



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: KIHARA KARIUKI, (PCA), MARAGA & J. MOHAMMED, JJA)**

**CRIMINAL APPEAL NO. 150 OF 2013**

**BETWEEN**

**AGGREY MBAI INJAGA ..... APPELLANT AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng & Warsame, JJ.) dated 17th May, 2011*

*in*

*H. C. Cr. A. No. 354 of 2007)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

- (1) Aggrey Mbai Injaga, hereinafter referred to as the appellant, was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. After trial, he was convicted of the offence and sentenced to suffer death as provided by law.
- (2) Being aggrieved with that conviction and sentence, the appellant preferred a first appeal to the High Court of Kenya at Nairobi. In that appeal he alleged that the trial court violated his constitutional rights by depriving him of vital documents during the trial, and by not affording him an opportunity to secure legal representation. The appellant further complained that the record of appeal was improper as it did not indicate clearly whether or not he had been present during trial, and that the trial court failed to give consideration to his defence.
- (3) That appeal was heard and determined by Ojwang and Warsame, JJ. (as they then were) who, after acknowledging their duty as a first appellate court to re-evaluate the evidence tendered before the trial court, dismissed it, upholding the conviction and affirming the sentence meted out by the trial court.
- (4) The appellant has now brought this second appeal which was canvassed before us by Mr. K. A. Nyachoti, learned counsel for the appellant. Mrs. G. W. Murungi, Senior Assistant Director of Public Prosecutions, opposed the appeal on behalf of the state.
- (5) This is a second appeal, and we remind ourselves of our duty of loyalty to the concurrent findings of fact of the courts below us. In the words of this Court in **Adan Muraguri Mungara**

***2007):***

***“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”***

(6) In addition, **section 361** of the Criminal Procedure Code enjoins us to entertain this appeal only on matters of law. In our view the only issue of law that arises for our determination in this appeal is whether or not the appellant’s rights were infringed in the manner his trial was conducted on the 6th March, 2007. On that date, before the hearing proceeded, the prosecutor indicated that he was prepared to proceed with five witnesses. The appellant then stated as follows:

***‘I do not want to proceed before this court. I still do not have a lawyer.’***

(7) The trial magistrate noted that the appellant had been granted adjournments on the 5th July, 2006, 11th August, 2006, 14th September, 2006 and the 8th January, 2007. All those adjournments had been granted to enable the appellant to engage an advocate to represent him, and it had been indicated that the adjournment of the 8th January, 2007 was a last adjournment.

(8) When Court resumed on the 6th March, 2007, the appellant made an application for yet another adjournment. The trial magistrate declined to grant the application, and directed that the hearing would proceed with the witnesses that were present. After this, the record indicates that the accused stated that he would not participate in the proceedings, and returned to the cells. Thereafter, the trial proceeded in the appellant’s absence after the trial magistrate invoked **section 77 (2)** of the retired Constitution which provided that a criminal trial could proceed in the absence of an accused person if he conducted himself in a manner that would render the continuance of his trial in his presence impracticable.

(9) Mr. Nyachoti’s contention is that the trial court was wrong in invoking **section 77 (2)** of the retired Constitution, and that the first appellate court misdirected itself in the interpretation and application of that section. According to Mr. Nyachoti, the first statement of the appellant that ***“I do not want to proceed before this court”***, was an application for disqualification of the trial magistrate while the second statement that ***“I still do not have a lawyer”***, was an application for adjournment to allow the appellant engage an advocate to represent him.

(10) Counsel submitted that the trial magistrate had a duty to conduct an inquiry into the application for disqualification, and then make a ruling on the same. Counsel added that as the trial magistrate ignored the application for disqualification, she demonstrated bias against the appellant, in violation of the principle of natural justice that every person shall be accorded a fair trial. Counsel also argued that the first appellate court failed to acknowledge that the appellant was not afforded a fair hearing as a ruling was never made on his application and as such it should have declared a mistrial or ordered a re-trial.

(11) In response, Mrs. Murungi submitted that there was no infringement of the appellant’s rights and argued that the statements the appellant made were to the effect that he did not wish to proceed because he had no lawyer. Counsel added that since the appellant had on previous occasions been granted adjournments in order to secure counsel, the trial magistrate acted in accordance with the law in proceeding with the trial as provided under **section 77 (2)** of the

retired Constitution.

(12) **Section 77 (2)** of the retired Constitution provided for the rights of an accused person during trial. In particular, that section provided that:

***“...except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.”***

(13) So under **section 77 (2)** every accused person had the right to be present during his trial unless he consented to the trial going on in his absence, or if the accused so conducted himself in a manner that ***‘would render the continuance of the trial impossible.’***

(14) Having gone through the trial record, we note that the appellant made four applications for adjournment; which were all granted for the appellant to engage an advocate to represent him. The trial record also indicates that the trial court granted a last adjournment on the 8th January, 2007 but when the trial resumed on 6th March,

2007, the appellant still requested a further adjournment.

(15) Our reading of the appellant’s statements do not appear to us to have been an application for disqualification of the trial magistrate as Mr. Nyachoti concluded, but rather an application for yet another adjournment so that the appellant could secure legal representation. When his request for adjournment was not granted, the record indicates what happened after in the following terms:

***“Accused: In that case I won’t participate in these proceedings***

***(accused goes back to the cells)***

(16) The trial court then noted that as the accused had left the court of his own accord, it was impracticable to proceed with the hearing in his presence, and therefore ordered that the trial do proceed in his absence. We concur with Mrs. Murungi that the appellant had conducted himself in a manner to render the continuance of the proceedings impracticable by requesting for numerous adjournments whenever the trial court sought to proceed with the matter, and by walking out of court and refusing to participate in the proceedings.

(17) We therefore find no merit in the assertion that the appellant was denied a fair hearing. Like the first appellate court, we note that throughout the trial, the court adequately accommodated the appellant by affording him sufficient time to engage an advocate of his choice.

(18) We therefore find that this appeal is devoid of merit, and hereby order it dismissed.

**Dated and delivered at Nairobi this 3rd day of October, 2014**

**P. KIHARA KARIUKI (PCA)**

**JUDGE OF APPEAL**

**D. K. MARAGA**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**