IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, W. KARANJA, KOOME, JJA

CRIMINAL APPEAL NO. 5 OF 2015

BETWEEN

PETER KAMONJO NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeal from the Judgment of the High Court of Kenya at Nairobi*

(Kimaru & Nyamweya, JJ.) dated 6th December, 2013

in

***H. C. CR. A NO. 557 of 2009*)**

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JUDGMENT OF THE COURT

1. Peter Kamonjo Njoroge (the appellant) was charged before the Chief Magistrate's Court in Kiambu with the offence of robbery with violence contrary to ***Section 296(2) of the Penal Code***. The particulars of the charge were that on 20th July, 2004, on or about 9.00 pm along Moi Road Junction, Magomano village, he jointly with others, armed with dangerous weapons, namely pangas, iron bars, hammers and knives robbed **Henry Kangara Njoroge**, (the Complainant), of safari boots, Kshs.3,000/= cash, national ID, pocket diary, jacket and Kenya Commercial Bank plate, all valued at Kshs.8,000/- and at or immediately before or immediately after the time of such robbery used actual violence by striking the complainant.

2. The appellant first appeared in court for plea taking on 11th December, 2008 whereupon he denied the charge and a plea of not guilty was entered. The case (***CR. Case No 2095 of 2008***) was partly heard by **Hon. K. Muneeni, Ag. P.M.** who disqualified himself after hearing the evidence of three witnesses. On 18th March, 2009, the matter was transferred to **Hon. A. Ongeri (Mrs.) P.M** who directed that the same be heard *de novo*. Hearing of the matter therefore started afresh and proceeded before **Hon. A. Ongeri (Mrs.) P. M** to full hearing albeit with difficulty due to disturbance and threats from the appellant. At various instances during the hearing of the case, the learned trial magistrate resorted to having the case proceed in the appellant's absence after the testimony of the complainant in accordance with ***Section 77(2)(f)*** of the retired Constitution.

3. The prosecution called 7 witnesses in support of its case. Upon the close of the prosecution's case, the appellant was taken back to Court for delivery of the ruling by the learned trial magistrate who found that the appellant had a case to answer as per ***Section 211 Criminal Procedure Code,*** and placed him on his defence. When asked to make an election as to how he was going to tender his defence, the appellant said he was not going to participate in the proceedings. The learned magistrate recorded that the appellant continued to make it difficult for the court to hear the matter in his presence as he continued being rude and unruly. In absence of any defence by the appellant, the matter was reserved for judgment. In a judgment rendered on 2nd December,2009 the appellant was found guilty as charged, convicted and sentenced to death as prescribed by law.

4. Dissatisfied with the decision of the learned trial magistrate, the appellant filed an appeal before the High Court (***H. C. CR. A No. 557 of 2009***). **Kimaru & Nyamweya, JJ.** dismissed the appeal, and upheld both conviction and sentence. Relentless, the appellant brought this second appeal before this Court on the following grounds:-

1) That the high court failed in its duty by failing to re-evaluate the entire evidence adduced as it was duty bound to and as a

result reached to a decision which was insupportable having regard to the evidence.

2) That the high court failed to observe that the case for the prosecution was not proved beyond reasonable doubt.

3) That the high court made an error in law by failing to observe that the failure to accord me (sic) **the appellant an opportunity to present my defence was a total violation of my constitutional rights to a fair trial and violated article 25 (c) of the constitution.**

4) That the learned trial judges of the first Appellate Court erred in law in failing to hold that the Appellant was unfairly deprived of his Constitutional right to a fair hearing.

5) That the learned trial judges of the first Appellate Court erred in law in failing to find that the Trial of the Appellant and the subsequent conviction and sentence to hang was riddled with fundamental irregularities and was in breach of the rules of Natural Justice all of which taken together amount to a total miscarriage of justice.

