



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI. JJ.A)

CRIMINAL APPEAL NO. 107 OF 2008

BETWEEN

DOUGLAS DANIEL ODHIAMBO)

JOHN ODHIAMBO *alias* KAMALIZA)... ..APPELLANTS

MARK ANENE OKUYUMBA)

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Busia (Ombija & Kariuki, JJ.) dated 2nd July, 2008 in

H.C.CR.A. NO. 105 OF 2003)

JUDGMENT OF THE COURT

The appellants, *Douglas Daniel Odhiambo* (the 1st appellant), *John Odhiambo alias Kamaliza* (the 2nd appellant) and *Mark Anene Okuyumba* (the 3rd appellant) were jointly charged before Busia Senior Resident Magistrate's Court with various counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code and convicted on two of those counts; (count 1 and count 2). Following their conviction they were each sentenced to death as by law provided. They each appealed to the High Court (Ombija & Kariuki, JJ.) but their appeals were dismissed thus provoking the appeal before us.

It was alleged in the 1st count that the appellants, on the 24th June, 2002 at Bwangangi village, Odiado sub-location, in Busia District within Western Province, jointly and while armed with dangerous or offensive weapons namely, *jembes*, *rungus* and *pangas* robbed **Silvester Olale** of one amplifier, one sola battery, one mobile phone – make Erickson and cash sum of Kshs.1500/= all valued at Kenya Shillings 37,000/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Silvester Olale (hereinafter Olale).

In the 2nd count, it was alleged that the appellants, on 23rd June, 2002 at Mudoya village, Muyafwa sub-location in Busia District within the Western province, jointly and while armed with dangerous weapons or offensive weapons namely, *pangas*, *simis* and *rungus*, robbed **Linnet Auma Makhoha** (hereinafter

“Auma”) of one radio – make Panasonic, one handbag, a purse, one pair of open shoes and cash sum of Kenya Shillings 14000/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Auma.

The appellants on their own filed various grounds of appeal and when their appeals came up for hearing, Mr. Jamsumbah, learned counsel for the appellants, sought leave of the court to be allowed to raise two jurisdictional issues. As Mr. Abele, the learned Assistant Director of Public Prosecutions raised no objection, we allowed counsel for the appellants to address us on those issues. We may frame the issues as follows: -

1. *That the learned judges of the High Court erred in law in upholding the conviction of the appellants without considering that part of the proceedings were conducted by an incompetent prosecutor.*
2. *That the learned judges of the High Court erred in law in upholding the conviction of the appellants without considering that part of the proceedings were conducted by an unqualified magistrate.*

These additional grounds of appeal supplemented the grounds filed by the appellants in person which, among other things, alleged that their identification was not positive and that the learned judges of the High Court failed to analyse and re-evaluate the evidence of the trial court and arrive at their own independent conclusion.

We have identified the above issues from the various complaints made by the appellants as in our view, the success or otherwise of these appeals turn on the same. Indeed they are the issues of law which as the second appellate court we are enjoined to consider.

We have, on our own, perused the record before us as we are expected to do and observed that the appellants took their pleas before Omwega, a Senior Resident Magistrate on 3rd July, 2002. They denied the charges and after several adjournments, the trial commenced on 31st October, 2002 before J.N. Mukut, a 2nd class District Magistrate (Prof.). The prosecutor was **Corporal Autai**. On that day the testimonies of **Olale** (PW1) **Agnes Okwaro Olale** (PW2) (hereinafter “Okwaro”) and **Auma** (PW3) were taken. PW1 and PW3 were the complainants in counts 1 and 2 upon which the appellants were convicted.

Thereafter the proceedings were taken over by Betty Maloba, a Senior Resident Magistrate, until conclusion. The prosecution before her was conducted by a Chief Inspector of Police.

We therefore do respectfully agree with Mr. Jamsumbah, learned counsel for the appellants, that part of the proceedings in the subordinate court was conducted by a police officer of the rank below that of an Assistant Inspector of Police contrary to the provisions of **Section 85 (2)** of the Criminal Procedure Code then applicable. The provisions of that subsection provided as follows: -

85 (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.”

Given the above provisions of the law, it is clear that an unqualified prosecutor conducted a significant part of the proceedings before the subordinate court. Mr. Abele, the learned Assistant Director of Public Prosecutions, did not suggest that Corporal Autai who conducted those proceedings had obtained permission from the Attorney General to conduct part of the prosecution in terms of the said sub-section of the Criminal Procedure Code, but even if he had suggested so, it would have been illegal. The learned Assistant Director of Public Prosecutions indeed readily conceded that Corporal Autai was not qualified to conduct the prosecution. In the celebrated case of **Roy Richard Elirema & Another vs. R. [2003] KLR 537**, this Court stated as follows: -

“For one to be appointed as a public prosecutor by the Attorney General one must be

either an advocate of the High Court of Kenya or a police officer not below the rank of Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as prosecutors must be declared a nullity. We now do so with the result that all convictions recorded against the two appellants must be and are hereby quashed and the sentences set aside.”

This Court further stated in the same case of *Elirema* (supra) as follows:

“It is, however, true that an Inspector Wambua also conducted part of the prosecution. But a police corporal does not in law, have authority to prosecute as a public prosecutor, as was submitted before us we cannot see that we can separate one part of the trial and hold it valid (i.e the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e the parts conducted by Corporals Kamotho and Gitau) are valid. There was only one trial and if any part of it was materially defective, the whole trial must be invalidated.”

In our case the proceedings before the subordinate court were further compounded by another defect. We have already observed that Olale, (PW1) Okwaro (PW2) and Auma (PW3) testified before Mukut DM II (Prof). The appellants were charged with robbery with violence contrary to **Section 296 (2)** of the Penal Code as we have already stated. Under the 1st Schedule to the Criminal Procedure Code, such an offence can only be tried by a subordinate court of the first class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate.

Under the above provisions therefore, Mukut who, it is recorded, was a District Magistrate Class II (Prof), had no jurisdiction to conduct any part of the proceedings involving the appellants as they faced a charge under **Section 296 (2)** of the Penal Code.

The above defects in the proceedings before the subordinate court do not appear to have been raised before the High Court. That notwithstanding, the learned judges of the High Court should have, on their own, taken up the two issues. We have, on our part, allowed counsel to address us on the twin issues because they are points of law.

In the end we have come to the conclusion that the trial before the subordinate court was a nullity. We accordingly declare it a nullity. It must follow that all the convictions recorded must be and are hereby quashed and the sentences set aside.

Mr. Abele urged us to make an order for retrial before the subordinate court. He submitted that the prosecution had a watertight case against the appellants and that a retrial could be mounted with dispatch. In counsel’s view, the same would be in the public interest and lastly that the appellants would not be prejudiced.

Mr. Jamsumbah, on his part, opposed an order for retrial on the ground that the appellants have been in custody for nearly ten (10) years and there is likelihood of their fundamental rights under the Constitution being infringed if a retrial is ordered. Counsel was further not convinced that witnesses would readily be available for the retrial.

We have anxiously considered the plea for a retrial and the opposition thereto. We indeed appreciate that the charge which faced the appellants was a serious one and that justice must be done and seen to be done to all including the victims of the offences. However, looking at the record in this case, we have found factors which would militate against a retrial. In the case of **Ahmed Sumar vs. Republic [1966] EA 481** at page 483, it was stated: -

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a

conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.”

The court, in that case, referred to the case of **Pascal Clement Braganza vs. R** [1957] EA 152. In its own words: -

“We were also referred to the judgment in Pascal Clement Braganza vs. R [1957 EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible evidence or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

This Court has therefore settled that the primary consideration whether to order a retrial is when and where the interest of justice require that the order be made. It said as much in **Benard Lolimo Ekimet vs. R** [Criminal Appeal No. 151 of 2004] (UR). In its own words: -

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

In the case before us, both courts below in convicting the appellants relied, *inter alia*, on the charge and caution statements allegedly made by the appellants. Yet we are not certain that those statements were properly admitted in evidence. The record shows that those statements were produced by **Chief Inspector Henry Kimeto** (PW4). He first sought to produce the statements allegedly made by the appellants without identifying which of the appellants he was referring to. One of the appellants stated that he did not make the statement. In his own words: -

“I did not write.”

It is not clear, from the record, who of the appellants made that expression. It could have been the 1st or 2nd appellant. We say the 1st appellant because he would have been the first to be asked to respond and it could also have been the 2nd appellant because he was the first suspect PW4 testified about. Subsequently in his testimony PW4 stated that he charged and cautioned the 1st appellant after talking about the statement of the 2nd appellant.

From the record, we are not satisfied with the manner in which the alleged charge and caution statements were handled by the subordinate court. The value of those statements was greatly weakened considering that a trial within trial does not appear to have been held before the statements were admitted. The statements were therefore admitted in evidence without considering that they had either been retracted and or repudiated.

In **Tuwamoi -v- Uganda** [1967] EA 84, the predecessor of this Court stated as follows: -

“We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases.....”

Here the evidence of confession attributed to the appellants was accepted as true at the mere say so.

We have further given consideration to the issue of identification. The record shows that besides the identification at the scene of crime, the prosecution sought to rely upon evidence of identification parades

which were mounted by Inspector **William Lupao** (PW6). It is settled that for evidence of identification parade to carry any value, the identification parade must have been held with scrupulous fairness and in accordance with the Police Force Standing Orders (see **R-v- Mwangi s/o Manana [1936] 3 EACA 29**).

And in **Njihia -v- Republic [1986] KLR 422**, this Court stated as follows, at page 424: -

“It is not difficult to arrange well conducted parades. The orders are clear. If properly conducted especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade and reach back to his impression of the person who perpetrated the alleged crime.”

To achieve the objective of properly conducted identification parades, the Police Force has designed identification parade form (Police 156) which has outlined the procedure to be followed whenever it is necessary that a witness be asked to identify a suspect. **Standing Order 6 (iv) (d)** and **(n)** are pertinent and are in the following terms: -

“(d) the accused person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) the parade must be conducted with scrupulous fairness otherwise the value of the identifications as evidence will be lessened or nullified.”

In the appeal before us, we have observed the following from the record of the subordinate court. Olale (PW1) is alleged to have identified the appellants at the scene and also at an identification parade subsequently conducted by PW6. When Olale testified he said *inter alia* as follows: -

“On 26/6/2002, I got word that a suspect had been arrested with my mobile telephone. I went up to Bumala AP Camp and I identified the mobile telephone – make Erickson ex MFI – which Accused 1 had been found with when he was arrested....”

And **Corporal Patrick Wafula** (PW7) said as follows regarding that aspect of the case: -

“On 26/2/02, [26/6/02] I was at the police post at 4.00 p.m. when the members of the public came to the post alleging they had arrested a suspect at Bumala, on allegations of a robbery which occurred on 24/6/02. One complainant Sylvester Olure (sic) was there. He found his mobile by the suspect. I informed the Inspector, we went and collected the suspect.”

Given the testimony of PW7, there was no point of mounting an identification parade for Olale to identify the appellant. Yet the investigating officer found it necessary to conduct an identification parade for the 1st appellant, in which parade, Olale participated and purported to identify the 1st appellant. The decision to require Olale to identify the 1st appellant in the said identification parade contravened **Force Standing Order No. 6 (iv)(c)** which reads as follows: -

“(c) the witness or witnesses will not see the accused before the parade;”

So, the purported identification of the 1st appellant by Olale at the identification parade could not lend

credence and support to his alleged visual identification at the scene. Yet that evidence was relied upon in convicting the 1st appellant.

We have also observed that the same members were used for the parades mounted for all the appellants. The parade officer (PW6) admitted as much in his evidence-in-chief. Yet the witnesses did not say that the appellants were of similar age, height, general appearance and class of life. The use of the same members for the parades for all the appellants greatly diminished the value of the evidence of the parades. In **David Mwita Wanja & Others vs. R [Criminal Appeal No. 117 of 2005]**, it was stated as follows:

“For our part we think the use of the same members of the parade in respect of the two appellants, Peter and Joseph and one identifying witness, Lolo, was extremely prejudicial to the appellant, thus rendering the parades worthless.”

That is also our view of the parades mounted in respect of the appellants herein. We find that parade evidence worthless.

The two courts below did not consider the issues we have discussed above. We do not know if they would have come to the same conclusion if the issues had been considered.

We have also considered the period the appellants have been in custody which period is an important and relevant factor to be considered whether an order for a retrial should be made. The record shows that the appellants were arrested on 26th June, 2002 and appeared before Omwega (SRM) on 3rd July, 2002 for plea. They denied the charge and were remanded in custody pending trial. The trial proper commenced on 31st October, 2002 and was concluded on 14th January, 2003. The appeals before the High Court were concluded on 2nd July, 2008. The appeals before us were lodged in the 2nd half of 2011 and have just been heard. The entire process has therefore taken over ten (10) years to be concluded in the anticlimax of a mistrial. The appellants have not in any way contributed to the mistrial and an order for retrial will mean that they undergo a second trial more than ten (10) years after the alleged commission of the offence. Such a trial in our view would violate the appellants’ rights under the Constitution. **Article 77 (1)** of the repealed Constitution provided as follows:-

“77 (1) If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

And **Article 50 (2) (e)** of the **Constitution 2010** reads as follows:-

“50 (2) Every accused person has the right to a fair trial which includes the right: -

.....

(e) to have the trial begin and conclude without unreasonable delay.”

We also have **Article 159 (2) (b)** of the same Constitution which reads as follows:-

“2. In exercising judicial authority, the courts and tribunals shall be guided by the following principals –

a.

b. Justice shall not be delayed;”

We are alive to our mandate that the purposes and principles of our Supreme Law must be protected and promoted. Applying those principles enshrined in the Constitution we have come to the conclusion that a

retrial should not be ordered in this case. It is also our view that even if the prosecution were to act diligently and the trial court proceeds with dispatch, the appellants, trial would still take sometime. The trial may even take longer the second time round, as the prosecution witnesses may have relocated or their circumstances changed. Further delay in the trial of the appellants would therefore be inevitable. This view is buttressed by the record of the trial before the subordinate court at which the prosecution could not avail all its witnesses at any one time. That was just about a year after the offence was allegedly committed. The position must be worse now, ten years later.

In the end, as we have already stated the appeals are allowed. The convictions of the appellants are quashed and the sentences set aside. The appellants are set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 17th day of May, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR