IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 14 OF 2018

BETWEEN

JOHN KARIUKI GIKONYO...APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Ongeri, J.) delivered on 6th December, 2016

in

H.C.C.A No 54 of 2015)

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JUDGMENT OF THE COURT

[1] John Kariuki Gikonyo (*the appellant*) has preferred this second appeal challenging his conviction and sentence for the offence of robbery with violence. Our role as the second appellate court was succinctly set out in ***Karani vs. R* [2010] 1 KLR 73** wherein this Court expressed itself 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."***

[2] We will start by giving a brief background of the facts before the two courts below. On 11th December, 2012 at around 11.37 am, Sharmina Firdaus *(the complainant- PW2)* was at her house in Kizingo Mombasa with her two children and two house helps. She was busy trying to reach her husband on phone albeit unsuccessfully, when she suddenly saw the appellant and another man enter her house which was within a block of houses. The two intruders proceeded to tie PW2 on the wrists using a headscarf and ordered her to lie down. The intruders demanded to be shown the safe and cupboard where valuables were kept. At the time, the second intruder who was wielding a knife threatened to kill PW2 and her children in the event she failed to comply with their orders. During the ensuing commotion, PW2's husband tried to call her back but the intruders forbade her from taking the call. Unknown to them however, PW2 had already pressed the receive button on the phone; as a result of which her husband, Rana Mohammed *(PW1)* was able to hear his wife as she beseeched the intruders not to harm her or the children. He immediately left for his home, accompanied by some of his employees.

[3] Meanwhile, the intruders had managed to get PW2 to show them where the safe was located. According to PW2, she identified the appellant as the one who locked her in the bathroom and thereafter proceeded to ransack the room. All this time he was warning her of dire consequences to herself and the children in the event she raised an alarm. The intruders took from the safe, two cameras, two wrist watches, gold rings, jewels, three mobile phones, as well as the knife they had used to threaten them. As the attackers were attempting to flee from the scene, PW2 ran to the window and made a distress call to all and sundry that there were thieves on the loose.

[4] By then, PW1 and his employees had arrived at the gate and that was when he spotted two men with bags attempting to leave the building. When he ordered them to stop, the two took off, one of them scaled the wall and jumped off the building while the appellant tried to hide in the roof of the building. Together with the guards who manned the gate, PW1 gave chase, one of the attackers managed to escape after jumping off to the neighboring building, although he was also apprehended after a short while. The appellant was apprehended while

still on the roof, and soon thereafter, police were called and Corporal Eunice Mutua *(PW3)* arrived with two other officers and re-arrested the two attackers, the appellant from the roof and the other attacker, as he was trying to escape.

[5] The two attackers were later charged before the Senior Resident Magistrates' court with the offence of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the Penal Code. The particulars of the charge were later amended and read as follows:

> ***"On the 11th day of December, 2012 at Kizingo area in Mombasa County, jointly with others not before court, while armed with an offensive weapon namely a kitchen knife, robbed Sharmina Firdaus of 12 bangles, 2 cameras make canon, 4 mobile phones make Blackberry bold, 2 Samsung Galaxy and Nokia N85, 13 pairs of earrings, 8 pieces of necklaces, 18 finger rings, a purse, 3 wrist watches make Rado, Titin and Certina, 2 cash safes make Vepox and cash Kshs. 158,000/- all valued at Kshs. 3,477,000/- and at or immediately after the time of such robbery threatened to use actual violence to the said Sharmina Firdaus."***

[6] Both denied the charge, trial proceeded with the prosecution calling evidence of 4 witnesses from which the learned trial magistrate (Ruguru Ag. SRM), found the two accused persons had a case to answer and placed them on their defence. However, before the hearing of the defense case could take off, the appellant's co-accused absconded and was never traced. Nonetheless, the court proceeded to conclude the trial, with the appellant opting to give an unsworn statement in his defence. He denied having committed the offence and stated that on the material date, he had gone to Kizingo Complex in search of a debtor who owed him Kshs.40,000/- and who had requested to meet him at the complex. On arrival he said, one of the guards manning the complex asked him whether he had seen some two individuals who had tried to escape. The appellant retorted that it was not his business to keep an eye on people, at which point the guard descended upon him with kicks and blows and then accused him of being a thief, which he knew nothing about. Unconvinced of the appellant's version, the trial magistrate found him guilty and sentenced him to suffer death.