5. Learned counsel for the appellant, **Mr. Mogikoyo A.O.,** filed a supplementary memorandum of appeal bearing two grounds which are basically on the alleged violation of the appellant's right to a fair trial as espoused under ***Section 77*** of the retired Constitution which is replicated under ***Article 50*** of the current Constitution. According to counsel the appellant's trial was riddled with irregularities and was in breach of the rules of natural justice as he had not been accorded a hearing. He noted that apart from the 1st witness who was cross examined by the appellant, all other witnesses testified in his absence and they had not therefore been cross examined. Moreover, counsel submitted that the appellant was not given the opportunity to defend himself yet the 1st appellate court found that the charge was proved beyond reasonable doubt. He urged that there was miscarriage of justice and this Court should so find and order a retrial. On the principles to guide this Court when making orders for retrial, counsel cited cases of ***Phillip Kipngetich Keter -vs- Republic, Criminal Appeal No. 327 of 2010*** and ***Yusuf Sabwani Opicho –vs- Republic, Criminal Appeal No. 208 of 2008***.

6. On her part, **Mrs G. Murungi,** learned Senior Assistant Director of Public Prosecution (SADPP), opposed the appeal and submitted that under ***Section 77(2) (f)*** of the retired Constitution the trial court could proceed in the absence of an accused person who makes it difficult for the proceedings to continue in his presence. She further submitted that the Court was properly guided under ***Section 77*** *(supra)* and that the appellant should not be heard to complain when he is the one who made it impossible for the Court to proceed in his presence. She confirmed that indeed the issue of whether the exclusion of the appellant from the trial was a contravention of the right to fair trial under ***section 77(2) (f)*** of the previous constitution was not analyzed by the High Court but contended that this Court can still look at the proceedings. In this regard, she pointed out that:-

a) the trial court concluded that it managed to conclude the hearing with great difficulty as evident on page 9 of the proceedings.

b) the matter had to start *de novo* before another court after the first magistrate disqualified himself following threats from the accused as clearly stated on page 10-12 of the record.

c) a medical report was filed in court and the accused was found fit to stand trial.

d) at page 20 of the record, the magistrate ordered the court to proceed in the absence of the accused for shouting at the prosecution.

e) at page 27 of the record, the appellant told the magistrate he would not sit down and that she should do what she wanted.

Furthermore, there was evidence on record that the appellant was found in possession of the stolen items immediately after the robbery. Mrs. Murungi urged us to dismiss the appeal as the appellant was the author of his own misfortune as he was solely responsible for being excluded from the proceedings. In response to SADPP's point on the exclusion of the appellant from trial, counsel for the appellant submitted that the exclusion of the accused from the proceedings should have been the exception.

7. This being a second appeal, this Court's jurisdiction is limited to matters of law pursuant to ***Section 361(1) (a) of the Criminal Procedure Code***. It is trite that this Court can only interfere with the decision of the superior court on facts where there was an omission or commission that should be treated as a matter of law. In ***Karani vs. R*** **[2010] 1 KLR 73** this Court set out the parameters where the Court can interfere with the decision of the superior court regarding matters of fact as follows:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. Whether Betty and Chege were credible witnesses are matters of fact and we would be very reluctant to interfere with the concurrent findings of the two courts on such matters."*** *(Emphasis added)*

Similarly, in ***Karingo v Republic*** ***[1982] KLR 213*** the Court stated as follows:

> ***"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." (Emphasis added)***

8. Having considered the record, submissions by counsel and the relevant law, we identify the issues that fall for our determination as follows:-

> **i. Whether the exclusion of the appellant from the trial was a contravention of the right to fair trial under section 77(2)(f) of the previous Constitution**
>
> **ii. Whether the learned judges of first appellate Court failed to reevaluate the evidence and as a result occasioned a miscarriage of justice**

On the first issue**, *Section 77*** of the previous Constitution provided that an accused person has right to fair trial. Under Subsection (2) thereof, paragraph (f) read as follows:-

> ***"…And except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the Court has ordered him to be removed and the trial proceed in his absence."***

Under the new dispensation, a similar provision on an accused person's right to fair trial is given under ***Article 50 (2) (f) of the Constitution of Kenya, 2010*** thus:-

