



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE J.J.A)**

**CRIMINAL APPEAL NO. 314 OF 2010**

**BETWEEN**

**SIMON GITHAKA MALOMBE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*Being an appeal from the conviction and sentence of the High Court of Kenya at Embu(Khaminwa & Makhandia JJ) dated 7<sup>th</sup> July, 2008)*

**in**

**H.C.CR.A. NO. 54 OF 2008**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

Simon Githaka Malombe (the Appellant) appeals to this Court against the dismissal by the High Court (Khaminwa J, as she then was and Makhandia J – as he then was) of his first appeal against a conviction and sentence of death imposed on him by the Kerugoya Senior Resident Magistrate (J.N. Onyiego) on a charge of robbery with violence contrary to **Section 296(2) of Penal Code**. He was acquitted on three other counts of the same offence.

The particulars of the charge that earned the appellant the conviction and sentence were set out in count II of the charge sheet were that;

***“On the 12<sup>th</sup> day of March 2005 at Muchangara village in Kirinyaga District within Central Province, jointly with others not before Court, being armed with dangerous weapon (sic) namely axes, pangas and rungus, robbed JAMES KINYUA MUTHIE cash 2600 and at or immediately before or immediately after the time of such robbery wounded the said JAMES KINYUA MUTHIE.”***

The two courts below found the prosecution case, based on identification or recognition of the appellant at the scene, to have been established. It was that on the date charged, PW2 JAMES KINYUA MUTHIE (JAMES) was asleep in his house. With him was his wife MONICA MUTHONI (PW4) (Monica). At 12 midnight, his house was broken into by some armed thugs. They broke his security light and he switched on the light in his house. One of the robbing trio was a rungu wielding Simon Githaka (the appellant)

who started beating him with it on the legs, knees and elbows while demanding money. James had none but had a watch which the thieves took. The appellant was someone James knew well as he was a step cousin – a son to the brother of James’ step mother Sarah Wanjiku.

After that robbery James was taken to hospital for treatment and was also given a P3 form which was duly filled and produced by the clinical officer John

Mwangi (PW7) showing the injury he sustained as ‘harm’. He gave the appellant’s name to the police as one of the robbers.

Monica’s account of events was different in certain respects. She and James were awoken by a loud bang at about midnight. Two men broke into the house and started beating James while demanding for money. He gave them Ksh.2600 which was on the chair as they took his wrist watch. She identified one of them as Kithaka, her husband’s step cousin, who swore to kill James. Kithaka hit her twice on the right leg and cut the iron sheets that were the couple’s wall. They left after locking the couple inside the house. The police later arrived and took James to hospital. The couple told them that they had recognized the appellant.

The appellant was the following morning set upon by angry members of the public who were intent on lynching him in connection with the robbery in James’ and neighboring houses. He was rescued from the jaws of death by police officers including PC Phillip Karue (PW6) who arrested him and later charged him with the offence.

That evidence by the prosecution was accepted by both courts below and therefore constitutes concurrent findings of fact with which we would not, as a second appellate court enjoined to address matters of law only by **Section 361** of the **Criminal Procedure Code** ordinarily upset. We would be entitled to interfere as a matter of law, if the said findings were based on no evidence or constitute conclusions that are plainly wrong and therefore perverse or bad in law. See **STEPHEN MURIUNGI & ANOTHER –VS- REPUBLIC** [1982-88] 1KAR 360 and **MWITA –VS- REPUBLIC** [2004] 2KLR 60.

The facts as we have set them out herein appear straight-forward enough but for one peculiar aspect: None of the witnesses was subjected to cross examination. This, indeed, is the gravamen of this appeal captioned in Ground 2 of the “Supplementary Ground of Appeal” filed by the firm of Kimunya & Co. as follows;

***“2. The learned Judges of the appellate court erred in finding that the trial was fair yet, the (sic) Article 50(2) (c) and (j) were not complied with.”***

That ground, though inelegantly crafted, must refer to the 2010 Constitution as Mr. Kimunya, the appellant’s learned counsel clarified before us. We are quite certain that the said Constitution does not and could not have applied to the trial which occurred in the year 2005. That said, the fair trial guarantees encapsulated in the provisions, namely the right of an accused person to be afforded adequate time and facilitated to prepare a defence, and to be informed in advance of and be given reasonable access to the evidence the prosecution intends to rely on have always existed. **Section 77(2) (c)** of the retired Constitution, recognized them. Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of **JUMA –VS- REPUBLIC** [2007] EA 461 reasoned as follows, and we agree;

***“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence...”***

From the record before us, the appellant tried to exercise this right to access in advance the evidence of the prosecution but in vain.

On 15<sup>th</sup> July 2005 the appellant is on record as having applied to be supplied with witness statements. The prosecutor replied that he had no objection whereupon the Court asked that witness statements be supplied to him and the hearing was fixed for 17<sup>th</sup> August 2005.

On that day, the case would not be reached so it was adjourned to 20<sup>th</sup> September 2005 when the prosecution had five witnesses. The record reads as follows;

***“Accused: I have a lot of problems. Since I was remanded nobody has come to see me. I needed statements. I have no money.***

***Prosecutor: I have no objection. We are ready to proceed.***

***Court: Accused’s application allowed. Hearing on 5.12.05. Each witness from Sagana to be paid 200/- as travelling and subsistence. Prosecution to supply statements as prayed for.”***

Again the case could not be reached on the stated date so it was adjourned to 28<sup>th</sup> December 2005 when the following transpired before J. N. Onyiego, SRM;

***“Prosecutor: I have five witnesses bonded.***

***Accused: I need witness statements before I proceed. I have no cash. I am praying for an adjournment.***

***Prosecutor: On 20.9.05 the prosecution was ready with five witnesses who were in court. The court adjourned. He did not have cash to photocopy. On 5.12.05 the case could not be reached. I had five witnesses. He did not ask for statements. Today I have five witnesses and he is not ready. Case to proceed.***

***Accused: I do not have enough money even now.***

***Court: Application is made in bad faith. Accused is never ready with the case. He is looking for delaying tactics. He has no money to photocopy statements. Case to proceed.”***

With that, the prosecutor called three witnesses who testified in chief. At the end of each witness’ direct examination, the court record shows;

***“XX [Cross Examination] by Accused: Nil”***

After that the case was adjourned twice. On 21.3.06, the prosecutor asked for an adjournment as his one witness who had been bonded was not in court. The appellant, quite an intrepid personality, renewed his plea thus;

***“Accused: I want complainant’s statement.***

***Court: Prosecution to supply statement of complainant.”***

As before, there is no indication that this order by the trial magistrate was complied with.

It is contended for the appellant that the failure to provide witness statements to the appellant violated the appellant’s right to a fair trial. He criticized the learned Judges of the High Court for treating that complaint when raised before them in a casual manner. He is right. In their judgment, this is what the learned

Judges stated;

*“As for witness statements, the record shows that indeed the appellant made an application to be supplied with such witness statements before the commencement of the hearing of the case. The prosecution did not oppose the application. Accordingly the application was granted. It would appear that the appellant was required to obtain the statements with his own funds. He was required to avail the money for the statements to be photocopied and availed to him by the prosecution. He never gave out the money. The court did not make the order that the photocopies would be paid for by the prosecution or the court. He cannot therefore turn around and blame the court and or the prosecution for his failure to obtain witness statements. He can only blame himself.*

*All in all, we find that the appellant’s constitutional rights to a fair trial were not at all violated. The appellant was accorded every opportunity and chance to conduct his defence in a fair manner and to the best of his ability. He chose to exercise it the way he did and that was his choice which ought to be respected. Neither the trial Magistrate nor the prosecution should come under attack by the appellant for his own failures.”*

With great respect to the learned Judges, we are quite unable to follow, less still agree, with that reasoning. We do not quite fathom how the appellant can possibly be to blame for the prosecution’s failure to supply the witnesses statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal.

Mr Kaigai, the learned Assistant Director of Public Prosecutions, while conceding that the failure to provide the requested statements definitely and fatally compromised the fairness of the appellant’s trial, seemed to suggest that there is some ambiguity as to who bears the burden of providing witness statements as between the prosecution and the court. With respect, that ambiguity is not real. It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in **Article 50(2) (c) and (j)** be real.

The denial of witness statements in the present case reduced the trial to a farcical sham. The appellant, finding himself incapacitated without the witness statements, elected not to cross-examine any of the witnesses. In doing so he was making a dignified protest against a process so unfairly weighed and tilted against him as to be wholly unacceptable. The result was that all of the evidence on record lacked the searching test of cross-examination. Cross examination has long been described as being, quite aptly in our view, **“beyond any doubt the greatest legal engine ever invented for the discovery of truth.”** Per Judge S.C. Sarkar in Sarkar’s Law of Evidence (India, Pakistan, Burma and Ceylon) 9<sup>th</sup> Edn. P.1120. Only after testimony has been interrogated and confronted through the crucible of cross examination can it be entitled to the tag of veracity.

So critical is cross-examination in a criminal trial that where an accused person is unrepresented, a trial Magistrate is required under **Section 208(3)** of the **Criminal Procedure Code** to expressly explain it to the accused person and be careful to record exactly what he said in response to the explanation. It is not expected that the court would maintain a detached neutrality and act as some kind of impartial umpire in the strict tradition of the adversarial system. Rather, he is statutorily enjoined to assume a didactic role as an educator of process. That clearly did not occur herein.

In the end, the appellant was relegated to the position of a mere observer, a passive attendant of his own trial yet, in a criminal trial, the accused person is the most central character in the sometimes complex human drama of attempting to test the truth about criminal allegations. He cannot, by no fault of his own be made a mere spectator.

In this regard, we respectfully agree with the author of the **Essentials of Criminal Procedure in Kenya** (P.O. Kiage, Law Africa 2010) at P.151 in his

comment on this;

***“This provision, which, is acknowledgement of the disadvantage at which an unrepresented accused stands, is intended to level the playing field and its efficacy must lie in the court’s ability to appreciate its fair trial implications and its [the court’s] concomitant duty to play a more active and didactic role.”***

There is no way of telling what a proper cross-examination of the various witnesses would have done to the prosecution case as presented. The one thing clear is that there is no basis for the learned Judges’ reference to the case in these laudatory terms;

***“That being the case the testimonies of PW2 and PW3 on the recognition of the appellant remained uncontroverted and or unchallenged. The learned Magistrate was bound to act on such evidence. That notwithstanding, the learned Magistrate was keenly aware of the need to be cautious before accepting and acting on such evidence. That is why he addressed himself on the question of the light available in the house, the fact that the appellant was well known to the two witnesses and the appellant and or whether the case was fabricated. In our view the learned Magistrate approach to the critical issues at hand was beyond reproach and was certainly commendable. We have no reason to fault him on the question of identification, nay, recognition of the appellant.”***

The lack of cross-examination in the specific circumstances of this case totally compromised the evidence of all the witnesses and especially of PW2 and PW4 whose testimony was used to found the appellant’s conviction. Indeed, on our own perusal of the record we do see a number of contradictions and inconsistencies in the accounts of James and Monica. It may well be that on cross

examination the contradictions would have been further magnified or diminished.

There is no telling, but the appellant is not to blame.

The upshot of our consideration of this matter is that the evidence that was used to convict the appellant was fatally wanting. He did not get a fair trial as he was entitled to. His conviction cannot stand.

Having considered the totality of this case, and considering that the trial court did give orders several times that the prosecution do avail witness statements which the prosecution disregarded, we do not agree with Mr. Kaigai that this is a proper case for retrial. The appellant has spent a decade behind bars on a tainted conviction based on questionable but unquestioned evidence. We quash that conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of July 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**