[7] The appellant unsuccessfully mounted an appeal against the conviction and sentence before the High court. In a judgment delivered on 6th December, 2016, **(Ongeri, J.)** upheld the findings of the trial court and dismissed the appeal; hence this second appeal, which is predicated on the appellant's homegrown grounds of appeal as well as some supplementary grounds of appeal filed by Mr. Wamotsa, his learned counsel. In a nutshell, the appellant impugns the concurrent findings of law by the two courts below arguing that the two courts below failed to find that the case against the appellant was not safe to sustain a conviction as the prosecution failed to call crucial witnesses; ignored the appellant's defence; shifted the burden of proof; failed to evaluate the evidence and to find there was no evidence of the recovered exhibits; as the exhibits presented in court were at variance with the charge sheet which cast doubt as to whether a robbery ever occurred as claimed. Finally and in the alternative, the two courts failed to find that the evidence before court supported a case of attempted robbery and not a robbery.

[8] This appeal was canvassed through written submissions and oral highlights made during the plenary hearing. Mr. Wamotsa, learned counsel for the appellant argued that the amended charge sheet was fatally defective as it was never signed by the Director of Public Prosecutions (DPP) or his delegate as required under **Article 157 (6)** of the Constitution. Instead, it was signed by a police officer who was unqualified to do so, which meant that the ensuing proceedings were fatally defective. Counsel argued that this was a fundamental lapse that touches on the revered doctrine of separation of state powers between the prosecutorial and investigative agencies, thereby impacting on the appellant's fair trial. Moving on, he submitted that the property said to have been stolen was never adequately described in the charge sheet, rendering the charge sheet fatally incurable since the appellant was incapable of fully defending himself; that as things were, it could not be conclusively said that the items in the charge sheet were indeed the items recovered or even the exhibits before court, given that their respective serial numbers were never disclosed in the charge sheet.

[9] In addition to the foregoing, counsel went on to fault the findings of the two courts below which he submitted was based on grave irregularities of law and procedure. To begin with and in his view, the substance of the charge was never explained to the appellant, which was a violation of **Article 50 (2) (b)** of the Constitution as well as **Section 207 (1)** of the Criminal Procedure Code. Citing the decision in the case of ***Charo v. Republic [1982] KLR***; counsel emphasized that failure to explain the ingredients of a charge to an accused person renders a trial unfair. He likened this to a failure by court to provide an interpreter as was the case in ***Joseph Kamau Gitau v. Republic [2006] e KLR*** and stated that on that ground alone, the first appellate court should have acquitted the appellant.

[10] Counsel for the appellant also faulted the trial court for what he termed as failure by the court to inform the appellant of his right to legal representation as well as his right to recall witnesses following the amendment of charge sheet. In his submissions, this offended the provisions of **section 214 (1) (ii)** of the Criminal Procedure Code. Citing the decision in the case of ***Harrison Mirungu Njuguna v. Republic, Criminal Appeal No. 90 of 2004 (UR)***, he argued that failure by a court to inform an accused person of his legal rights is not a curable anomaly. Rather, that it is a fatal defect that goes to the root of a fair trial as the appellant was unrepresented. Moreover, it was imperative for the trial court to inform the appellant of his right to recall witnesses as well as his right to legal representation and having failed to do so, the trial court offended the provisions of **Article 50 (2) (g)** of the Constitution and the only fair remedy in the circumstances was an acquittal.

[11] Counsel further faulted the trial court for failing to examine PW2 under oath. In this regard, he submitted that if a charge is likely to attract a death penalty, in the event of conviction, the testimony upon which such conviction is based, must of necessity, be sworn testimony. The case of ***Samuel Muriithi Mwangi v. Republic [2006] e KLR*** was cited to bolster this assertion. Counsel contended that since the conviction herein was based on the testimony of PW1, who was not under any moral obligation to speak the truth as no oath was administered to him; the conviction was unsafe and the first appellate court should have found as much. Another incurable irregularity pointed out by counsel for appellant was an allegation that the trial court failed to sign the judgment and that as a result, the same offended the provisions of **section 169 (1)** of the Criminal Procedure Code. On this premise, counsel was of the view that the first appellate court should have declared the judgment a nullity and acquitted the appellant; as not even a retrial could suffice given the litany of inexcusable errors and violations of the law, which had greatly prejudiced the appellant.

[12] Moving onto the other grounds of appeal, counsel for the appellant submitted that the High court as the first appellate failed to re-evaluate and re analyze the evidence, particularly with regard to the testimonies of PW1 and PW2. He faulted the finding by the High court that the appellant was identified by PW3 which was not supported by the evidence on record; had the said court re- evaluated the evidence, it would have found the arrest of the appellant was dubious given that it was unclear whether he was ever found in possession of any of the

allegedly stolen items; moreover, the prosecution failed to call crucial witnesses, the police officers and the guards who were the first to respond at the scene were never called to testify yet their evidence was critical in ascertaining the true chain of events. Counsel contended that given this failure, coupled with the appellant's version of how he was arrested, reasonable doubt was cast as to the veracity of the prosecution case. Consequently, it was his position that both courts below should have inferred that the testimony of those witnesses who were never called would have been adverse to the prosecution case and on this ground, should have resolved the resulting doubt in favour of the appellant by acquitting him.

[13] On the issue of evidence of identification, counsel further contended that identification of the appellant by a single witness was not free from error given the prevailing circumstances which were unfavorable for a positive identification. This is because the duration of the encounter between PW2 and the appellant was never interrogated nor was their proximity and the appellant's view of her assailant elaborated on. While conceding that the appellant had never raised the issue of the necessity of an identification parade before, counsel nonetheless contended that the witnesses' identification of the appellant was unreliable given his explanation of how he came to be at the complex. Lastly, the appellant's *alibi* was wrongly rejected by the two courts below and that all in all, the prosecution failed to prove their case beyond reasonable doubt.

[14] This appeal was opposed; although the State did not file written submissions, **Mr. Isaboke** learned Senior Principal Counsel, made oral submissions. He stated that the offence occurred in broad day light with PW2 present at the scene. Also the time appellant took in the house with PW2 was sufficient for her to identify him and as a result, the identification of the appellant cannot be faulted. Moreover, the appellant was apprehended on the roof behind a water tank at the *locus in quo* and an identification parade was therefore not necessary as there was no mistake as to who the robbers were. On the issue of amendment of charge and the necessity to recall a witness, counsel submitted that recalling the witness was unnecessary as the evidence on record did not materially change and it supported the charge. Counsel for the state was of the view that the appellant was always at liberty to instruct counsel to represent him or make an application seeking legal representation from the National Legal Aid Board. Counsel urged us to find there was no justification for disturbing the concurrent findings by the two courts below including the fact that the appellant's defence lacked credibility and was rightly rejected. On that premise, counsel for the state urged the dismissal of this appeal.

[15] This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In ***David Njoroge v Republic*, [2011] eKLR**, this court stated that under **section 361** of the Criminal Procedure Code:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213".***

The ingredients for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** were set out in ***Johanna Ndung'u vs Republic- Criminal Appeal No 116 of 2005 (unreported)*** as follows:-

> ***a) if the offender is armed with any dangerous or offensive weapon or instrument, or;***
>
> ***b) if he is in the company with one or more other person or persons, or;***
>
> ***c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.***

Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. See ***Oluoch vs Republic (1985) KLR 549***. Evidential facts tendered for proof of the ingredients of the offence must however be cogent and consistent save for such minor flaws as are curable under **section 382** of the Criminal Procedure Code**.**

[16] There are concurrent findings by the two courts below that the appellant was positively identified by PW2, who was the victim of robbery and that he was arrested at the scene of crime while attempting to hide and take off by hiding in the roof of the building. As aforementioned, on second appeal we are limited to dealing with issues of law only. As conceded by counsel for the appellant the issue of identification was neither raised before the first appellate court nor the trial court. This issue therefore does not fall for consideration by this Court (see. ***Morris Mutie Thomas v. Republic [2016] eKLR***).

[17] Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in ***Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009*;** held as follows:

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

[18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal. Consequently, the questions that linger for our determination in this appeal are threefold;-

> **a) Whether the first appellate Judge failed to consider PW2's evidence was not administered on oath and the effect of such**

evidence in a criminal trial.

b) The effect of failure by the prosecution to call crucial witnesses.

c) Whether the first appellate court failed in its duty to re analyze the evidence and misdirected itself and if so, the consequences thereof.

[19] On the first issue, counsel for the appellant contended that the trial court was duty bound to ensure that PW2 testified under oath, given the gravity of the sentence in the event he was convicted and the importance of administering an oath to a witness in a criminal trial. Secondly, he faulted the two courts below for failing to find that crucial witnesses were not called to testify; failure to consider the appellant's defence and lastly that the prosecution had failed to demonstrate a nexus between the recovered items, those in the charge sheet and those found on the appellant (if any).

[20] On the first issue **section 151** of the Criminal Procedure Code, requires that evidence must be given on oath. The section provides as follows;

> ***"Every witness in a criminal cause or matter <u>shall</u> be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."*** *(Emphasis added)*

The issue also finds mention under **section 15** of the Oaths and Statutory Declarations Act, Cap 15, which provides for the affirmation of persons who object to the taking of an oath; while **section 16** thereof sets out the form of an affirmation to be administered. Similarly, the authors of **Archbold, Criminal Pleading Evidence & Practice, 2002** address the issue by stating that:-

> ***"The general common law rule is <u>that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he has previously been sworn to speak the truth.</u> ….This general common law rule is subject to important statutory exceptions (post. SS 8 – 31 et seq.) The witness must be sworn in open court."***

[21] Under Kenyan Law, the only discernible exception to this rule is with regard to the testimony of children of tender years; who do not understand the nature of an oath (see. **section 19** of Cap 15). Generally therefore, the testimony given in criminal cases must always be either under oath or affirmation. In the present case, though the record is indicative that the other prosecution witnesses were duly sworn, it is silent as to the swearing or affirmation of the star witness, PW2. As rightly submitted by counsel for the appellant, the consequences of testimony given without oath or affirmation are dire, as the defect in turn impacts on the legality of the conviction (**Samuel Muriithi case** *supra*). The learned first appellate Judge erred in failing to address this issue even though the same was raised before her. What is the way forward? As per **Phipson on Evidence (15th Edn) at page 169,** where a witness has given testimony without oath or affirmation, the defect is curable by recalling the witness and administering the oath or affirmation then asking him/ her to ratify his previous testimony. However, where the trial has already been concluded as is the case herein, the recourse left is either an acquittal or a retrial, depending on the circumstances of the case.

[22] In this case, **Mr. Wamotsa** had urged this Court not to order a retrial, arguing that the appellant had suffered gross and unexplained violations of his rights and was thus greatly prejudiced. We are alive to the fact that this trial began six years ago in 2012 and that the prosecution called only a total of four witnesses; with the appellant being the sole defence witness. It has not been argued that the said witnesses are unavailable in the event a retrial is ordered. We also find given that the other issue of failing to re-evaluate the evidence would be futile as it would revolve around PW2's testimony, which as stated above was a nullity *ab initio*.

[23] We have anxiously considered whether this is a matter that is suitable for a re- trial. In this regard, we have reviewed some of the principles that guide the court on whether to order a retrial in the cases of; ***<u>Ahmedi Ali Dharamsi Sumar V Republic</u> (1964) E.A. 481***. In that case the predecessor of this Court held inter alia;-

> ***"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person."***

Also the case ***Fatehali <u>Manji V Republic</u> (1966) E.A. 343***, by the same Court where it was held that;

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."***

[24] Failure to swear or affirm PW2 was a mistake by the trial court and the prosecution had nothing to do with it. Unfortunately, counsel for the prosecution did not address us on whether the witnesses would be available to testify if an order of retrial is made six years after the offence occurred in December 2012. Witnesses change their addresses, although perhaps the formal witnesses were police officers, we have no information of whether they are in service or whether the documents produced as exhibits are available. With these reservations in mind, we are also conscious that a re- trial should not prejudice the appellant who has served a number of years in prison. The benefit of the question that was not answered on whether he would be prejudiced by a re- trial goes to the appellant.

[25] The appeal herein is hereby allowed, we quash the conviction and set aside the sentence of death. Unless the appellant is otherwise lawfully held, he is set at liberty forthwith.

Dated and delivered at Mombasa this 7th day of 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