



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 6 OF 2018**

**BETWEEN**

**JOSEPH MUNYAO MAKAU .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Ojwang, Odero, JJ.)  
dated 7<sup>th</sup> September, 2010***

***in***

***H.C.CR.APP. No. 121 of 2009)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant, Joseph Munyao Makau, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 26<sup>th</sup> March 2008 at about 2:30 p.m. at Kichaka Simba Village in Kwale District, within the then Coast Province, robbed John Maundu of a red wallet, travelling bag, three T-shirts, three exercise books, a pair of blue plastic shoes and cash Kshs.700.00 and at/immediately before or immediately after the time of such robbery while armed with offensive weapon, namely, a knife, he threatened to use actual violence to the said John Maundu.

2. The appellant was tried before the Magistrates' court at Kwale where the prosecution called four witnesses. The appellant gave sworn testimony on his own behalf. The trial court was satisfied that the prosecution had proved its case against the appellant to the required standard and convicted him in a judgment delivered on 9<sup>th</sup> July 2009. He was subsequently sentenced to suffer death. His first appeal was dismissed by the High Court (*J.B. Ojwang and M. Odero, JJ.*) in a judgement delivered on 7<sup>th</sup> September 2010.

3. In the present second appeal, the main complaint by the appellant as canvassed by learned counsel *Miss. Aoko Otieno*, is that his right to fair trial was violated; that although he requested to be supplied with witness statements to enable him conduct his defence, he was compelled by the trial court to proceed with the trial without the witness statements.

4. Counsel referred us to the record of proceedings before the trial court and pointed out that in the course of the trial, the appellant indicated that he had difficulty proceeding with the hearing without the witness statements. Yet, the trial court compelled him to carry on without the witness statements; that the appellant was facing a serious charge and had no legal representation and extra caution was therefore called for in the conduct of the trial; and that the appellant was highly prejudiced.

5. Furthermore, counsel argued, the sentence meted out is manifestly harsh having regard to all the circumstance under which the offence was committed. Counsel urged us to set aside the death sentence and substitute the same with time served and set the appellant free, in the event that we uphold the conviction.

6. Conceding the appeal, learned Senior Prosecution Counsel **Mr. Ketoo**, agreed with counsel for the appellant that the appellant's right to fair trial was violated in that he was compelled to carry on with the trial without being provided with witness statements.

7. We have considered the appeal and the submissions. Under Section 361 of the Criminal Procedure Code our duty as the second appellate court is to consider only points of law. In

**Kaingo vs. R (1982) KLR 213** at p. 219 this Court stated that:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)***

8. The only point of law arising in this appeal is whether the appellant's right to fair trial was violated by the trial court by compelling him to proceed with the trial without having been supplied with witness statements.

9. In **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, a decision rendered by this Court prior to the promulgation of the Constitution of Kenya, 2010, the Court expressed:

***“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”***

10. In that case, the Court cited with approval an earlier English Court of Appeal decision in **R vs. Ward [1993] 2All E R 557** where it was stated that the duty of disclosure continues throughout the trial. The English court stated:

***“Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.”*** [Emphasis]

11. In the present case, the record shows that on 16<sup>th</sup> May 2008, prior to the commencement of the trial, the court ordered that witness statements be provided to the appellant. On 31<sup>st</sup> October 2008, after the first prosecution witness had testified and before the second prosecution witness took the stand, the appellant indicated in no uncertain terms that he was not ready to proceed with the trial in the absence of witness statements. He stated, *“I am not ready as I do not have even the statements”*. The trial court did not heed the appellant's cry and instead ordered the, *“case to proceed as it is already a part heard accused has never been keen on statement.”* (sic).

12. In those circumstances, counsel for the appellant was justified, in our view, in complaining that the appellant's right to fair trial was violated. As already noted, the duty of disclosure is a continuing one during the trial. The trial court erred in taking the view that the appellant had in effect waived his right to the witness statements on account of the first prosecution witness having testified without his witness statement being supplied to the appellant. We are therefore satisfied that there is merit in this appeal which was rightly conceded by the respondent.

13. Having found that the appellant's right to fair trial was violated, ordinarily, we would have ordered a re-trial. However, considering the passage of time since the offence was committed, approximately 12 years ago, and considering also the impact that might be occasioned in locating witnesses for purposes of a re-trial, as well as the fact that the appellant has been in custody since that time, we are inclined allow the appeal.

14. Accordingly, we hereby quash the conviction, set aside the sentence and order that the appellant be set at liberty unless otherwise lawfully held.

***Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.***

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**