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed."***

9. We appreciate that the impugned trial proceeded and was concluded under the old constitutional regime and so **Article 50** of the Constitution is not therefore applicable. We have however found it necessary to make reference to the said article because it replicates the previous provision. This in our view is because however vibrant and robust the current Constitution is in terms of safeguarding an individual's fundamental rights, it is alive to the fact that human beings will not always behave as expected of them by the existing laws and norms of a civilized society. The Constitution may guarantee a party all the rights contained in all the human rights instruments, but cannot force an unwilling citizen to submit himself/ herself to the protection of such instruments if indeed they don't want to.

10. There is a popular African adage that says that you can take the cow to the river but you cannot force it to drink water. The appellant was accorded the opportunity to be heard. From the record, after the first trial magistrate disqualified himself as is evident from the proceedings taken on 18th March, 2009 the Principal Magistrate, Mrs Ongeri (as she then was) directed that the matter was to proceed *de novo.* She was therefore giving the appellant another chance to be heard afresh by an impartial court which did not know the history of the appellant's conduct in the earlier court. From the record, it is clear that from the word 'go' the appellant started giving that court problems. The learned magistrate managed to take evidence of one witness but thereafter the appellant made it impossible for the court to proceed in his presence due to his persistent disruptive and unbearably disrespectful conduct in court. All this was recorded in the proceedings for instance at pages 9,12,13, 20 and 27. At page 32 of the record, after being placed on his defence, the appellant pointing a finger at the magistrate said he was not going to participate. After recording what had transpired, the learned magistrate proceeded to set down the case for judgment while noting that the appellant had continued to make the hearing of the case difficult and that despite several warnings he was still rude and unruly.

11. We have decided to go into those facts in detail because the first appellate court did not do so in its re -evaluation of the evidence before them. We note however that the issue had not been properly captured in the appellant's memorandum of appeal before the High Court because his only complaint as espoused in ground three thereof was that his defence had been rejected and not that he had been excluded from the proceedings.

12. Having considered the grounds raised in this appeal, we are not persuaded that the appellant has demonstrated to this Court that his exclusion from the trial court proceedings was unreasonable or unjustified. All the court is required to do is accord a party an opportunity to be heard. If a party deliberately and adamantly refuses to take such opportunity he cannot thereafter be heard to complain that he was not heard. Furthermore, the appellant cannot seek to benefit from his own misconduct. In this respect, this Court in the case of ***Daniel Karuma alias Njaluo and Republic [2015] eKLR, Criminal Appeal No. 157 of 2014*** when determining the issue on exclusion of the accused from trial put it aptly as follows:

> ***"The Appellant's right to be present during the trial was dependent on his conducting himself in a manner consistent with the sobriety of the trial. That being the position the appellant compromised his right to be present during the trial by failing to treat the trial proceedings with the reverence and seriousness that it deserved. He cannot leverage on an outcome brought about by his own misconduct to vilify the proceedings of the trial court."***

Therefore, after considering the record, the submissions by both counsel and the law as articulated in the above authority, we find the appellant's right to fair trial under ***Section 77 (2)*** of the retired Constitution was not violated as the appellant was properly excluded from the proceedings due to his conduct. He was taken to the river of justice but he resisted to drink the water that flowed freely from it. The learned magistrate did what she was supposed to do in the circumstances. The appellant was the author of his own misfortune, and he cannot benefit from his own misconduct by seeking to have a second bite at the cherry. The two grounds of appeal urged before us therefore fail.

13. Having gone through the evidence on record, we also find that even in absence of the appellant's defence, both courts below properly analysed the evidence on record, made concurrent findings of fact, which are not challenged in this appeal, and drew the proper conclusions. We are satisfied the appellant was properly convicted. The appeal is totally devoid of merit and is hereby dismissed. There being no appeal against sentence or invitation to this Court to interfere with the same, we uphold both conviction and sentence.

Dated and delivered at Nairobi this 8th day February, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR