



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CRIMINAL APPEAL NO. 57 OF 2014**

**BETWEEN**

**JOSEPH KAMORA MARO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Mombasa (Omondi & Odero, JJ.)*

*dated 15<sup>th</sup> March, 2011*

in

H.C.Cr.A. No. 115 of 2009)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant, **Joseph Komora Maro alias Hiribae** was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that:

***“On the 25<sup>th</sup> day of July, 2004 at 6.45 p.m. at Kizingo area of Lamu Island in Lamu District of the Coast Province, jointly with others not before court while armed with dangerous weapons – pangas, arrows and bows, robbed NAUREEN ALAM of her mobile phone make Nokia, a Kodak camera, a video camera make Sony, a battery charger make Sony, a Walkman cassette player make Benson and hedges, a spare battery, a document purse containing cash Kshs3,5000/=, Uganda Shs.60,000/=, US dollars 561/=, toilet attires (assorted) and two electric gadgets all valued at Kshs143,380/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said NAUREEN ALAM.”***

The trial commenced on 16<sup>th</sup> February, 2005 before Hon. **Ogembo, D.O.** the then Senior Resident Magistrate at Malindi Law Courts. It was subsequently taken over by Hon. D. Ochenja and finally Hon. D. W. Nyambu who recorded the evidence of the last prosecution witness (PW11) as well as the appellant’s statement of defence having been affirmed. It is Hon. D.W. Nyambu who crafted the judgment which was delivered on 13<sup>th</sup> August, 2009 wherein the appellant was found guilty of the charge facing him. He was sentenced to death as by law prescribed.

The appellant was dissatisfied with the conviction and sentence and he filed an appeal in the High Court which was dismissed by **Omondi & Odero, JJ**. It is the dismissal of the appellant's appeal that provoked this appeal before us. The appellant's appeal before us was premised on the following grounds of appeal:-

**“1. That the trial Magistrate and the learned High Court Judges erred in law by convicting and sentencing me to death despite the fact that my constitutional rights as enshrined in section 72(3) (b) of the old constitution and article 49(1)(f) of the new constitution have been violated.**

**2. That both the trial magistrate and the High Court appeal judges erred in law in failing to observe the provisions of the criminal procedure code (Cap 75 Laws of Kenya) whereby section 200 C.P.C. was contravened.**

**3. That the trial magistrate and the first appellate judges erred in law by relying of (sic) the evidence on record that I the appellant was one of the robbers, simply because I was shot and not putting into consideration that:**

**i. All the robbers were wearing masks.**

**ii. Pw1 never came to ascertain that the alleged robber who was shot was indeed one of the robbers.**

**iii. That the identification as not proved beyond reasonable doubt.”**

During the plenary hearing before us, **Mr. Kimani**, learned counsel for the appellant invited us to set aside the conviction and sentence as the proceedings were unlawful the appellant having been held in police custody from 25<sup>th</sup> July, 2004 upto 30<sup>th</sup> September, 2004, a period of about 65 days, and that although the appellant had filed **Malindi Msc. Cr. Appl. No. 5 of 2009**, seeking that the charges against him be dismissed for being held in custody for 59 days before being taken to court, in a ruling dated 15<sup>th</sup> March, 2010 the appellant was advised by the High Court to take up the issue on appeal to this Court.

Mr. Kimani also raised the issue of non-compliance with **section 200(3)** of the Criminal Procedure Code as Hon. Ogembo heard the evidence of six (6) witnesses (*should be 7*) Hon. Ochenja three (3) witnesses and finally Hon. Nyambu heard the evidence of PW11. He faulted the court for failing to recall the prosecution witnesses on the basis that they were unavailable as they were tourists yet PW1 was based in Kileleshwa in Nairobi; PW2 was the owner of the establishment where the alleged robbery took place whilst PW3 was his daughter and a student in Dublin in Ireland.

Finally, Mr. Kimani took issue with the alleged identification of the appellant in view of PW1's evidence that all the robbers were masked. He relied on the following authorities:

**“1. Ann Njogu & 5 Others v Republic [2007] eKLR**

**2. Albanus Mwasia Mutua v Republic [2006] eKLR**

**3. Samwel Ngare Kayaa alias Kuria Wanjohi alias Mapua & Another v R. Mombasa Criminal Appeal No. 5 of 2011 (UR)**

In response, **Mr. Wohoro** the learned Senior Assistant Director of Public Prosecutions opposed the appeal on the basis that the long incarceration of the appellant was occasioned by long hospitalization as the appellant had been shot in the leg at the *locus in quo*. The learned counsel further submitted that even if the appellant had been held in excess of the stipulated period, his remedy was an award of damages and not an acquittal.

As to the provisions of **section 200(3)** of the Criminal Procedure Code the learned counsel submitted that the trial court was not obligated to recall witnesses but was mandatorily required to inform the appellant

of his rights and that in any event the appellant's counsel had waived the right to recall the witnesses by proceeding to have the matter heard to conclusion.

This being a second appeal, our mandate is as stated in **section 361** of the Criminal Procedure Code, to wit:

***“361(1) A party to an appeal from a subordinate court may subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:-***

***(a) on a matter of fact, and severity of sentence is a matter of fact; or,***

***(b) against sentence, except where a sentence has been enhanced by the by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

The above provision of the law was amplified in the case of **Hamisi Mbela & Another v. Republic Mombasa Criminal Appeal No. 319 of 2009 (UR)** wherein this Court held:-

***“8. This being a second appeal, this court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M’Riungu vs Republic [1983] KLR 445.***

***Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)).”***

We have considered the grounds of appeal, the rival submissions, the proceedings of the trial court and the judgments of the two courts below us.

As to the issue of violation of the appellant's constitutional rights both in the retired and current Constitution, we note that the offence was committed on 25<sup>th</sup> July, 2004 before the enactment of the Kenya Constitution 2010. The current Constitution is therefore inapplicable. But even assuming that the appellant's rights were violated under the retired Constitution, the position in law is that this violation does not entitle the appellant to an acquittal. Contrary to the position in the *Ann Njogu* case (*supra*) as well as *Albanus Mwasia Mutua* (*supra*), the law is now well settled that a suspect whose personal liberties are violated by long incarceration is not entitled to an acquittal but an award of damages. In **Julius Kamau Mbugua v R. Criminal Appeal No. 50 of 2008** the Court stated as follows:

***“the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72(b) expressly compensatable by damages.”***

Besides, we note that the trial took exceedingly long as the appellant often sought adjournment on account of ill-health and often complained of not keeping good health. Indeed the prosecution explained that the appellant was not arraigned in court immediately for plea as he had been shot on the leg in the locus in quo and this necessitated hospitalization before he was eventually arraigned in court.

The other ground of appeal raised by the appellant was the non-observance of **section 200(3)** of the Criminal Procedure Code by the trial court.

**Section 200(3)** of the Criminal Procedure Code provides as follows:

***“(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right [emphasis mine].*** (emphasis added)”

How did the trial court handle the issue?

On the onset, we wish to point out that it is unfortunate that the appellant’s trial was handled by not less than three (3) Magistrates. The trial commenced on 16<sup>th</sup> February, 2005 before Ogembo D.O. who recorded the evidence of PW1 **Naureen Alam**, PW2 **Louis Van Aardt**, PW3 **Emily Van Aart**, PW4 **Lawrence Ndhiwa**, PW5 **Benjamin Charo Emmanuel**, PW6 **Issa Mohamed** and PW7 **James Ndaa Karisa**. On 10<sup>th</sup> July, 2007 the trial was taken over by **D. Ochenja**, and the appellant in earnest raised the need for the trial to commence de novo. He is on record as having stated as follows:-

***“I would wish the matter is (sic) commence de novo because I don’t want the matter to be handled by two Magistrate’s”***

The appellant’s application was opposed by the prosecution on the basis that most of the witnesses were tourists. The trial Magistrate (D. Ochenja) proceeded to write a ruling and declined to have the matter start *de novo* on the reasoning that the trial had taken long and further that some of the witnesses may have left the country. He directed that the matter proceeds from where it had reached. **Mr. Angima** who appeared for the appellant undertook to discuss the court’s position with the appellant to ***“see whether we may proceed from where we had reached”***. The matter came up for hearing next on 13<sup>th</sup> November, 2007 in the presence of Mr. Angima who did not revisit the issue. Thereafter, the court recorded the evidence of PW8 **Dr. Gideon Mutua**, PW9 **Pc. Justus Kipchumba Bett** and PW10 **Muslin Said**, the Clinical Officer at Lamu District Hospital. All these witnesses were duly cross-examined by Mr. Angima for the appellant. However, on 5<sup>th</sup> May, 2008 the matter was placed before another new Magistrate, namely Hon. D. W. Nyambu and **Mr. Otara**, learned counsel who appeared for the appellant on that day asked for the case to start *de novo*. The prosecution opposed the application on the same grounds that some of the witnesses were tourists. D.W. Nyambu adjourned the case to 26<sup>th</sup> June, 2008 to enable her peruse the record. When the matter came up for hearing on 26<sup>th</sup> June, 2008, Mr. Otara did not revisit the issue but he is on record telling the court ***“we are ready to proceed”*** Later, Mr. Angima joined the coram and the record states:

***“section 200(3) CPC explained to the accused through his advocate who opted to have the case proceed from where it has reached”***

Hon. Nyambu proceeded to further direct that witnesses who were in Kenya were to be recalled for further cross-examination by the defence. In spite of this directive no names were furnished. Hon. Nyambu thereafter recorded the evidence of PW11 **C.I. Noel Koiya** as well as the appellant’s defence.

Our summation of the above is that the appellant was informed of his rights under **section 200(3)** of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial Magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that ***“this provision does not oblige the succeeding magistrate to start de novo”*** but what is mandatory is to inform an accused of his right under **section 200(3)** of the Criminal Procedure Code. The case of **Samwel Ngare Kayaa alias Kuria Wanjohi alias Mapua & Another v R Mombasa Criminal Appeal No. 5 2011 (UR)** cited by the appellant’s counsel is distinguishable as in that case the trial court failed to comply with **section 200(3)** of the Criminal Procedure Code completely.

One more issue raised by the appellant was on identification. To begin with the robbery took place at about 6 p.m. and hence it was still day light. PW3 and PW5 told the court that they identified the appellant. Each one of these two witnesses gave a vivid account of the events. The first appellate court analysed and re-examined the evidence on identification and came to the conclusion that the appellant was positively identified. Besides, the appellant was shot by PW2 and he fell on the spot where he was eventually removed from. We agree and as noted by the first appellate court,

***“... the most compelling evidence linking the appellant to this offence is the evidence of his shooting.”***

He himself did not deny being in PW2’s premises. The two lower courts rejected the defence of the appellant that he had gone to PW2’s premises for a drink. We find no reason to fault the concurrent findings of the two courts as it is clear that the appellant was found in locus in quo having been shot by PW2.

The upshot of the above is that we find no merit in this appeal and the same is dismissed in its entirety.

***Dated and delivered at Malindi this 9<sup>th</sup> day of October, 2014***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**