his views instead of confining himself to facts relevant to sentence.
5. That in the event of the convictions being quashed a re-trial would not be fair and should not be ordered.

We start with Mr Nowrojee's critical analysis of the evidence and his argument that neither conversion nor identity was proved. Starting with the issue relating to conversion we quote below the relevant portions of section 294 of Penal Code:

> "Any person who unlawfully and without colour of right, but not so as to be guilty of stealing, **takes or converts to his own use or to the use of any other person** any …….vehicle ……is guilty of a misdemeanour…"

We have emphasised the portion which was the subject of exhaustive interpretation by the advocates. Mr Nowrojee's interpretation was that there were four offences created in the section namely where the accused:

1. Takes to his own use or to the use of any other person – 2 offences or
2. Converts to his own use or to the use of any other person – 2 offences.

The particulars of the offence in count 1 alleged that the accused

> "jointly converted to your own use….".

Mr Nowrojee contended that conversion implied or presupposed a lawful taking or possession in the initial stage and that the offence is committed only when the vehicle is subsequently put to an unauthorised use. On the other hand taking meant "an unlawful taking" at the initial stage.

We do not accept that interpretation. Our view is that the word "takes" alone constitutes one offence like a person who takes a vehicle unlawfully but does not put it to any use. The other offences covered by the words

> "converts to his own use or to the use of any other person".

So in fact there are three and not four offences created in this section. If the legislature intended the user of the vehicle as a part of the word "takes" then the word "for" would have followed it. The word "to" goes with "converts" and not with "takes" because the phrase "takes to" has a different meaning which will not apply here.

Mr Chunga cited the Kenya case of *R vs Burns* [1958] EA 142 We have studied this High Court decision of Sir Ronald Sinclair CJ and Templeton J and agree that conversion consists of dealing with property in a manner that is inconsistent with the right of the owner. We do not agree with Mr Nowrojee's submission that in *Burns'* case the vehicle was already in lawful possession of the accused who was a police officer at that police station. That government vehicle was on charge to his police station.

In our view an offence of taking under this section started with the taking which is unlawful and without colour of right. If the person so taking the vehicle does not use it then the particulars of the charge will merely state

> "the accused unlawfully and without colour or right but not so as to be guilty of stealing took a motor vehicle…"

otherwise how could an offence committed by merely taking unlawfully a vehicle without using it be differentiated under this section?

On the other hand, if subsequent to a lawful taking the taker uses the vehicle the particulars of the charge would use the word "converted" in the manner as stated in count 1. In view of the prosecution evidence that was produced, we are satisfied that the appellants were charged in the proper form and that there is no error or defect in the particulars.

Coming now to the question of identification of the appellants, Mr Nowrojee said that no evidence had been produced to prove that the appellants in fact were the persons who drove the Land Rover from the University premises. He said the evidence was that the vehicle after being so driven away had stopped at the Great Court. The driver and the riders could have changed there or at Kabete or at Kenyatta University College which appeared to be the destination of the persons who had driven it away. We accept the possibilities put forward by Mr Norwrojee.

The prosecution evidence was that P W 2 had seen and heard some students (students in this judgment mean students of the Nairobi University) asking for the bus driver. Clearly the students wanted to be driven in one of the University vehicles. The evidence of the transport officer (PW 3) was that after his refusal the group of students who had come to him for a bus had quietly gone out to the bus which they failed to start. More students came and the group grew bigger. The students managed to start the Land Rover and the group entered it and drove off in it. According to the evidence of these two witnesses and that of the security officers (PW 10), this incident took place between 10.00 a.m and 10.30 a.m. At about 1.30 p.m the appellants, all university students, were found in that Land Rover at a road block on the highway between Kenyatta University College.

Mr Chunga very properly drew attention to the doctrine of recent possession which he submitted could be applied in deciding any offence that was related to or connected with the object found in such recent possession. A group of unidentified students had driven away in the Land Rover between 10.00 a.m and 10.30 a.m with the intention of going to Kabete and Kenyatta University College. The Land Rover was also seen at the Great Court. About three hours later the same Land Rover was seen driven out of the Kenyatta University College. To our minds the prosecution evidence that we have summarised above was sufficient to require the appellants to be put on their defence. In fact, in our view the presumption arising out of the doctrine of recent possession in this case is very strong that the group intercepted at the road block was the same group of students who had boarded and driven the Land Rover from the University earlier in the day. We are not at this stage considering the defences made in the charge and caution statements and put forward during cross-examination of the prosecution witnesses. But we only confine ourselves to the finding that there was strong circumstantial evidence pointing to the appellants as the group which took away the Land Rover.

We now come to the submission that the opening address by the Attorney -General was contrary to the law, highly prejudicial and contained extraneous and irrelevant matter calculated to inflame and prejudice the mind of the court against the appellants. It is also a ground of appeal that the prosecutor exceeded his function in telling the court in the opening address and at different times throughout the trial of his views of the alleged conduct of the appellant. We must state at the outset that we are satisfied that the term "complainant" in section 208(1) of Criminal Procedure Code includes the prosecutor as well as the person so described in the particulars of the charge. It is clear from section 26(3)(a) and (b) of the Constitution that the state through the Attorney–General is or can become the complainant in every criminal proceeding.

Mr Nowrojee drew the court's attention to various passages in the opening address of the Attorney–General which he claimed were prejudicial and containing extraneous and irrelevant matters intended to inflame the court's mind against the appellants. He sought an acquittal on these grounds and in support cited the cases of *Nathan House vs R* (1922) 16 Cr Appl R 51, *Banks v R* (1917) 12 Cr Appl R 75, *B E Clewer vs R* (1953) 37 Cr App R 35 and *Kabeni v Rep* [1970] EA 503.

We have carefully considered these authorities and accept Mr Nowrojee's contention that the conduct of counsel, the words he utters in his address and also the conduct of the court such as undue interruption by the judge are proper grounds for acquittal an appeal.

Mr Chunga, Assistant Deputy Public Prosecutor, in reply claimed that whatever allegations the Attorney–General had made in his opening address had been proved. The prosecution was not precluded from giving the background of the case and the status of an accused in society in the opening address. Evidence had shown that apart from the appellants there were others also involved in the perpetration of the offence. The comparison of the appellants' behaviour with that of donkeys kicking their master did not mean that the appellants were donkeys but that they were ungrateful. The Attorney–General's references to the expulsion and denial of sponsorship of certain students leading to the boycott of classes at the University College were intended to give the court a background of incidents forming part of the *res gestae* resulting in unlawful taking away of the Land Rover belonging to the University by the students. The court was to be told why the appellants needed the vehicle.

Mr Chunga pointed out sections 5 to 16 of the Evidence Act (cap 80) to explain factors governing admissibility of evidence and relevancy of facts. He contended that the whole of the opening address was relevant and if there were any irrelevant parts they had not prejudiced the mind of the Chief Magistrate as could be seen from the judgement. After referring to *Nathan's* and *Bank's* cases and other cases cited by him and the proviso to section 382 of Criminal Procedure Code, Mr Chunga stressed the following points:

1. Advocates of the represented appellants had not objected to any part of the opening address at the time it was delivered.
2. A jury is more susceptible to influence by an opening address than a professional and experienced magistrate.
3. An opening address is never part of the evidence and the prosecution does not undertake to prove all allegations made therein.
4. Even if parts of the opening address were prejudicial or irrelevant and it is shown that the trial court was influenced by such parts, the first appeal court will not necessarily quash a conviction but will test whether despite the said irregularities there was sufficient evidence to convict.

We accept the merit in Mr Chunga's arguments. We do not propose to go through the opening address of the Attorney–General with a fine toothcomb. Both counsel did that for our benefit and we are mindful of all the arguments they put forward. Mr Chunga is correct in stating that the opening address is never part of the evidence. It is important therefore that the Attorney–General's address should not be presented as though it were evidence. It is also the reason why extra care should be taken by the prosecutor to ensure that the address is confined strictly to matters relating to the charge and the particulars of the charge and the evidence the prosecution intended to call to prove only the said particulars. The Attorney –General likened the students' behaviour to that of donkeys. He described the students going for meals and teas and then returning to the Great Court to attend meetings instead of attending lectures. The said comparison and reference to meals were unnecessary and, in the particular circumstances at this case, unfortunate. An accusation of ungratefulness before an accused has been found guilty can only prejudice the mind of the court to the detriment of the accused before the hearing of the evidence. T

he use of the words "utter defiance" following the sentence "they went against law and order" and the use of the words "incited" and "incite" had to our minds no relevance to the particulars of the charges in the four counts which the prosecutor had undertaken to prove against the appellants. The use of the words "defiance" and "incitement" constituting serious offences contrary to section 96 of the Penal Code in such minor offences with which the appellants had been charged were in our view meant for no purpose other than to influence the trial court to the detriment of the appellants even before the hearing of evidence – particularly when the appellants had not been charged with any of those serious offences contrary to section 96 of the Penal Code.

The repeated association of the appellants with "others" in the opening address was also improper. In none of the charges is it stated that the appellant or appellants concerned had committed the offence stated therein "with others not before the court". We accept Mr Chunga's point that no objection had been raised at the time to any part of the Attorney-General's opening address. On that day, February 26, 1985, the record shows that Mr Wetangula, Mr Kiragu and Mr Khamati representing accused 13, 8 and 6 respectively were present. Neither Mr Kokonya then representing the 10th accused was present nor Mr Karanja's representing the 8th accused was present, nor was any explanation offered then or later for their

absence, nor surprisingly did it appear that any of the advocates present had been requested to hold briefs for either of the two absent advocates. Be that as it may, both the two absent advocates, through their own unexplained absence, were not in a position to hear or object to any part of the Attorney– General's opening address. In view of the fact that the opening address turned out to be one of the main grounds of this appeal it surprises us that none of the advocates present took any objection at that time to the undesirable portions of the opening address.

We do not agree with Mr Chunga that because no reference to the objectionable matters in the opening address had been made by the Chief Magistrate in his judgment that he was not influenced by them. Influence is not necessarily manifested in the judgment. Nor is that the only test. We are of the view that parts of the Attorney–General's address were irrelevant and calculated to prejudice and influence the trial court to the detriment of the appellants. We are mindful of all the authorities cited and arguments put forward admirably by both the learned counsel. In view of the above observations we ask ourselves whether any material or significant injustice resulted from the opening addresses. On the strength of the prosecution evidence we are unable to so find.

As to the ground so vehemently argued by both counsel that the Chief Magistrate's actions had left the appellants unrepresented and deprived them of the benefit of the services of their advocates, we observe that on February 22, 1985 the hearing was fixed for 3 days commencing February 26, 1985. The hearing did not finish. At the close of the day's hearing on February 28, 1985 the fifth prosecution witness was still under crossexamination. Before the court was adjourned to a new hearing date the Chief Magistrate had to deal with applications for bail. Ruling on applications for bail was given the following day, that is on March 1, 1985. As the hearing had not been fixed for March 1, 1985, the same had to be adjourned to a new hearing date. The prosecution suggested March 4 to 8, 1985. The dates did not suit defence counsel, Mr Kiragu and Mr Wetangula. Eventually by consent of all the parties the trial was adjourned and the hearing fixed for March 27, 28, and 29, 1985, "and if necessary in April, 1985". As this adjournment and fixing of the new hearing dates were done in compliance with section 205 (1) of the Criminal Procedure Code, we quote below the relevant portions of the sub-section:

> "The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, ..."

The marginal note is "adjournment". In *Jowitt's Dictionary of English Law* 2nd edition by John Burke, "adjournment" is described as

> " a putting off to another time or place, a continuation of a meeting from one day to another…"

The meaning of the word "adjourn" in *Shorter Oxford Dictionary* is given as to defer or put off proceedings to another day; to suspend proceedings and dispense for a time or *sine die*; to cite, or summon for, or remand to, a stated day.

It is clear that what adjournment means is putting off to a future date or day only. On March 1, 1985, the Chief Magistrate had lawfully adjourned the hearing to a future date which was March 27, 1985 onwards in the presence of all advocates who represented some of the appellants. The provisions of section 205 (1) of Criminal Procedure Code were complied with.

The next thing that happened was that three days later on March 4, 1985, Assistant Deputy Public Prosecutor, Mr Chunga for prosecutor, Mr Kiragu for accused No 8, Mr Wetangula for accused 5, 12 and 13 were present before the Chief Magistrate. It is also noted that all the accused were absent. Mr Kokonya, though informed, was absent, and so was Mr Khamati. As it is not noted that he had been informed we can only presume that Mr Khamati for accused 6 had not been informed. In the absence of all the unrepresented appellants and in the absence of Mr Khamati for accused 6 the court made the following order:

> "The hearing in this case will commence at 9.00 a.m from 5th March, 1985 and both counsels advised accordingly. The other advocates to be so informed also. Accused to be produced."

There are serious flaws in the above proceedings of March 4, 1985. It has to be noted that the words used in Section 205(1) of the Penal Code are

> "… The court may before or during the hearing of a case adjourn the hearing…."

So the only acts that a subordinate court is permitted under the Criminal Procedure Code to do in connection with the adjournment and thereafter fixing of a hearing date are those as stated in the sub-section. If during the fixing of the hearing date the court acts in a manner not prescribed in the sub-section then it is acting beyond what it is permitted to do thereunder. It will thereby be acting unlawfully.

Coming back to the proceedings of March 4, 1985, the new hearing date that was fixed for March 5, 1985 whereby the trial was brought forward by a little over 3 weeks, was not an adjournment to a future date within the definition of that term stated above. Further, the new hearing date was fixed in the absence of eight unrepresented appellants and in the absence of one advocate (Mr Khamati) for one of the appellants. The fixing of the hearing date on March 4, 1985 was in contravention of section 205(1) of the Criminal Procedure Code and was unlawful. It must, however, be stressed that under the sub-section the discretion as to fixing of the hearing date is the magistrate's only. Convenience of an advocate or a party is not a consideration mentioned. Subject to relevant considerations such as expeditious disposal of cases, this discretion as a rule takes into consideration the convenience of the accused person and / or his advocate.

Mr Chunga, Assistant Deputy Public Prosecutor, for the respondent strongly argued that the hearing date was brought forward because of the concern felt by the Chief Magistrate for the appellants over the length of period they were spending in remand and that the advocates had not objected on March 4, 1985 to the change in the hearing date. We must point out here that prior to proceedings on March 4, 1985 the chief magistrate's conduct of the case had been in our view above reproach. He had not only displayed concern over the period being spent in remand by the appellants but had also been considerate to the advocates and had fixed hearing dates which did not inconvenience them. In fact, on February 26, 1985 after the Attorney–General's opening address when the court was getting ready to receive evidence from prosecution witnesses three advocates (for accused 6, 8 and 13) applied for adjournment because up to that date they said they had been refused access to the appellants and so had not been able to get proper instructions. It would have been difficult not to support the Chief Magistrate if he had at that time refused adjournment because as he very rightly remarked the advocates had been appearing on behalf of their clients from a much earlier date. Yet they had never brought this complaint to his notice on any of the earlier occasions. Mr Chunga also pointed out that the office of the Attorney–General had not received any such complaint from any of the advocates concerned. In our view such inattention in the preparation of defence in a criminal trial does not reflect any credit on the part of the advocates concerned. However, the Chief Magistrate was considerate to the advocates and allowed adjournment till the afternoon session to enable them to obtain instructions.

But we do not find any substance in the reasons mentioned by Mr Chunga to justify the advancement of the hearing date. The Chief Magistrate must have had in mind the concern over the appellants' remand period on March 1, 1985 when he fixed the hearing date in compliance with section 205(1) of the Criminal Procedure Code from March 27, 1985 and onwards. No extra factor is recorded in the proceedings of March 4, 1985 that could have resulted in such an increased concern over the appellants' remand period. As to the failure on the part of the two advocates present to object to the bringing forward of the date it is clear from the record that the advocates were not asked of their views on the new date.

In fact, what appears to have happened was that the Chief Magistrate merely presented them with his pre-conceived order of the court and which Mr Nowrojee very aptly described was a "*fait accompli*". Further the Chief Magistrate was well aware, having been so informed on March 1, 1985 that the week following did not suit the advocates because of prior commitments and that was why the hearing had been

adjourned to March 27, 1985.

The upshot of this unlawful as well as arbitrary order of the court of March 4, 1985 was the withdrawal of all the four advocates who were by then representing six of the appellants. All the appellants on March 5, 1985 and again on March 6, 1985 applied for adjournment till March 27, 1985 to engage advocates. Adjournment was granted up to March 6, 1985 but refused thereafter and the hearing proceeded on March 6, 1985. The appellants made it clear to the court that they were not participating in the trial. Except for 2nd and 3rd accused none of the other appellants said anything in his defence. However, in the peculiar circumstances of this case, we do not propose to treat the cases of the 2nd and 3rd accused as different from the rest of the appellants.

Mr Chunga spent a great deal of time in analysing the cross-examination of prosecution witnesses up to February 28, 1985, the charge and caution statements of the appellants, and the judgment of the Chief Magistrate to show the line of the proposed defence of each appellant and how the Chief Magistrate had taken into consideration the defence that each appellant had in mind and that, therefore, no prejudice had been caused. We can only say that no amount of such remedial steps can substitute a proper defence made by an accused who is fully participating in a trial with the knowledge that the court is giving him a proper hearing. In most of the authorities that were cited on this issue a principle of major importance that was stressed is that justice must not only be done but must be seen to be done - it must be seen to be done not only by public at large but also by the accused. That did not happen in this case. We are mindful of Mr Chunga's cogent submission that the appellants had not acted in good faith when they had on March 5 and 6 sought adjournment up to March 27, 1985 to seek legal representation. We find it surprising that up to March 1, 1985 none of the eight unrepresented appellants had expressed any desire for or had sought an adjournment to engage an advocate. Suddenly, 4 or 5 days later when the hearing was expected to recommence the unrepresented appellants felt that they now needed legal representation. Of course an accused has a right to engage the services of an advocate at any state of proceedings. But all of them feeling that need on a particular day naturally arouses suspicion. Further on March 6, 1985, almost all of the appellants wanted an adjournment up to March 27, 1985 which was the date to which the hearing had been originally adjourned to suit the convenience of the advocates. The behaviour of the appellants seems to lend support to Mr Chunga's accusation of bad faith. But in fairness the appellants' actions have to be viewed in light of the events that had taken place earlier.

The arbitrary and unlawful proceedings and order of the court of March 4, 1985 was the direct cause for the withdrawal of advocates. It cannot also be denied that the presence of the advocate provided the unrepresented appellants a shield which was lost by the withdrawal of the advocates. We are satisfied that section 77(d) of the Constitution was breached. Being mindful of all the relevant factors and circumstances, we find that on this ground we are unable to support any of the convictions in respect of any of the four counts. The appellants are entitled to an acquittal on all counts on this ground.

That brings us to the question of whether or not to order a retrial before another magistrate under section 354(3) of the Criminal Procedure Code. We shall also consider the question of sentence with this issue.

We have considered the evidence for the prosecution carefully. *Primafacie* it is strong evidence. We are also mindful of the fact that the appellants had not put forward proper defences as provided by law. We are also keeping in mind the authorities cited on this issue on behalf of both sides. We are satisfied that this would be a proper case to be remitted for retrial by another court of competent jurisdiction. That brings us to the question of sentence imposed by the Chief Magistrate. On count 1 on which all the fourteen appellants were jointly charged, the appellants, all young people and first offenders with the probability of having acted under a mob influence, were each given the maximum prison sentence which was a term of 6 months' imprisonment. The Chief Magistrate had remarked on the fact that the appellants had been in custody for one month but that does not appear to have affected the Chief Magistrate in his decision as regards the sentence. We understand that the appellants have served their sentences in respect of counts 1 and 3 and that some of them have been released. We are of the view that it will be unfair and justice will not be seen to be done if we now order a retrial.

The upshot is that the conviction of each appellant on every count on which he was convicted is now

quashed, the sentence/s in respect of such conviction/s are set aside and any appellant still serving sentence is ordered to be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 19th day of July, 1985.

A.M COCKAR

JUDGE

E.N.A TORGBOR

JUDGE