IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MUSINGA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 174 OF 2007

BETWEEN

PETER GACHIGWA MIGWI……...…...…APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

*(Being an appeal from a sentence of the High Court of Kenya at Nairobi (**J.B. Ojwang & G.A. Dulu, JJ**.) dated 12th July, 2007 in H.C.CR.A NO. 614 of 2004)*

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JUDGMENT OF THE COURT

The appellant was convicted by the trial court for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court. That court, (**Ojwang & Dulu, JJ.**) heard the appeal, upheld the conviction by the trial court, but as regards sentence substituted the life imprisonment with a sentence of death, having been urged to do so by the State Counsel.

The appellant was again dissatisfied with the outcome of the appeal and moved to this Court. This being a second appeal the Court can only deal with matters of law, not issues of fact. However, where sentence has been enhanced by the High Court, this Court has power to determine whether the enhancement was proper in law. **Section 361(1)** of the Criminal Procedure Code states as follows:

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (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 -***
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> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
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> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

Before the trial court as well as the High Court, the appellant was unrepresented, and so after delivery of the judgment now appealed from, the appellant filed a home grown memorandum of appeal. But shortly before the hearing of this appeal, he instructed **Mr. Ondieki** to come on record for him. Learned Counsel filed a supplementary memorandum of appeal which consists of 17 odd grounds. We think that nothing

much turned on some of those grounds and that was indeed affirmed by Counsel for the appellant when he abandoned quite a number of them and argued just about five of the grounds.

The brief facts of the case were that on 30th March, 2001, **Geoffrey Mburu Mbugua**, hereinafter referred to as "**the deceased**", was carjacked by a group of people who allegedly included the appellant. The incident occurred at about 9.00 a.m. when there was sufficient sunlight.

Immediately after the robbery, police were notified by members of the public and they started tracking down the robbers. The police had been given the registration number of the deceased's motor vehicle and after a short while, they managed to trace it around Clayworks/Roysambu area. The vehicle had five occupants and when it was flagged down by the police, the occupants defied the order and instead opened fire at the police. An exchange of fire occurred and some of the suspects escaped. The appellant was not lucky, he was found in the vehicle hiding under the steering wheel. The deceased was on the co-driver's seat, dead. It was not clear whether the deceased had sustained fatal injuries during the exchange of fire or whether he had been killed earlier by the robbers.

The police arrested the appellant and upon conducting a search on him recovered from his trouser pocket the deceased's wallet which had his identity card and ATM Cards. Kshs. 5,500/- and a wrist watch were also found hidden in the appellant's inner wear.

In his defence, the appellant stated that on the material day at about 9.00 a.m. he was walking along the road when he heard gunshots and saw people running helter skelter. He suddenly felt a lot of pain on his left hand and realized that he was bleeding profusely. He screamed and a police officer came to his aid and took him to Kasarani Police Station. He had Kshs.6,600/- at the time. The police searched him but recovered nothing. He denied any knowledge of the said robbery.

The first ground of appeal that was argued by Mr. Ondieki, the appellant's learned counsel, is that the High Court "***erred in law by re-substituting (sic) and fundamentally changing the sentence".*** We prefer to deal with the issue of sentence after we have considered the grounds that challenge the appellant's conviction.

The appellant argued that the High Court failed to re-evaluate the entire evidence tendered before the trial court and arrive at its own conclusion. Mr. Ondieki submitted that if the High Court had done so, it would have realized that the prosecution evidence had many material contradictions and therefore not able to sustain a conviction. On our part, we do not agree with the appellant's counsel on that score. The High Court carefully evaluated the evidence and reached its independent conclusion. Regarding some contradictions in the prosecution evidence, this is what the learned judges stated:

> ***"The next complaint of the appellant is that the learned trial magistrate erred in convicting the appellant in the face of conflicting and contradictory evidence of prosecution witnesses. The contradictions he has raised are with regard to the registration number of the motor vehicle, and that PW7 the investigating officer, stated that the appellant was injured in the hand, while PW4, PW5 and PW6 stated that the appellant suffered no injuries. We have perused the evidence on record. We are of the view that the apparent minor contradictions do not go to the root of the prosecution case. We therefore find no merits in that ground of appeal and we dismiss the same."***

We entirely agree with that finding.

Mr. Ondieki further submitted that the appellant's conviction was unsafe because it was largely based on the evidence of a single identifying witness, which, in any event, was weak circumstantial evidence. He was referring to the evidence of **Police Constable Reuben Kieti, (P.W.4)** who was one of the arresting officers and who was also present when **Police Constable Sindani, P.W.5**, searched the appellant shortly after his arrest. However, PW.4 was not a single identifying witness. Several other police officers who were with PW.4 at the material time also gave evidence that corroborated the evidence of PW.4 in all material aspects. The other police officers were Police Constable Leonard Sindani, PW.5, **Police**

Constable Charles Mwangi, PW.6 and **Police Constable John Rotich, PW.7**.

P.C. Kieti testified that after they were notified of the car-jacking incident by members of the public, they followed the robbers in another vehicle and caught up with them at Clayworks area. They saw the vehicle take a left turn, only to hit a dead-end and that is where some of the occupants therein got out and started firing. The police had not lost sight of the stolen vehicle. After the robbers fled, PW.4 and his colleagues moved to the deceased's vehicle and therein found the appellant crouching under the steering wheel. How else could he have got into the vehicle, unless he was one of the robbers who had car-jacked the deceased? That cannot be described as "weak circumstantial evidence" by any stretch of imagination. That evidence cannot lead to any other hypothesis except that the appellant together with the runaway persons were the ones who had robbed the deceased. The well known holding in **KIPKERING ARAP KOSKE V REPUBLIC** EACA 16 135, is quite apt:

> ***"That in order to justify on circumstantial evidence the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

There was further compelling evidence to link the appellant to the robbery and this is, his possession of the deceased's stolen property, so soon after the robbery. The deceased's wallet contained his national identity card as well as his ATM cards. There were several witnesses who witnessed the recovery of those items from the appellant's pair of trousers. The appellant did not proffer any explanation as to how he otherwise came by those items. The possession of those items so soon after the robbery was sufficient to sustain a conclusion that the appellant had participated in the robbery. See **MATU V REPUBLIC,** [2004] 1 KLR 510

One other ground on which the appellant hinged his appeal is that the High Court ignored the fact that **section 200** of the **Criminal Procedure Code** had been breached by the trial court. The record shows that on 18th April, 2002 the trial magistrate (**M.W. Muigai**), stated as follows:

> ***"The court has read through the typed proceedings and they are not clear enough for the court to competently proceed with the hearing from where it stopped. The hearing will start de novo under section 200 CPC."***

Up to that stage, four prosecution witnesses had testified. Mr. Ondieki submitted that in making the aforesaid order, the court acted on its own motion yet the appellant was opposed to a fresh start of the hearing. Counsel added that the appellant was prejudiced by that move because the prosecution got a chance to fill in certain gaps. He also alleged that the prosecution did not recall PW5 and PW6 to testify. Lastly, counsel submitted that failure to take a fresh plea was fatal to the prosecution case.

Although it is correct that initially the appellant protested when the court ordered that the hearing starts *de novo*, prompting the trial court to adjourn the hearing so as to grant the appellant an opportunity to challenge that decision, we think counsel may not have realized that on 3rd September, 2002 the appellant told the court that he was ready for a fresh hearing, as long as he could be supplied with the typed proceedings. A copy of the proceedings was then handed over to him.

Section 200 of the **Criminal Procedure Code** states as follows:

> ***"200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –***
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> a. ***deliver a judgment that has been written and signed but not delivered by his predecessor; or***
> b. ***where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence,***

ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial".

We do not see the relevance of the appellant's complaint that PW5 and PW6 were not resummoned to testify when the trial was recommenced. The record shows that all the witnesses who had earlier testified were resummoned and they testified. PW5 and PW6 had not testified earlier, they testified for the first time before Mrs. Muigai. PW5 testified on 7th October, 2004 and his cross examination went on until 1.00 p.m. He was then stood down to that afternoon for further cross examination. When the court reconvened at 3.00 p.m. he was not available and so the prosecutor called PW6. On the same day PW5 was again put in the witness box to complete his cross examination, which he did.

Perhaps the only complaint that we think is worth considering is whether the plea ought to have been taken again since the hearing was starting afresh. Plea had been taken on 10th April, 2001 and the appellant pleaded "Not Guilty". What is a trial *de novo?* **BLACK'S LAW DICTIONARY**, **4th Edition** defines trial *de novo* as:

"a new trial or retrial in which the whole case is gone into as if no trial whatsoever had been heard in the court below."

However, the term "*de novo*" is not provided for in **Section 200** of the **Criminal Procedure Code** and we believe that the context in which the trial magistrate used it can only be in terms of **section 200 (1) (b)** which requires the court to "**resummon the witnesses and recommence the trial**". As already stated, the trial magistrate fully complied with that statutory requirement.

Where a succeeding magistrate decides to recommence a trial pursuant to **section 200 (1) (b)** of the **Criminal Procedure Code**, the law does not place an obligation on the trial court to have an accused take a plea again. But even if one were to interpret that subsection to imply that upon recommencement of a trial an accused person is required to take a fresh plea, the primordial issue for consideration in this appeal would be whether the appellant was prejudiced by the fact that he did not take a fresh plea. We do not think so. Procedurally, the appellant was exactly in the same position as he was after he took his plea in the previous magistrate's court.

In **DAVID IRUNGU MURAGE & ANOTHER V REPUBLIC**, Criminal Appeal No. 184 of 2004 at Nakuru, (unreported), this Court held that an accused person was not prejudiced when the trial proceeded on the assumption that he had pleaded not guilty. The Court stated:

"The issue that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of the opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code."

We respectfully adopt the same position in this appeal.

Mr. Ondieki further argued that the appellant's defence was not analysed and given due consideration by the trial court as well as the first appellate court. Our careful reading of the record of appeal shows

otherwise. This is what the trial court said regarding the appellant's defence:

> ***"The accused's defence does not cast doubt on the prosecution case, he claims in a nutshell that he was found by the police. There is no evidence in any prove (sic) knowledge of the accused person by the police officers. There was no evidence of bad faith; malice or revenge between them. If the accused alleged that members of the public rule led (sic) this killer during the gunshot spree why would the police officer pick only on him and frame up these charges against him? Why did they not at random pick more who also ran all over the place? The court finds this claim farfetched and not backed by evidence on record".***

The first appellate court carefully analysed the appellant's defence and concluded as follows:

> ***"In our view, the learned trial magistrate considered the defence of the appellant and rejected the same and gave reasons for so rejecting the same. Therefore the learned trial magistrate did comply with the requirements of Section 169 of the Criminal Procedure Code (Cap 175)."***

In view of the above, we must reject this ground of appeal.

Turning to the issue of enhancement of sentence, before the appeal was heard, the appellant was informed by the 1st appellate court judges that the sentence for the offence of robbery with violence was death and not life imprisonment. The appellant was warned that there was the possibility of his sentence being enhanced to death if the appeal was not successful. In spite of that warning the appellant elected to proceed with the appeal.

When the hearing of the appeal commenced, the State Counsel urged the Court to enhance the sentence, pursuant to the provisions of **section 364(1) (a)** of the **Criminal Procedure Code**, which the court did. We do not agree that the first appellate court erred in so doing since **section 296 (2)** of the **Penal Code** is clear that anyone convicted of robbery with violence "**shall be sentenced to death**". The sentence was therefore lawfully enhanced.

All in all, we find no merit in this appeal and dismiss it in its entirety.

Dated and delivered at Nairobi this 21st day of June, 2013.

G .B. M. KARIUKI

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JUDGE OF APPEAL

D. K. MUSINGA

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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