IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (P), OUKO & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 482 OF 2007

BETWEEN

PETER SABEM LEITU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi, (Justices Lessit & Ochieng) dated 19th October, 2004

in

H.C.CR.A. NO. 89 OF 2000)

****

JUDGMENT OF THE COURT

PETER SABEM LEITU, the appellant, was after trial, convicted by the Senior Resident Magistrate, Mrs. W. Juma sitting at Makadara, for the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** *and* sentenced to death. The particulars of the offence as outlined in the charge sheet are that on the **15th day of March, 1999** at Mini Bakery, Industrial Area in Nairobi jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant robbed one Ghosh Sukhendu Ksh. 112, 237. 70/= and immediately before or immediately after such robbery threatened to shoot the said Ghosh Sukhendu. His first appeal against conviction and sentence was dismissed and conviction and sentence upheld by the High Court at Nairobi (J. Lessit & Fred Ochieng, JJ) on 19th October, 2004, hence this second appeal.

The brief facts giving rise to this appeal are that after the appellant pleaded not guilty to the charge of robbery with violence, the prosecution called a total of eight witnesses to prove the charge, the combined effect of which was that **Stephen Kungu, PW2,** a sales man and driver at Mini Bakeries was in the process of handing over the proceeds of the day's sales to the manager, Paul Muya at the close of business, when five men, armed with pistols walked in. They ordered everyone in the room to lie down. **PW2** testified that he had two bundles of money. One bundle of Ksh. 32,966/50 from the sale of scones while the second bundle of Ksh. 52,626/= was from the sale of bread. The robbers searched his pocket

and took a further Ksh. 10,000/= making a total of Ksh. 95, 592/50, the money that was stolen. He was emphatic that he could not identify the robbers. Later, he learnt that the manager PW3 Paul Muya had also been robbed. About five minutes later, the witnesses went to the car park where they found one person arrested by the company's security officers. The person had been beaten and his face was swollen.

The manager, Paul Muya on his part confirmed that while in his office waiting for the salesmen to bring the sales proceeds of the day, he was ambushed by the robbers who ordered him to lie down. He, too could not identify the robbers but after about five minutes, he was told by one Nzioka that one suspect had been arrested.

The testimonies of **Richard Ochieng, PW5** and **Johnstone Ngote, PW6** are very crucial because it is only them who alleged to have identified the appellant.

PW5 was guarding Mini Bakery premises on the fateful day at 6:30 p.m, in the company of a salesman when a man he identified as the appellant and five others walked into the factory. One of the men pointed a pistol at him and ordered him and the salesman to lie down. They obeyed the orders and after some time, the robbers walk out. When he raised his head, he saw the appellant. Another watchman, **Johnstone Ngote** (**PW6)** quickly grabbed the appellant and immediately called PW5 to assist. They both held the appellant and beat him up. Nothing was recovered from the appellant.

PW6 confirmed that while on the outer gate of the factory, five men walked in. When he tried to ask them what they wanted, two men, the appellant being one of them, slapped him. He was ordered to lie down together with his colleague as one of the robbers stood at the door with a pistol. The appellant stepped on his back and also frisked people's pockets. The witness told the court that four robbers left the premises while the fifth robber (the appellant herein) appeared not to have seen his colleagues leave. As the four closed the door behind them leaving the appellant behind, PW6 immediately jumped on the appellant and held him. Other guards and workers responded. The appellant was beaten by members of the public and was only saved by the arrival of **PW7 Snr. Sgt. Okoko** from Industrial Area Police Station, who after arresting him escorted the appellant to the hospital following the injuries inflicted by members of the public. He was hospitalised.

Put on his defence, the appellant gave unsworn evidence to the effect that he was walking from South B Estate to Lunga Lunga where he worked, when he was confronted by people who asked for his identification. He was taken by these people to Mini Bakery where he was assaulted and lost consciousness which he regained after six days.

Based on the above evidence the appellant was convicted by the trial court and as explained earlier his first appeal to the High Court was dismissed. The appellant through his advocate has now proffered the following grounds of appeal in a supplementary records of appeal dated 13th July 2010 and 25th May, 2011 respectively.

> **"1. That the trial was a nullity as part of the trial was conducted by an incompetent police prosecutor not qualified as per the provisions of Section 85 (2) of the Penal Code *(sic)*.**
>
> **2. That there was a violation of the appellant's constitutional rights to interpretation as enshrined by Section 77 (2) "F"** ***(sic)*** **of the constitution for appellants.**
>
> **3. That there was a violation of my *(sic)* fundamental constitutional rights as enshrined by Section 72 (3) of the Constitution.**
>
> **4. That the charge sheet was defective, as the complaint *(sic)* never testified.**
>
> **5. That evidence tendered was at variance with the particulars of the charge.**

6. That the defence of the appellant was not considered.”

During the hearing of this appeal, **Mr. Swaka** learned counsel for the appellant submitted that the trial should be declared a nullity since the prosecution was conducted by an incompetent officer contrary to the provisions of **Section 85 (2) of the Criminal Procedure Code;** that the charge sheet was defective because it was at variance with the evidence in that Ghosh Sukhendu the person named as the complainant was infact not robbed and that **PW3 Paul Muya** ought to have been named the complainant. Mr. Swaka also asked court to declared the case a nullity *ab initio* since the appellant's fundamental rights were violated because he was held by the police for 22 days.

On the other hand Miss. Oundo, the learned Principal Prosecuting Counsel opposed the appeal. With regard to the prosecution by an incompetent officer, she submitted that the officer in question, P. C. Wanjohi only sat in court when the appellant was giving his unsworn testimony which did not require cross-examination; that this presence alone did not prejudice the appellant. On the issue of the charge sheet being defective, Ms. Oundo submitted that in the event the charge sheet is found to be defective, it was curable under **Section 382** of the Criminal Procedure Code, as no miscarriage of justice was occasioned by naming Gosh Sukhendu as the complainant. Regarding the argument that the appellant’s fundamental rights were infringed by detention beyond the prescribed period, learned counsel submitted that the issue should have been raised in the High Court. She explained that the delay was most likely caused by the hospitalisation of the appellant.

The Court of appeal on a second appeal is restricted to consider only points of law. See **section 361 of the Criminal Procedure Code, Cap 75, Laws of Kenya. See** also **Njoroge -vs- Republic (1982) KLR 388**, where this court at page 389 held;

> ***“..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..See M'Riungu -vs- Republic (1983) KLR 455.”***

Based on the foregoing, we shall first consider whether the charge sheet was defective. The charge sheet reads;

“Charge: Robbery with violence contrary to Section 296 (2) of the Penal code.

The particulars

> ***of the offence: On the 15th day of March, 1999 at Mini Bakery, Industrial Area within Nairobi Province, jointly with others not before court, while armed with a dangerous weapon namely pistol, robbed one Ghosh Sukhendu Ksh. 112, 237. 70/= and immediately before or immediately after such robbery threatened to shot the said Ghosh Sukhendu.”*** (Emphasis supplied).

The person alleged to have been robbed according to the charge sheet is one **Ghosh Sukhendu, PW1,** who was the Production Engineer at Mini Bakeries. It was his evidence that he only learnt of the robbery afterwards when he found a crowd of about 30 people outside the factory. He saw one person lying down bleeding and was informed by the Manager that five people had robbed the Salesman, Stephen Kungu of Ksh. 112, 237. 70/= and that the bleeding man was one of the suspects.

It is clear from the above testimony that PW1 was neither a witness to the robbery nor was he a victim yet he was named in the charge sheet as the complainant when clearly from the entirety of the evidence, the stolen money belonged to Mini Bakery.

This court considered the ingredients necessary in a charge sheet and stated as follows in the case of **Isaac Omambia V. Republic [1995] eKLR;**

> ***"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence"***

The question therefore is, whether the aforesaid defect in the charge sheet caused any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. We think not. Having pleaded to the charge, which contained a clear statement of a specific offence, we are satisfied he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence.

Although **Section 295** of the Penal Code provides that the offence of robbery with violence is committed when a person steals something and in the process uses or threatens to use actual violence on the victim, in terms of **Section 137 (d)** of the Criminal Procedure code, the name of the complainant need not be provided in the charge sheet. The section provides that:-

> **"(d) the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as a person unknown."**

It is our view that it was sufficient that the person from whom the money was stolen was called and testified. The appellant got the opportunity to cross-examine him hence no prejudice was suffered by the mix-up. In any case, the stolen money, from the evidence, belonged to Mini Bakery, and not Gosh Sukhendu. The special owner was therefore PW3, Paul Muya.

Again, **Section 137** aforesaid is to the effect that no objection shall be taken to a charge in respect of its form or content as long as it is framed in accordance with the rules enumerated under that section.

On the question of the alleged infringement of the appellant's constitutional right under Section 72 (3) of the former Constitution, we note from the record that the appellant was arrested on 15th March, 1999 and presented in court on **7th April, 1999** instead of 29th March 1999. No explanation was tendered by the prosecution. However, the appellant in his testimony said that following the mob assault, he lost consciousness and only regained it six days later.

PW7 the police officer who rescued him from the mob and thereafter arrested the appellant, said that they took the appellant to Kenyatta National Hospital where he was admitted following the injuries he sustained during the mob attack. That perhaps could have been the reason for the delay. That is our guess. The prosecution ought under the law to have offered an explanation but failed to do so.

As to whether this issue can be raised now on a second appeal and whether the appellant is entitled to an acquittal or a discharge, we reiterate what this Court said in its latest decision on both questions in the case of ***Julius Kamau Mbugua Vs Republic [2010] eKLR***;

> **"It is the function of the Government to ensure that citizens enjoy their right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of *Habeas Corpus* to secure release (see Section 389 (1) (a) of Criminal Procedure Code and Section 84 (1) of the Constitution).**

In addition, Section 72 (6) provides a remedy by way of damages to a person who is unlawfully arrested or detained……….."

In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.

Lastly on this point, even if it is found by a court that the extra judicial detention was unlawful, and that it is related to the trial, we consider an acquittal or a discharge to be disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case then, the only appropriate remedy under Section 84 (1) would have been an order for compensation for such breach.

On another ground, the appellant has alleged that the trial should be declared a nullity since part of it was conducted by an incompetent police prosecutor in violation of the provisions of Section 85 (2) of the Criminal Procedure Code as it stood before it was amended by the Statute Law (Miscellaneous Amendments) Act No. 7 ofi2007. Section 85 (2) of the Criminal Procedure Code which was applicable when this matter was decided in the subordinate court provided that:-

> **"85 (2) The Attorney General, by writing under his hand may appoint any advocate of the High Court or a 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.*"**

In view of the above, this Court has previously held that proceedings in a criminal trial conducted by a person below the rank of an Assistant Inspector of Police would be a nullity. In the case of Ingute & Another V. Republic [2002] LLR 4606 this court in considering the issue said that:-

> ***"This issue was carefully and fully considered by this court in the celebrated case of Elirema & Another v. Republic [2003] KLR 537 in which the court considered Section 71 (1) of the Constitution and Section 85 and 86 of the Criminal Procedure Code and went on to state; In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution."***

The record in this appeal shows that P.C. Wanjohi came on record on 9th December, 1999 as a prosecutor when the appellant gave his testimony. The record further shows that, P.C Wanjohi did not address the court. The appellant gave unsworn testimony. P.C Wanjohi did not, strictly speaking, prosecute the case on the day in question.

In the case of Ahmed Anakeya Mohamed & Another v R- Mombasa Criminal Appeal No. 161 of 2004 (unreported) it was observed that where no witnesses are called and examined, there can be no prosecution. The Court said:-

> **"In this case the three "mentions" were made before the Chief Magistrate. Not even the trial magistrate. No witnesses were called by the prosecution and they could not have been called. Some of the accused persons were not even present. In sum, nothing of substance took place. The Elirema case does not apply." (Emphasis supplied).**

We have said enough to show that the evidence was sufficient to sustain the appellant's conviction.

Both courts below concurrently and correctly found that the appellant was arrested while engaged in the commission of the crime charged. Accordingly, his appeal is dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 20th day of SEPTEMBER, 2013.

P. KIHARA KARIUKI,

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PRESIDENT,

COURT OF APPEAL

W. OUKO

....

JUDGE OF APPEAL

A. K. MURGOR

…......................................

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR