IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 172 OF 2013

BETWEEN

PAUL KIMANI …………………………………………....………. APPELLANT

AND

REPUBLIC ……………………………………………………...… RESPONDENT

(Being an appeal from a Judgment of the High Court of Kenya at Machakos (P.K. Kariuki & Kimaru, JJ.) dated 23rd day of May, 2011

in

H.C.CR. NO. 60 OF 2009)

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JUDGMENT OF THE COURT

The appellant, Paul Kimani is aggrieved by the decision of the High Court, (P. Kihara Kariuki, as he then was and Kimaru, JJ) upholding the conviction and death sentence imposed by the trial court for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code.

The trial court arrived at the decision after considering the evidence of the complainant, Nanana Lethiria, a Tanzanian employed in a bar in Kibande Maji on the Tanzania side of Namanga border.

According to her, on 26th August 2007 at about 12 mid-night while coming to Namanga on the Kenya side of the border to meet a friend she was ambushed on the *"no-man?s land"* by the appellant who was armed with a screw driver and who was known to her. The appellant grabbed her on the collar and using the free hand removed the mobile phone from her pocket. The appellant them ran into Kenya. The complainant reported the attack to the Tanzania police station at the border where the incident was recorded. The complainant returned to the police station the next day and in the company of a police officer from the Tanzania police station they proceeded to Namanga bus stage where the appellant was arrested.

Upon his arrest, the appellant led police officers from Kenya and Tanzania to a house where the stolen

phone was recovered from a certain lady. As the appellant was being led to the police station, he attempted to escape but was re-arrested. This attempted escape formed the basis for the charge in the second count. We shall revert to this count later.

At the trial, apart from the appellant, the police officer from Tanzania, namely, PW2 Cpl. Gideon Mkwawa and his Kenya counterpart, PW4, Cpl. Peterson Amimo testified on how the complainant made a report of the robbery; how the appellant was arrested and how he led them to the recovery of the exhibit – the mobile phone.

The appellant in his defence denied all these allegations and maintained that he had no knowledge why he was arrested, but was surprised at the police station when he was informed that he was a suspect in a case of robbery.

From the evidence presented, the learned trial magistrate found that an offence under **section 296 (2)** of the Penal Code was proved beyond any reasonable doubt; that the prosecution had similarly proved the offence of escape from lawful custody contrary to **section 123** of the Penal Code; and that the appellant's defence was not plausible. After convicting the appellant on the first count and sentencing him to death, the learned trial magistrate failed to impose a sentence on the second count, stating erroneously that no need arose for doing so after the imposition of the death sentence. The correct practice is to impose a sentence which, in view of the death sentence, is to be held in abeyance. Nothing really turns on this misdirection.

The appellant's appeal to the High Court, as we have noted earlier, was dismissed. In dismissing the appeal, the learned Judges found that, although the complainant was the only eye witness to the robbery, the appellant was known to her for several months prior to the night of the robbery; that there was sufficient light at the scene of the robbery; that when reporting the incident to the police, the complainant supplied, in sufficient detail the appellant's particulars; and that the complainant's phone was recovered in circumstances satisfying the doctrine of recent possession. Like the trial court, the learned Judges found that the appellant's defence was displaced by the overwhelming prosecution evidence proving the ingredients of robbery with violence contrary to **section 296 (2)**; that the appellant, armed with a screw driver, a dangerous weapon, threatened the complainant with physical harm before robbing her of her phone.

The appellant brings this second appeal on three grounds contained in the memorandum of appeal filed by R.A. Ochuru Advocates, that is:

> **"1. THAT the learned trial Judge erred in law by failing to note that the provision under section 85 (2) of the CPC was not complied with.**
>
> **2. THAT the learned trial Judge erred in law by failing to note that the lower court did not have jurisdiction to prosecute** (sic) **the matter as envisaged under section 5 of the Penal Code.**
>
> **3. THAT the learned trial Judge grossly erred in law by concluding that the prosecution case was proved beyond reasonable doubt, failing to note that the same remained unproved as required in law."**

As the second appellate court in this appeal, we can only consider and determine matters of law. See **section 361** of the Criminal Procedure Code and **Kaingo Vs. Republic** [1982] KLR 213. We are satisfied that the three grounds above raise points of law.

Arguing the first ground, Mr. Amutallah, learned counsel for the appellant drew our attention to page 22 of the proceedings where the record shows that the prosecutor who led the evidence of PW4, Cpl. Peterson Amimo on 23rd March 2009, was Sgt. Shipendi. Mr. Kivihya for the respondent, on the other hand, pointed out that the description of the prosecutor as a '*sergeant?* on page 22 must have been a mistake because on page 6 he is described as '*inspector?* of police.

We have on our part noted that the same prosecutor is, once more, referred to on page 14 as '*sergeant?*. We are persuaded, from the repetition of the „*sergeant?* title, that officer Shipendi was of the rank of a sergeant of police. In terms of **section 85 (2)** of the Criminal Procedure Code, before the amendment to it introduced by Act No. 7 of 2007, and following the decision of this Court in **Roy Richard Elirema & Another Vs R.** [2003] KLR 537, only police officers of the rank of Assistant Inspector and above could be appointed by the Attorney General to conduct prosecution. For instance, in **Joseph Victor Achoka & 2 Others Vs. R** Criminal Appeal No. 201 of 2005, this Court found as follows:

> **"On the day of the ruling, the prosecution was taken over by Corporal Mwangala (Cpl. Mwangala) who took the ruling on behalf of the Republic that all the 7 accused persons had a case to answer. They all proceeded to present their evidence but three of them reserved further evidence pending production of the Occurrence Book (O.B.) containing the first report of the alleged crimes to the police. The O.B. was never produced.**
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> **It is clear to us that a substantial part of the defence case was conducted by an unauthorized person in the name of Cpl. Mwangala, contrary to section 85 of the Criminal Procedure Code. As this is a matter conceded by the State, we need not belabour it. The whole trial was therefore vitiated and must be declared a nullity on the authority of Elirema & Another Vs. R [2003] KLR 537."**

Sgt. Shipendi made three appearances in the proceedings in the trial court. Out of the three occasions, he only prosecuted once when he led the evidence of Cpl. Peterson Amimo on 23rd March 2009. The other two occasions, although he was the prosecutor in court, in the first instance, on 28th January 2008, and although referred to as an inspector, he was only in court for purposes of taking a hearing date. On the next occasion on 25th June 2008, he was in court to receive a ruling on whether or not to recall a witness. The ruling was not delivered and a fresh date issued. That leaves only the proceedings of 23rd March 2009, on which date he prosecuted.

We have been asked by Mr. Amutallah to discharge the appellant if we find that Sgt. Shipendi conducted prosecution yet he was unqualified so to do. In his opinion, an order for a retrial would be prejudicial to the appellant as the offence was committed in 2007, the core witnesses were Tanzanians who may not be readily available to be recalled and the error was committed by the trial magistrate who permitted an unqualified prosecutor to participate in the trial.

Following the decision in **Elirema** case (supra) any trial in which a police officer of the rank below inspector conducted the prosecution was declared a nullity and the appellant either discharged or a retrial ordered. That approach which dominated decisions rendered after 2003 appeared to change with this Court laying the law that it is not every participation in the trial by an unqualified prosecutor that will vitiate a trial; that only where the prosecutor „*prosecutes?* by calling and examining witness that the Court will consider the effect. Finally, the court has also held that the effect on the outcome of a trial partly conducted by an unqualified prosecutor will depend on the impact of that evidence on the overall prosecution case. With regard to this last point, this Court, faced with an appeal raising a point with a striking similarity as the one before us, in the case of **Peter Kihia Mwaniki Vs. R.** Criminal Appeal No. 280 of 2005 resolved it this way:

> "**In the matter before us, Cpl. Osiemo, who by virtue of the aforesaid provision was not qualified to prosecute the appellant's case, did not conduct the whole trial. He only participated in leading the evidence of one prosecution witness. What would be the legal effect of his aforesaid action? The invalidity of what he did may only properly affect the proceedings relating to the time he prosecuted. In our view the invalidity should not extend to what was done according to law. We think that, as submitted by Mrs. Murungi, the evidence of the fourth prosecution witness can be expunged from the record without doing violence to the rest of the proceedings. The question which then follows would be whether once that evidence is expunged, the remaining evidence is sufficient to sustain the appellant's conviction. We posed that question to Mrs.**

Rashid, but her view was that the illegality committed by Cpl. Osiemo, adulterated the entire proceedings. With due respect to her she has taken a very dim view of the matter and we think that her view is convoluted and against the interests of justice. The interests of justice dictate that we expunge the evidence of the fourth prosecution witness, which we hereby do, and proceed to consider whether the remaining evidence is sufficient to sustain the appellant's conviction."

See also **Daniel Njihia Njuguna & 2 Others Vs. R** Criminal Appeal No. 122 of 2004. We hold, in view of this, that the entire trial is not vitiated but the evidence of Cpl. Peterson Amimo ought to have been expunged. We shall shortly see the impact of this on the prosecution case when we consider ground 3.

In the second ground, the appellant argues that since the offence was committed on *"no man?s land"*, the Kenya Court lacked jurisdiction to entertain it. In the alternative, it is contended that since the complainant was a Tanzanian citizen and the report of the robbery was made to police station in Tanzania, the trial ought to have been conducted in Tanzania. Learned counsel for the respondent for his part submitted that the suspect, being a citizen of Kenya and the stolen item having been recovered in Kenya, the Kenya court had jurisdiction to try the appellant.

Sections 5 and **6** of the Penal Code provide some light to the question. They stipulate that:

"5. The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

6. When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the manner as if such act had been done wholly within the jurisdiction."

In **The State Vs. Zendere** [2004] ZWBHC 19 the High Court of Zimbabwe (Ndou, J.) considering in a criminal review, the finding of the trial magistrate that he did not have territorial jurisdiction to try the accused, a Zimbabwe national, who was charged with forgery of a passport in the '*no-man?s?* land between Zimbabwe and Botswana for purposes of entering Botswana, held that:

"In my view, there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of Zimbabwe."

We agree entirely. **Section 29 (h)** of the Criminal Procedure Code recognizes this as it provides that:-

"29. A police officer may, without an order from a magistrate and without a warrant, arrest –

…………….

(h) any person whom he suspects upon reasonable grounds of having been concerned in an act committed at a place out of Kenya which, if committed in Kenya, would have been punishable as an offence, ……….."

Like crimes committed outside the territorial waters of Kenya (in the high seas), it is now settled on the authority of the **Attorney General Vs. Mohamud Hashi & 9 Others**, Civil Appeal No. 113 of 2011, that Kenya courts have jurisdiction to try such crimes.

There was evidence in the matter before us that after the robbery in *"no- man?s land"*, the robber ran into Kenya with the stolen phone. The offence was reported to a police station on the Tanzania side of the

border but because the alleged offender was identified by the complainant as a Kenyan and having fled into Kenya, the matter was handed over to the Kenya police. In any case, **section 380** of the Criminal Procedure Code directs that:-

> **"380. No finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice."**

The appellant has not alleged that he was prejudiced in his trial for an offence committed in *"no-man?s land"*. That ground fails.

Was there evidence to justify the appellant's conviction? According to Mr. Amutallah, the only incriminating evidence was the mobile phone which he submitted was not even found in the appellant's possession. We do not, with respect, agree with this. The two courts below unanimously made concurrent factual finding that, although the offence was committed at night, the appellant was known to the complainant; that for a period of between 4 to 5 months he was a frequent visitor to the bar where the complainant worked; that the appellant himself led the police to the recovery of the complainant's mobile phone from a house in Namanga. Both courts meticulously evaluated the evidence presented in the case and found that the offence was proved to the required standard. They found no substance in the defence proffered by the appellant.

For our part, we are satisfied that the evidence of identification although by a single witness was credible. This was indeed a case of recognition, the appellant having been known to the complainant for a considerable period of time, drinking cold Pilsner beer in the bar where the latter worked as a waitress. The encounter, although at night, there was evidence that at the scene there was sufficient electricity light from both sides of the Kenya/Tanzania border. During the encounter, the appellant and the complainant talked to each other. When the complainant reported the matter for the first time Cpl. Gideon Mkwawa confirmed in his testimony that the complainant gave him the appellant's name (Kimani) and told him that she knew the appellant well and could recognize him. Thirdly, the appellant, upon being arrested voluntarily led the police to a house where the complainant's stolen phone was retrieved.

From the evidence of the complainant, that of Cpl. Mkwawa and Cpl. Amimo, all of whom were present when the phone was recovered, it is not clear who between them received it from the lady who handed it over on behalf of the appellant. Cpl. Amimo simply said that the lady '*gave us the phone?*. Cpl. Amimo's evidence was limited to the recovery of the phone. If that evidence is severed from the proceedings, we are satisfied that the evidence of Cpl. Mkwawa and the complainant relating to the evidence of recovery filled the void left after expunging Cpl. Amimo's evidence. The complainant was able to identify the phone to the satisfaction of the trial court from some marks. All the ingredients for the commission of the offence of robbery under **section 296 (2)** of the Penal Code were present in this case. The appellant was armed with a screw driver, a dangerous or offensive weapon, in the circumstances of this case; that the appellant used personal violence on the complainant before and at the time he stole her mobile phone. See **Daniel Muthomi M'Arimi Vs. R** [2013] eKLR. The third ground similarly fails. The defence did not displace this evidence.

The appeal lacks merit and we accordingly dismiss it

Dated and delivered at Nairobi this 8th day of May 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

………………………

JUDGE OF APPEAL

S. GATEMBU KAIRU

………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR