



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Criminal Appeal 357 of 2008

BETWEEN

CHIRO SONJE MBAGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Malindi (Njagi &
Omondi JJ) dated 24th September, 2008**

in

H.C.CR.A NO 32 of 2008

JUDGMENT OF THE COURT

Chiro Sonje Mbagu, the appellant herein was charged in the Senior Resident Magistrate's Court at Kilifi with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge were that on the 30th day of October 2004 at about 3.45pm at Maweni area in Kilifi District within Coast Province jointly with others not before the Court, while armed with knives he robbed Omar Mwinyi of cash Kshs. 5,000/- a national identity card and personal documents and at or immediately before or immediately after the time of such robbery wounded the said Omar Mwinyi.

On the day of the incident, Omar Mwinyi (PW1) was at home with 5 workers where they were putting up or constructing a wall for him. The appellant led a group of people to the home and attacked (PW1) with a rungu. They took him and the workers to a booth which was under construction and locked them there. But before locking them there they robbed PW1 of Kshs 5000/-, an identity and electoral cards. PW1 and his workers reported the incident to Mtwapa Police Station after they freed themselves from the booth. Later PW1 heard one suspect in the case had been arrested and he went to Mtwapa Police Station where he confirmed the arrested suspect to be the appellant whom he knew as a leader or member of the vigilante group in the area. The evidence adduced by PW1 before the Senior Resident Magistrate as to how the offence was committed was supported by Ali Mwinyi (PW2) and Mwazara Kwamu (PW3), some of the workers at the scene when the attack occurred.

Police constable Nkulil (PW4) was at Mtwapa Police Station on 30th October 2004 when PW1 and others went to the station to report the incident to him. The leader of the group which caused the incident was identified. On 6/11/2004 PW4 was at Mtwapa Police Station when the appellant was identified as the leader of the group which attacked PW1. PW4 then arrested the appellant, investigated the case and then

charged him with the offence the subject of the present appeal. These were the brief facts of the prosecution case as recorded by the trial court.

When the appellant was put to his defence he testified that he was an acrobat and that he knew the complainant but that he knew nothing about the offence he was charged with. The trial magistrate, (C.O Obulutsa) (SRM) wrote and delivered his judgment on 1/4/2005 and rendered himself thus:-
“ From the evidence it is for the court to determine whether the accused took the money and documents from Omar while armed and used violence, on him. It is clear from his defence that the accused is known to the complainant who says he knows the accused as a member of the local vigilant (sic) group. PW4 Nkulil testified that when Omar reported he gave the names of the accused as Rasta Moi which he knew him as. He also confirmed that when Omar went to the station to follow up the matter he is the one who pointed him out in the cells having received information he was being held there. This confirms that the accused was positively identified on account of his familiarity. An identification parade was therefore not required. The two witnesses Mwinyi and Mwazera confirmed being attacked by the group and that Omar was injured. A P3 form was produced by doctor Mwakangulu PW5 showing that the complainant had a cut wound below the left eye broad STI to the hip and left hand. Under section 296(2) of the Criminal Procedure Code it is for the prosecution to show that the offenders are armed or use actual violence by wounding a victim and are more than one. The ingredients have been proved. The defence of the accused which dwelt more on his arrest did not address the testimony of the prosecution witnesses which is unchallenged.....the accused is found guilty and is convicted accordingly.”

The trial court then proceeded to sentence the appellant to death, the only sentence prescribed by **section 292(2)** of the Penal Code. The appellant's appeal to the superior court was dismissed on 24th September 2008 (L. Njagi and H.A. Omondi JJ). The appellant has now appealed to this Court through a supplementary memorandum of appeal filed in Court on 15/1/1010. It has 3 grounds of appeal as under:-

“1 The superior court erred in failing to find that the appellant did not have a fair hearing before the subordinate court within the meaning of the provision of S. 77 (1) & (2) (b) (c) & (d) of the Constitution.

2 The subordinate court erred in law in failing to explain to the appellant his rights under s. 211 of the Criminal Procedure Code and failing to record the appellant's response thereto.

3 The superior court erred in failing to find that the subordinate court's analysis of the appellant's evidence was at variance with the appellant's evidence.”

The appeal was heard before us on 18/1/2010 when Mr F. Mwakireti learned counsel for the appellant addressed us on the above points. He complained about failure by the trial court to explain to the appellant the nature and seriousness of the charge facing him to enable him to adequately prepare for his defence and gave various incidents in the recorded evidence to support this view. The incidences included failure by the prosecution to supply the appellant with witness statements in time or at all and failure by the court to either swear or remind him of the oath when he was stood down on 18/1/2005 and recalled on 25/2/2005 and it was not shown if he was sworn or reminded of the oath. It was also not shown if the appellant was sworn by unsworn statement in his defence.

Counsel referred to the evidence showing that the appellant was a member of a vigilante group and suggested that if an offence was committed then it was of simple assault. He also complained that the appellant raised the defence of *alibi* which the prosecution did not rebut. Mr Monda, Senior State Counsel for the State raised various procedural defects in the record of proceedings, and did not support the conviction and sentence of the appellant and said this was a proper case for retrial because the appellant and the complainant were known to each other, the assailants were more than one and the complainant suffered injuries during the attack. He submitted that a retrial would not cause prejudice to the appellant.

This is a second and final appeal and that being the position only points of law fall for this Court's consideration and determination, see **section 361(1)** of the Criminal Procedure Code. Learned counsel for the appellant has raised what we consider to be procedural lapses with legal implications in the record of the trial court. He in particular has complained of the breach of **section 77 (1) and (2)** of the Constitution

of Kenya and **section 211** of the Criminal Procedure Code. For ease of reference we wish to reproduce the relevant part of the sections quoted as hereunder:

Section 77(1).....

Section 77(2) every person who is charged with a criminal offence:-

- (a) shall be given adequate time and facilities for the preparation of his defence**
- (b) shall be permitted to defend himself before the court in person or by a legal representative.**
- (c) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and**

On the other hand, **section 211** of the Criminal Procedure Code, also quoted by learned counsel for the appellant provides as follows:

“211 (1) (a) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that if he does so, he will be liable to cross-examination, as to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(b) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps to compel the attendance of witnesses.”

According to learned counsel for the appellant, the above sections were not complied with by the trial court thus denying the appellant a fair hearing since he was not informed of the seriousness of the charge facing him for him to adequately prepare his defence. He stressed on **section 77 (2) (d)** which we have quoted above and which permits the accused to defend himself:

“before the court in person or by a legal representative”.

The superior court judgment was attacked because it failed to take into account the legal issues raised by counsel for the appellant. But in our view the superior court decided the appeal before it on the basis of the grounds of appeal filed thereat. These grounds were as shown in what was filed in the superior court as amended grounds of appeal. They are as follows:-

- 1. That the learned trial magistrate erred in law and fact by failing to consider that the said knives were not state (sic) whether are dangerous or offensive even with the evidence of the doctor he was told of any weapon.**
- 2. That the learned trial magistrate erred in law and fact by failing to consider that the alleged recognition was informed as he PW 1 failed to mention my name or the name he alleged to be mine was not indicated in the charge as alias.**
- 3. That the learned trial magistrate erred in law and fact by basing my conviction (sic) allegation that I was rasta while the other witnesses who were together with him never mentioned of the same.**
- 4. That the learned trial magistrate erred in law and fact that my source of arrest had no**

connection with the present case.

5. That the learned trial magistrate erred in law and fact by not considering that when PW 1 was recalled he wasn't cross-examined under oath contrary to section 251 of the Criminal Procedure Code.

6. That the learned trial magistrate erred in law and fact by not adequately considering my defence evidence.

We have perused the judgment of the superior court and it is our view that that judgment considered the appeal on the basis of procedural irregularities in the record of the trial court, the identification of the appellant and his later evidence in cross-examination. That is what the appellant complained about in that court. The superior court set out a fresh the case as recorded by the trial court, reconsidered and re-evaluated the evidence as is its duty to do – see **Okeno vs Republic [1972] EA 32**. It found no fatal irregularities in the charge sheet in regard to the absence of the time when the offence was committed and the description of the weapon used in the attack as a dangerous weapon.

On the identification of the appellant in the group of the attackers, the Judges were satisfied the appellant was positively identified. They were satisfied PW1 described the appellant by the name “Rasta Moi” which he knew him by. The appellant agreed the two knew one another. The Judges were also satisfied the injuries sustained by PW1 as shown on the P3 form fell within the provisions of **Section 296(2)** of the Penal Code.. On the evidence of PW1 adduced in cross-examination after being stood down the Judges said this:

“We indeed confirm that when PW1 gave evidence on 18th January, 2005, it was on oath and even cross-examination began when he was still on oath. However he was stepped down after appellant requested for time to get statements of witnesses before proceeding. When he was recalled on 25th February, 2005 (all the record does not specify that he is the one recalled and we can only draw an inference from the record) the cross-examination proceeded without an indication that he was reminded of being on oath. We therefore find that his cross-examination did as a matter of fact contradict (sic) of the provision of section 151 Criminal Procedure Code and we expunge the evidence of PW1 on cross-examination given on 25th February, 2005. However that does not nullify the proceedings because the rest of the evidence of PW1 and all the other witnesses’ evidence properly complied with section 151 Criminal Procedure Code.”

All the issues raised in the appeal before the superior court were dealt with by the judgment delivered on 24th September, 2008 and it would be expecting too much of the Judges of the superior court to go outside what was presented before them to consider and decide on the legal points now raised before this Court. Even on consideration of these issues, **section 77 (2) (d)** of the Constitution of Kenya is directed at the court to give the accused person an opportunity to defend himself either:

“in person or by a legal representative”.

The appellant in this appeal was in person and as the record of the trial court shows he was accorded ample opportunity to defend himself and to cross-examine prosecution witnesses. When he submitted before the superior court he did not complain that he was not given the witness statements which caused the adjournment of his case temporarily on 18/1/2005.

The seriousness of the sentence to be imposed upon the accused on conviction is never an issue to be discussed when that accused pleads “not guilty” to the charge laid against him. After all he is presumed innocent until proved guilty. It is, however, an issue where the accused pleads “guilty” to a serious charge which carries a mandatory death sentence. Here he is warned of the consequences he faces by pleading guilty.

Section 211 of the Criminal Procedure Code is a direction to the trial court as to what steps should be taken at the close of the prosecution case if it is decided that the accused be placed on his defence. We do not believe the subordinate courts should record the section verbatim when placing the accused person on his defence but words to the effect that:

“After perusing the prosecution evidence, I am satisfied a prima facie case has been established against the accused person which warrant he/she be placed to him/her defence and I now place

him/her to his/her defence. I have also explained to the accused his/her rights to defend himself or herself.”

But in order to save time in the subordinate courts Magistrates often resort to the short words:

“Section 211 complied with”

to indicate they have given the requisite directions

We think this is sufficient and, we do not feel the appellants rights in the case before the trial court were violated under that section because the appellant, nevertheless, defended himself. In the circumstances of this appeal we are satisfied the superior court considered the appeal before it, including the appellants defence which was analyzed but found not capable of challenging the prosecution case. However, we are not satisfied all the ingredients of the offence under **section 296 (2)** of the Penal Code were satisfied given the nature of the evidence involved. We are not convinced that any property was stolen from the complainant. The assailants were interested in keeping PW1 out of the disputed area but in the process they injured him. The P3 form, for example only shows the report made by PW1 was that “ He alleges to have been assaulted by a group of people known to him. “ Please examine him” There was no mention of a robbery in that report. Neither PW2 nor PW3 who were with PW1 during the attack mentioned anything about sh. 5000/- being taken from PW1. In the circumstances, and by virtue of the provision of **section 179 (2)** of the Criminal Procedure Code, we quash the appellant’s conviction for the offence of robbery with violence under **section 296 (2)** of the Penal Code and find him guilty for the offence of assault causing actual bodily harm contrary to **section 251** of the Penal Code. Consequently upon this finding, the death sentence imposed on the appellant on the offence of robbery with violence aforesaid is set aside and substituted by one of five years imprisonment to run from the date of conviction and sentence by the Magistrate. These are the Court’s orders.

Dated and delivered at Mombasa this 22nd day of January 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR