IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 392 OF 2010

BETWEEN

CHARLES KIPKURUI CHEPKUONY ……..……APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kericho (G.B.M. Kariuki & D.K. Maraga, JJ) dated 2nd November, 2010

in

H. C. CR. A. NO. 30 OF 2009)

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JUDGMENT OF THE COURT

The appellant CHARLES KIPKURUI CHEPKUONY appeals to this Court against the decision of the High Court at Kericho (G.B.M. Kariuki and D.K. Maraga, JJ, as they then were) which had dismissed his first appeal against conviction and the sentence of death imposed on him by the Senior Principal Magistrate at Kericho. He had been charged with a single count of robbery with violence and two counts of malicious damage to property contrary to **section 296(2)** and **339(1)** of the **Penal Code,** respectively.

The particulars of the capital robbery charge were that on the 28th day of January 2008 at Kotetine village, Chilichila Division in Kipkelion of the Rift Valley Province, jointly with others not before court, and while armed with offensive weapons namely bows and arrows, he robbed **Wilson Soi Wanyama** for his two heads (sic) of cattle all valued at Kshs. 30,000 and contemporaneously with that robbery used actual violence on the victim.

The prosecution called a total of nine witnesses and, the trial Magistrate finding that a *prima facie* case had been made out against the appellant, he was called upon to make his defence which he did by way of an unsworn statement. He called no witnesses.

As we have stated the trial court found him guilty of the robbery with violence charge and sentenced him

to death but acquitted him on the malicious destruction of property charges. His appeal to the High Court having been dismissed, he raises some eight grounds of appeal before us through the Supplementary Memorandum of Appeal filed and argued by his learned counsel **Mr. Maragia.**

Whereas Mr. Maragia largely dealt with the merits and demerits of the appellant's conviction which he contended was erroneous and unsupportable, he did raise two issues which, though not concerned with the evidentiary basis of the appellant's conviction, we consider of sufficient moment to dispose of the appeal. Those issues both arise from what transpired before the trial court on 5th May 2009, the day the trial Magistrate found that the appellant had a case to answer. That finding was embodied in a ruling which stands out for its unusual length and detailed foray into an analysis of the evidence. The said ruling is worth setting out in full;

> ***"The accused was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on 28.1.08 at Kotetine village, jointly with others not before court and while armed with offensive weapons namely bows and arrows robbed Wilson Soi Wanyama of two cows worth shs. 30,000/= and used violence in the course of the robbery.***
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> ***The second charge is malicious damage to property contrary to section 339(1) of the penal code. The particulars of the offence are that on 9.2.2008 at Kotetini villages, jointly with others not before court willfully and unlawfully damaged the house of Wilson Soi Wanyama valued at Kshs. 700,000/=.***
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> ***The third offence is similar to the second one and particulars are that on 9.2.08 he willfully and unlawfully damaged the house of David Marindany Kirui valued at Kshs. 9,000/=.***
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> ***Wilson Wanyama Soi (PW1) told the court that the accused led a group of raiders who shot him with an arrow and drove away his cattle. They also destroyed his houses and goods. PW2, PW3, PW4, PW5 and PW6 all told the court that they saw the accused in the group that stole the cattle and that he was armed with a bow and arrows. They also saw him damaging structures belonging to PW1 and PW5.***
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> ***From the foregoing, I find that a case has been made out sufficiently to call upon the accused to make a defence. The accused person is accordingly put on his defence on all three charges. All the reasons and concise evaluation of all evidence adduced will be in the final judgment."*** (our emphasis)

It is argued for the appellant that the learned Magistrate went way beyond his remit under **section 211** of the **Criminal Procedure Code** and betrayed the fact that he had pre-determined the case before placing the appellant on his defence. He analyzed the evidence and made definitive findings that the prosecution witnesses had seen the appellant at the scene of the crime and that indeed those were the same reasons for his eventual conviction of the appellant.

Ms. Nyarike for the State sees nothing wrong with the manner that the learned trial Magistrate handled the ruling on a case to answer. With respect, she cannot be right. A ruling on a case to answer is not the occasion for a detailed analysis of the prosecution case already tendered unless the court intends to acquit the accused person at that stage. All that is required is an indication, in little more than a sentence, that a *prima facie* case, namely one which, as was aptly put by the predecessor of this Court in **RAMANLAL BHATT -VS- REPUBLIC** [1957] EA 332, ***"a reasonable tribunal properly directing its mind to the law as the evidence would convict if no explanation is offered by the defence."***

The opportunity to defend oneself is an integral part of the fair trial guarantees built into the criminal justice system and we have no hesitation stating that when, as here, a trial court expresses what appear to be settled and firm views indicative of the accused person's culpability after improperly conducting a deep evidentiary analysis, the appearance of preconception and predetermination is unacceptable and goes to make a travesty of the ensuing defence. It makes it a hollow ritual because the court seems to have

already made up its mind and this strikes at the very heart of the accused person's right to be heard in his own defence and renders the trial a mistrial and a nullity.

A second error committed by the learned Magistrate, which as well goes to the very integrity of the trial process, relates to compliance with **section 211** of the Criminal Procedure Code which provides that;

> ***"211(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shal l inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***
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> ***(2) if the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that here is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."***

From the record before us, there is absolutely no indication that the learned Magistrate informed the appellant of the rights he had and called upon him to exercise them whichever way pleased him. The duty to explain this essential step to the accused person reposes on the trial court and it is expressed in mandatory terms admitting to no ambiguity. That duty is not transferrable as it is the concomitant of a right that is personal to the person accused. That he has legal representation does not therefore lighten, much less excuse the duty that the court bears. We have said as much in several decisions including **NJOKA -VS- REPUBLIC** [2001] KLR 175.

The net effect of these two errors on the part of the trial court, which appear not to have been raised at the High Court but are fundamental issues of law so that we are without the benefit of that court's opinion on them, are matters which should have come to its attention in its discharge of the fresh, and thorough re-evaluation a duty as a first appellate court, (See **OKENO -VS- REUBLIC** [1972] EA 32), is that the entire trial was totally vitiated.

The fault was not of the prosecution's but the courts. In the absence of indication that a new trial would not be feasible, and having considered the interests of justice which would be best served by a timely judicial consideration of the charges against the appellant in the merits, a retrial commends itself to us. Any possible prejudice would be obviated by an order of an expedited start and conclusion of such retrial.

In the result, the conviction and sentence imposed on the appellant are set aside. The appellant shall be presented before the Resident Magistrate's court of the appropriate class at Kericho for the commencement and expeditious conclusion of his retrial.

Dated and delivered at Nakuru this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR