REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, O'OKUBASU & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 431 OF 2006

BETWEEN

W.O.O ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from an order of the High Court of Kenya at Kericho (Musinga, J.) dated 27th October, 2006

in

H. C. Cr. Revision No. 89 of 2006)
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JUDGMENT OF THE COURT

The appellant herein **W.O.O**, was arraigned before the Principal Magistrate's Court at Nakuru where he was charged with two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the offence were as follows:
"CT I. ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

W.O.O on the 19th day of December, 2004 at Kericho town in Kericho District within Rift Valley Province, jointly with another not before court, being armed with a dangerous or offensive weapon namely a gun, robbed FAITH WAIRIMU NJUGUNA of a mobile phone make Nokia and cash Kshs.21,594/= all valued at Kshs.28,594/= and immediately before or immediately after, threatened to use actual violence to the said FAITH WAIRIMU NJUGUNA."

"CT II. ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

W.O.O on the 19th day of December, 2004 at Kericho town in Kericho District within Rift Valley Province, jointly with another not before court and being armed with a dangerous or offensive weapon namely a gun, robbed PC ARTHUR MWANGI of his mobile phone make Samsung R220 s/no. 35073708732487/0 valued at Kshs.7800/= and immediately before or immediately after, threatened to use actual violence on the said PC ARTHUR MWANGI."

The appellant denied the charges in both counts and his trial commenced on 9th June, 2005 before A. G. Kibiru (Senior Resident Magistrate). The prosecution called a total of eight witnesses in a bid to prove its case against the appellant. The witnesses testified how they were attacked by a gang of robbers on the material night and how the two complainants lost their property in the course of the robbery.

The learned trial magistrate considered the prosecution case vis-à-vis the defence put forth by the appellant and came to the conclusion that the prosecution had proved its case against the appellant. In concluding his judgment delivered on 2nd October, 2006 the learned trial magistrate said:-

"On that very night the accused went to the house of PW 3 where he spend the night. The following day him with PW 6 did come to the town to go to hospital. But which in town the accused sold a mobile phone he had to a person near Sunshine Hotel (judicially noticed). They never went to hospital. The clinical officer who examined the accused found him with a cut wound on the left hand. There were no other injuries detected. Such is the contrast the injuries the accused says to have suffered from mob justice. The accused was arrested by members of the public near slaughter house. The injury sustained is exact to that, that PW 1 knows he inflicted. The accused went with injury to the house of PW 3. The accused himself led the recovery of the phone which the complainant identified. I find evidence against the accused is overwhelming. He is guilty as charged and shall accordingly be convicted."

After conviction and before being sentenced the appellant had the following to say by way of mitigation:-

"Since I was arrested in 2004 I have been in court all through day and night. The prison is congested. I am HIV positive. I ask the court to give me leniency as to my health status. I have developed severe backache. I was born out of wedlock. She died in bomb blast in Nairobi. I am the sole breadwinner my two sisters and a brother. I have jeopardized during confinement. I appeal that the court grant me justice that I deserve. This is a capital offence. I wish to quote Proverb 19-14 it says a king who judges a victim with mercy will be blessed."

Having heard the foregoing from the appellant, the learned trial magistrate proceeded to sentence the appellant as follows:-
"Ct. The accused to serve 5 years imprisonment. The accused to be supplied with ARV's drugs."

It would appear that the appellant's trial magistrate's file was placed before Mr. K. Ngeno (Ag. Senior Principal Magistrate) on 16th October, 2006 who made the following order:-

"CT: I note that the charges preferred against the convicted person are both under S.296 (2) of the penal code. The learned trial magistrate has convicted and sentenced the accused to five years imprisonment.

I now refer this matter to the High Court here in Kericho to give directions as to the legality of the five year sentence imposed."

Pursuant to the foregoing the appellant's file was placed before Musinga J who on 27th October, 2006 made the following orders:-

"<u>ORDERS UPON REVISION</u>

The accused in the aforesaid case was charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. After a full trial, he was convicted and sentenced to five (5) years imprisonment. The only sentence that is prescribed under Section 296 (2) of the Penal Code for any person convicted under that Section of the law is death. The trial magistrate therefore erred in law in sentencing the accused to five years imprisonment.

Consequently, in exercise of the powers conferred upon this court by Sections 362 and 364 of the Criminal Procedure Code, the sentence against the accused person is now enhanced to DEATH as by law prescribed. A copy of this decision should be forwarded to the learned trial magistrate."

The appellant was naturally aggrieved by the foregoing orders of Musinga J and hence, through his lawyer Mr. Karanja Mbugua, filed supplementary grounds of appeal challenging the orders of the learned judge.

This is the appeal that came up for hearing before us on 18th April, 2011 when Mr. Mbugua appeared for the appellant while Mr. V. O. Nyakundi appeared for the State.

Since Mr. Nyakundi conceded the appeal Mr. Mbugua merely pointed out that the appellant was not given an opportunity to be heard when the record was placed before the High Court.

We have traced the record of the appellant right from the time he was arraigned before the trial magistrate's court to the High Court. It is significant to note that the appellant was convicted of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and after his mitigation (which we have set out in full) the learned trial magistrate sentenced the appellant to 5 years imprisonment. The learned trial magistrate made even a further order to the effect that the appellant be supplied with ARV's drugs. Then, without the appellant's knowledge, his record was placed before Musinga J who made revisionary orders to the effect that the appellant's sentence would be enhanced from 5 years imprisonment to the death sentence.

That order in revision was made in absence of the appellant. That was not in accordance with ***section 364 (1)*** and ***(2)*** of the Criminal Procedure Code which provides:-

"364 (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."

This right for an accused person to be heard is emphasized by ***section 365*** of the Penal Code. In the result, we have come to the conclusion that there was no legal justification for denying the appellant an opportunity to be heard before the enhancement of the sentence from 5 years imprisonment to the death

sentence.

Accordingly, we allow the appeal and set aside the revisionary orders of the learned Judge made on 27th October, 2006. It is so ordered.

Dated and delivered at Nakuru this 21st day of April, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR