IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 309 OF 2009

BETWEEN

JOHN OUMA ORUNGO)

JAMES MUNGAI KAMAU)

PHILIP NYERERE)……..…….APPELLANTS

AND

REPUBLIC ..…….....…….……RESPONDENT

(*An appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Muchelule, JJ.) dated 23rd July, 2009* in

H.C.CR.A. No. 132, 134 & 135 OF 2004)

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JUDGMENT OF THE COURT

The history of this appeal is to say the least sad. The three appellants namely ***John Ouma Orungo***, ***James Mungai Kamau*** and ***Philip Nyerere*** together with two others were charged with two offences both of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. The particulars of the first count were that: -

> **"On the 17th day of February, 2003, at Migori Wholesalers in Migori District within Nyanza Province, jointly with others not before court, being armed with dangerous weapons namely AK 47 rifle robbed Mohammed Jamaa Salah of Kshs.3,704,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Mohammed Jamaa Salah."**

Each of the appellants pleaded not guilty to the charge. At the hearing before the Senior Resident Magistrate's Court, seventeen (17) witnesses gave evidence for the prosecution, one of whom was the complainant named in the charge sheet. First appellant who was the first accused before the trial court gave a sworn statement in his defence whereas the second appellant who was the fifth accused and the third appellant who was the fourth accused both gave unsworn statements in their respective defences. First appellant was represented by an advocate at his trial, but the second and third appellants conducted

their defences in person. The other two accused persons before the court were also represented by an advocate. After full hearing, the trial court convicted the three appellants in this appeal who were as we have said, in that court, the first, fifth and fourth accused. In so doing the learned Senior Resident Magistrate (S.O. Atonga) however found them guilty of a lesser offence of robbery with violence contrary to ***Section 296 (1)*** of the Penal Code contending in doing so that ***Section 179 (2)*** of the Criminal Procedure Code allowed him to do so. We do not think he was right on that aspect, but we do not propose to discuss that in this judgment as the irrelevance of discussing that aspect will be clear later in this judgment. The three appellants were, after mitigation each sentenced to serve a term of six years imprisonment and the motor vehicle the subject of the charge ordered returned to the owner.

Notwithstanding that rather lenient sentence for what was originally a very serious offence which could have attracted death sentence if it had stood, the appellants were nonetheless dissatisfied with the conviction and sentence. They appealed against the same to the High Court. These were Criminal Appeal Numbers 117, 119 and 123 all of 2004. Before those appeals could be heard and disposed of, the State also filed appeal against the sentences meted out against each appellant. The appeals filed by the Attorney General were Numbers 132, 134 and 135 all of 2004. On 22nd June, 2009, all the appeals came up for hearing. On that day each of the three appellants herein applied for leave to withdraw his appeal. The court (Musinga and Muchelule, JJ.) granted them leave to withdraw their appeals. However, the State represented by Mr. Kemo continued and argued its case which in respect of each appellant, was premised on two grounds which were similar word for word and were namely: -

> *"1. The learned trial magistrate erred and misdirected himself in law in failing to convict the suspects on a charge of robbery with violence contrary to section 296 (2) when the prosecution's evidence proved the charge beyond any shadow of doubt.*
>
> *2. The learned trial magistrate erred in law in failing to interprete the provisions of section 179 (1) of the Criminal Procedure Code and therefore arrived at an unjustifiable decision."*

The Attorney General therefore sought that the appellants be convicted on the original charge of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and of course the consequence of that was that they could be sentenced to death. It cannot escape one's consideration that the two grounds raised were purely matters of law and that the appellants having withdrawn their appeals, left the issue of their conviction uncontested such that all the prosecution needed to do was to show that the evidence proved offence under ***Section 296 (2)*** and not ***Section 296 (1)*** and the court had to decide on that aspect on the main as the appellants were no longer challenging their conviction. As one of the appellants ***Elijah Omolo Amayo*** was sick after being released on bail, his appeal did not proceed on the hearing date in the first appellate court. It was adjourned. That left only the appeals against the three appellants herein to continue to hearing. The State applied for its appeals to be consolidated and despite objections from the appellants before us, the court, rightly in our view, consolidated all the three appeals and they were heard together. Mr. Kemo, the learned State Counsel then addressed the court at length and at the end of his submissions, the first appellant made an application to the court as follows: -

> *"I want to instruct an advocate. I pray for adjournment."*

That application was summarily rejected and all the court stated was: -

> "Court: Applicaton rejected."

It is not clear which application was rejected, whether it was the application to engage an advocate or application for adjournment. Further no reasons were given for rejection of the application whichever application was rejected. However, the court proceeded, but it is noteworthy that the first appellant did not immediately address the court. It was the second appellant who addressed the court and thereafter the third appellant. After the two addressed the court, the record shows that the first appellant ***John Ouma Orungo*** said: -

> *"I now wish to proceed on my own."*

And thereafter he addressed the court.

In a judgment delivered on 23rd July, 2009, the court allowed the appeal by the State, substituted the charge of robbery with violence contrary to ***Section 296 (2)*** in place of robbery contrary to ***Section 296 (1)*** and thereafter, in the same judgment sentenced each appellant to death. That is the genesis of this appeal premised on five (5) grounds, which are that: -

> *"1. The learned Judges erred in both law and fact in upholding the conviction and sentence of the subordinate court without considering that the appellants' fundamental rights as guaranteed under Section 72(2) of the old Constitution (Article 50(2) of the Constitution 2010) were violated.*
>
> *2. The learned Judges erred in both law and fact when they failed to re- evaluate the evidence on record.*
>
> *3. The learned Judges erred in both law and fact in failing to find that the charge sheet was fatally defective and therefore could not sustain the conviction of the appellants.*
>
> *4. The learned Judges erred in both law and fact in failing to find that the evidence on record does not support the charge.*
>
> *5. The learned Judges erred in law and in fact when they came to the conclusion that the appellants were not accorded an opportunity to defend themselves."*

At the hearing of this appeal, Mrs. Onyango, the learned counsel for all appellants submitted that the failure by the learned Judges to allow the first appellant adjournment to instruct a lawyer amounted to violation of the provisions of ***Section 72 (2)*** of the retired Constitution which we think she mistook for ***Section 77 (2)*** of the retired Constitution, which clearly states that it was a right of an accused person to be represented by a lawyer of his choice. The effect of that denial which was not made upon any reasons whatsoever was that the entire proceedings before the High Court were vitiated as the appeals had been consolidated and were proceeding as such. She also submitted on other grounds but for what will be clear hereafter, we do not consider it necessary to delve into those other submissions. Mr. Meroka, the learned Prosecuting Counsel conceded that the refusal to grant adjournment to the appellants to enable the first appellant secure the services of an advocate and particularly the rejection of that application without giving any reasons at all was a serious omission. He urged us to consider ordering a retrial stating that the prosecution would mount a credible prosecution. Mrs. Onyango, on the other hand felt the appellants having been in police custody as well as in prison now for over ten (10) years, have suffered enough and so urged us not to order a retrial.

We have considered the entire case before us. We are of the view that the learned Judges erred in law in refusing the application by the first appellant which sought to instruct an advocate and thus sought adjournment to do so. It was further unfair to refuse such a request without attaching any reasons in support of such refusal. The three appellants had been imprisoned for six years each on a lesser charge of robbery under ***Section 296 (1)*** of the Penal Code. The State wanted the court to set aside the conviction under that provision and to substitute it with a conviction under ***Section 296 (2)*** of the Penal Code which carried death sentence. This was a serious matter and was, if successful going to end up in their losing their dear lives. The issue as to which cases of robbery fall under ***Section 296 (1)*** and which ones fall under ***Section 296 (2)*** is a moot point even among lawyers. What with laymen? In our view, apart from the fact that the right to legal representation is guaranteed in both the old and the present Constitutions, this particular case where the court was to be addressed on whether or not the case before the trial court should have attracted a conviction under ***Section 296 (2)*** or ***296 (1)***, did in itself raise such a serious legal matter that required the services of an advocate whatever way one looked at it. Indeed the notes of Muchelule, J brings out the issue even more clearly. The learned Judge noted the first appellant as saying:

> *"I want to instruct an advocate to help me respond."*

And after the other two appellants had addressed the court, the learned Judge recorded the first appellant as saying: -

> *"I will not wait for advocate. I require to ….."*

Section 77 (2) of the former Constituion stated: -

> **"2. Every person who is charged with a criminal offence**
>
> **(a)…….**
>
> **(b) ……..**
>
> **(c) Shall be given adequate time and facilities for the preparation of his defence.**
>
> **(d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice."**

We agree with Mrs. Onyango that, the constitutional right for the appellant to be represented was violated upon no reasons advanced at all by the court. We also commend Mr. Meroka for conceding the appeal on that score.

The first appellate court's proceedings were vitiated and were a nullity. We set aside the judgement. In our view as the appeals had been consolidated, even the appeals by the other two were vitiated. That is when a fair trial as per the Constitution was not accorded to them. What next? Shall we or shall we not order a retrial, which in effect would be a rehearing of the appeals before the High Court? We say appeals before the High Court because in our view, the appeal before the High Court is what was vitiated as that is the forum where the appellant's right to representation was refused without any reasons.

It is not in dispute that the appellants have been in custody for over ten years. The hearing of their case commenced in April, 2003 and since then they have been in custody in one way or another. Of course they were sentenced to six years imprisonment on 31st May, 2004 and so served part of that prison sentence till 23rd July, 2009 when their sentence was about to expire when the heavier sentence of death was imposed. We mention this as it is in the proceedings and judgment on appeal that we have declared a nullity. In our view, had that aspect of the vitiated appeal not intervened these appellants would have long served their respective sentences of six years imprisonment. We have to put that aspect in mind as well as the fact that the appeal was also seeking to put right what appeared wrong namely whether the trial court could proceed under the provisions of ***section 179 (2)*** of the Criminal Procedure Code to reduce the charge from robbery with violence under ***section 296 (2)*** to robbery under ***Section 296 (1)*** both of the Penal Code. We must and do weigh these two aspects.

In the case of **Fategali Manji vs. The Republic, (1966) EA 343**, the predecessor to this Court had this to say:

> **"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."**

In a more recent decision, on the same issue, this Court in the case of **Rwaru Mwangi vs. Republic Cr. Appeal No. 18 of 2006 (ur)** was more exhaustive in the matters that need to be considered before ordering a retrial. It stated: -

> **"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment in court of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See Muiruri vs. Republic (2003) KLR 552. It is also necessary to consider whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result for a retrial."**

Lastly, this Court in the case of **Bernard Lolimo Ekimat vs. R. Criminal Appeal No. 151 of 2004 (ur)** summed up the principles that must guide a decision on whether or not to order a retrial. It stated:-

> **"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 this case, we have agonised over the circumstances fully and we are persuaded that interests of justice will not be served by an order for a retrial. Such an order will result into injustice to the appellants. The appellants have suffered enough and to order them to face it all once again even if it is only on appeal, would be no more than torture and not justice.

In the circumstances of this appeal, as the High Court proceedings are vitiated and one of the appellant's right to representation was refused in contravention of the then Constitution, as the same refusal affected the other two appellants as the appeals were consolidated this appeal is allowed, convictions quashed and sentences set aside. Each appellant is released 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

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR