



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 88 OF 2014

BETWEEN

LABAN NYAGA NJUE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Embu

(Okwengu & Khaminwa JJ) dated 27th November, 2005

in

H.C.CR.A. NO. 115 OF 2004)

JUDGMENT OF THE COURT

This is a second appeal by **LABAN NYAGA NJUE**, his first having been dismissed by the High Court sitting at Embu (Okwengu, J, as she then was, sitting with Khaminwa J) on 17th November, 2005. That appeal had been against the judgment of the Senior Resident Magistrate at Chuka whereby the appellant, who was the 4th Accused, was convicted on the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code and sentenced to death. The first accused suffered a similar fate but his separate appeal, **(Embu H.C. Criminal Appeal No. 122 of 2008 Lawrence Muriithi Kibariki Vs R)** was allowed by a different bench of the High Court (Makhandia & Karanja JJ, as they then were).

The particulars of the charge were that on 17th August, 2002 at Kamara Market, Chogoria location, Meru South District, the appellant and five (5) other persons, with whom he was charged jointly, while armed with dangerous weapons namely a gun, knife, rungu and axes, robbed Lawrence Mutiga of 14 bottles of Guinness beer, 10 bottles of Pilsner beer and cash Kshs.7,800/-, and injured him in the process.

Evidence was led by the prosecution through some five witnesses including P.W.1 and his wife Rose Mukwanjagi (P.W.2). The couple ran the business of a bar and were present therein when the robbery occurred. The evidence that led to the conviction of the appellant was that of P.W.2 who testified that just before the robbery the appellant had come into the bar where she was serving and asked to be sold 'changaa', which was not sold therein. Shortly afterwards, a gun shot rang out and the robbery was

underway with the appellant participating. When the appellant cross-examined her, this is what P.W.2 is recorded to have stated;

“I identified you as one of the attackers. It was 9.00 p.m. There was electric light. You ordered a drink as a usual customer. I told the Police I could identify some of the attackers. I told Police about looks. I said one of the suspects was a short brown man. You came nicely as a customer and I asked you what you wanted. You were just next to me not even a metre. I did not suspect you were a robber. You stabbed me with a knife.....I picked you out in a parade at Police Station.”

The learned trial Magistrate believed that evidence, and was satisfied that the conditions were favourable for the appellant’s identification and accordingly rejected the appellant’s unsworn statement to the effect that he was arrested for no apparent reason as he was proceeding to his place of work as a matatu tout in Embu town. The Magistrate first warned himself of the danger of convicting on the evidence of a single identification witness but, being satisfied that there was no possibility of error, proceeded to convict, a course of action that the learned judges of the High Court noted, approved and affirmed in upholding the appellant’s conviction.

As far as the appellant’s identification at the scene is concerned therefore, there is little doubt that the concurrent findings of fact by the two courts below were well-founded on the evidence and there was no possibility of error in the identification of the appellant. The conditions were favourable, a description of the appellant was given by P.W.2 to the Police and she picked him out at the identification parade. Both courts were alive to the need for circumspection and the testing of the evidence of identification with the greatest care so as to avoid the possibility of misjustice. See OGETO -VS- R [2004]2 KLR 14; RORIA -VS- R [1967] E.A. 583 and ABDALLA BIN WENDO & ANOR VS R 20 E.A.C.A 168.

Even though identification was a central aspect of the grounds both in the appellant’s own hand and in the 'Supplementary Grounds (sic) of Appeal' filed on his behalf by his learned counsel Mr. Njuguna, the same was not argued before us by counsel beyond the mention in passing at the tail end of his submissions, that “even on merit, identification was an issue.” On our own perusal and consideration of the record and the judgments of the two courts below, the identification evidence against the appellant was watertight and formed a secure basis for the appellant’s conviction.

The gravamen of Mr. Njuguna’s submission before us lay in the first three of the supplementary grounds of appeal, namely, that the prosecution before the trial court was conducted, at least in part, by one Police Sergeant Musila who was unqualified. Counsel therefore urged us to find that the entire trial was a nullity. He criticized the learned judges for failing to so find especially considering that the Republic had at the High Court conceded the appeal on that basis.

The record shows that on 25th March, 2003, there was a consolidation of some two files and the presentation of a new charge sheet, whereupon the appellant and his co-accused were charged and pleaded afresh. That new charge sheet was the foundation of the trial. The court prosecutor on that day was Sergeant Musila. When the trial proper commenced on 3rd December, 2003 and P.W.1 and P.W.2 testified, the Court prosecutor was one Inspector of Police Michuki, who was undoubtedly qualified to prosecute.

When next the matter came up for further hearing on 28th January, 2004, the court prosecutor was again Sergeant Musila. He is recorded to have made an application, which was granted, in the following terms;

“CP: I pray to contract (sic) [conduct] this matter under Section 88 (C.P.C.).

Court: Prosecutor allowed to prosecute.”

It is contended on the appellant’s behalf that Sergeant Musila was not a person qualified to prosecute under *Section 85* of the Criminal Procedure Code and the trial magistrate’s purported authority or permission to prosecute granted under *Section 88* was inefficacious to invest him with authority that he

lacked by statutory exclusion. *Section 85(1)* of the Criminal Procedure Code, before it was amended by *Act No. 7 of 2007*, provided as follows:

“85(1) The Attorney-General, by Notice, in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney-General.”

The words we have emphasized are the basis of the appellant’s complaint which he bolsters by referring to the decision of the High Court allowing the aforesaid appeal of his co-accused on precisely that point. That High Court bench, in arriving at its decision, rendered itself, *inter alia*, as follows;

“Case law in this area is now settled, ELIREMA & ANOR VS REPUBLIC [2003] KLR (537) set the pace. EKIMAT VS REPUBLIC, PASCAL OUMA OGOLA and many others have since followed. Proceedings conducted by an unqualified prosecutor are null and void for all intents and purposes. Null and void pleas cannot in our considered view form a basis for any subsequent proceedings though conducts by a qualified prosecutor unless such pleas are taken all over again before a properly qualified prosecutor. On this ground alone this appeal would succeed.”

That bench was aware that the learned judges whose judgment is impugned before us had already dismissed the appellant’s plea and held that the permission given by Sergeant Musila under *Section 88* of the Criminal Procedure Code rendered his prosecution of the matter valid. They simply stated that the learned judges herein were “entitled to their interpretation of *Section 88(1)* of the Criminal Procedure Code” but appear not to have interrogated the full effect of the permission granted by the court under that provision, which is in these terms;

“88(1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.”

From our reading of these provisions of the Criminal Procedure Code, it seems plain that under *Section 85*, the Attorney General (now the Director of Public Prosecutions) could appoint public prosecutors through two district mechanisms.

- i. By Gazette notification – for public prosecutors proper with general or limited geographical or subject matter authority.
- ii. By any written instrument – for Advocates or public officers (except junior police officers) for any specified case.

Public prosecutors appointed under *Section 85* have power pursuant to *Section 86* to appear and plead before any court where a criminal case is under trial or appeal without any further written authority. Such prosecution flows from the authority donated or delegated to the public prosecutor by the Attorney-General.

For persons who are not public prosecutors proper, by which we understand persons employed and gazzeted specifically as prosecutors or prosecuting counsel in the office of the Attorney-General (DPP), they can only be either advocates or persons employed in the public service with the rider that for the latter category, if they be police officers, their rank had to be that of Assistant Inspector or above.

What then was the position of a police officer, who held a rank lower than Assistant Inspector of Police? Evidently, he could not be appointed under the hand of the Attorney-General under *Section 85(2)* as the powers of the Attorney-General in that regard were circumscribed. On a proper reading of *Section 85(1)*, however, it would seem that were the Attorney-General to gazette such officer as a public prosecutor, it would be effective since appointment by gazette is subject to no strictures.

Even then, as far as conducting prosecution is concerned, *Section 88(1)* allows any person to do so as long as they obtain the permission of the magistrate. Indeed, such permission is mandatory for any person unless they be a public prosecutor or a person authorized by the Attorney-General.

Having taken this view of the matter, it is apparent that had Sergeant Musila merely embarked on or proceeded with the partial prosecution of the case either without, or on the basis of any authority given by the Attorney-General short of Gazettement, his conduct would have rendered the prosecution null and void as he was not of proper rank. In invoking the provisions of *Section 88(1)* of the Criminal Procedure Code and obtaining the permission of the trial magistrate, Sergeant Musila removed himself from the *Section 85(2)* handicap and his prosecution of the case was both valid and efficacious. It would lead to absurdity to hold that whereas any person could effectively prosecute with a magistrate's permission, a person of Sergeant Musila's standing could not do so even when invested with the same magisterial permission.

We are persuaded that the permission sought and obtained under *Section 88(1)* of the Criminal Procedure Code was both curative of Sergeant Musila's prosecutorial conduct, and decisive of the question whether the prosecution was valid or null. It was valid. The line of cases starting with **ELIRAMA (Supra)** and including the High Court decisions of **JOHN ODHIAMBO KAPTENG vs. R** (2005) e KLR and **NICHOLAS SHIRAO & ANOTHER vs. R** (2005) e KLR cited by Mr. Njuguna that held that police officers below the specified rank could not prosecute, while correctly decided, are clearly distinguishable from the present case because there, unlike here, the permission of the magistrate was never sought.

Act No. 7 of 2007, which came after that line of cases invalidating prosecutions by junior police officers addressed the incongruity by deleting the qualification in *Section 85(2)* that only police officers of the rank of Assistant Inspector and above could be appointed prosecutors. That amendment stands to reason and accords with the reasoning that we have set out herein. It is not the basis of our decision, however, as it came after the appellant's impugned prosecution.

Having disposed of the complaint about the prosecutor's authority and having already found on merit that the appellant was properly convicted, this appeal fails and we accordingly dismiss it in entirety.

Dated and delivered at Nyeri this 13th day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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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