



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O’KUBASU, KEIWUA & GITHINJI, JJ.A)
CRIMINAL APPEAL NO. 388 OF 2009

BETWEEN

GIDEON ISABWAAPPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kakamega (Kariuki & Ombija, JJ.A) dated 21st May, 2008

in

H.C.CR.A. NO. 97 OF 2004)

JUDGMENT OF THE COURT

The appellant ***Gideon Isabwa*** and one ***Milton Lumwachi***, (*Milton*) were convicted by Senior Resident Magistrate Vihiga for robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. Their respective consolidated appeals were dismissed by the superior court on 21st May, 2008. The appellants were alleged to have robbed ***John Juma Masambaka***, (complainant) of a mobile phone valued Shs.5000/= and cash Shs.500/=.

The complainant testified at the trial, among other things that, he, on the material day was going home at about 8.30 p.m. while carrying paraffin; that on the way he saw a torch light and he flashed his torch; that he saw a large group of people who attacked him and robbed him of his mobile phone and Shs.500/=; that the gang then poured paraffin on him as he was lying down; that when the gang went to look for a matchbox to set him on fire, he escaped; that he recognized the appellant who is related to him and, that he also recognised Milton.

The appellant testified at the trial that he was arrested by the Chief for reasons which the Chief did not explain; taken to police station and later charged with the offence. He stated in his evidence in cross-examination that he did not rob the complainant and that he did not know him.

The trial magistrate apparently believed the evidence of the complainant that he recognized the appellant and Milton and convicted both.

On appeal to the superior court by both the appellant and Milton the superior court evaluated the entire evidence including the evidence of the complainant; ***Josphat Alikula*** (PW6) and ***Morris Ayondi*** (PW7) and dismissed the appeals saying: -

“Against that backdrop of evidence we are persuaded that there was no need for identification parade. The evidence was that of recognition. PW6 and PW7 knew the appellants well. They followed them up to the house where they entered. They had pangas and mud stained shoes. Their alibi was thus displaced by the evidence of the two aforesaid witnesses who met and identified them. The two appellants could not have been at their various homes and running from the direction of the screams all at the same time.”

The appellant has appealed to this Court on two grounds, firstly that, the prosecution was conducted by unqualified prosecutors, and, secondly, that, the date when accused (*appellant*) was charged in court is not disclosed. At the hearing of the appeal, Mr. Omulele, learned counsel for the appellant who filed the memorandum of appeal withdrew the second ground of appeal and based the appeal entirely on the first ground.

In support of the first ground of appeal, Mr. Omulele referred to four occasions in the proceedings, where, according to him the prosecution was conducted by unqualified persons. The first occasion was on 2nd July, 2003 when the case was scheduled for hearing. On that occasion **Cpl. Mukavale** appeared as a prosecutor and applied for adjournment on the grounds that the complainant had been seriously injured and, that the P3 form had not been filed. The application for adjournment was allowed. The second occasion was on 24th December, 2003 when **Pc. Osur** appeared during the mention of the case. The third occasion was on 5th March, 2004 when Pc. Osur again attended the mention of the case. Lastly, the fourth occasion was on 19th May, 2004 when Pc. Osur attended the hearing of the case but the case was adjourned. Mr. Omulele relies on the authority of **Elirema & Another v. Republic [2003] KLR 537** where it was held, among other things, that, the Attorney General had no power to appoint a police officer below the rank of Assistant Inspector of Police as a prosecutor and that the prosecution by the two corporals in that case was a nullity.

The decision in ***Elirema's case*** was based on **S. 85 (2)** of the Criminal Procedure Code which provided that:

“The Attorney General by writing under his hand, may appoint an advocate of the High Court or person employed in public service, not being a police officer below the rank of an assistant inspector of police to be a public prosecutor for the purpose of any case” (emphasis ours).

That section has now been amended with effect from 15th October, 2007 by **L.N. 7 of 2007** which deleted the italicised words.

Mr. Omulele submitted that although the trial did not proceed on the four mentioned occasions, there was nevertheless a prosecution as according to him, a trial includes all proceedings which have taken place before a judicial officer including mentions.

On his part, Mr. Gumo learned Asst. Deputy Public Prosecutor supported the conviction and sentence and submitted that the prosecution was conducted by a competent prosecutor and that the two alleged incompetent prosecutors attended court for mentions only. He distinguished this case from ***Elirema's case***. Mr. Omulele referred to a passage at page 542, para. 5 of ***Elirema's case*** where the Court held in effect, that if any part of a trial is materially defective the whole trial must be invalidated.

The record shows that the prosecution was conducted by **I.P Ochieng** throughout who called eleven prosecution witnesses and that I.P Ochieng was still the prosecutor when the appellant gave evidence in his defence. With respect, it is not correct that appearance when a trial is adjourned or at mention of a case does in legal sense amount to prosecution. This Court, subsequent to the decision in the ***Elirema's case***, has held on several occasions that such an attendance is not a prosecution. To refer to only two decisions, in **Kuvua v. Republic [2005] 2 KLR 156** the Court held, among other things, that a “mention” of a case cannot be treated as being the same thing as the trial of the case. Similarly in **Mohamed v Republic 2005 (2) KLR 138** the Court held that a mention of a case was not a trial and, further observed that the Court in ***Elirema's case*** was concerned only on occasions when witnesses were summoned and heard or submissions were made.

From the foregoing, the sole ground of appeal, which was not in any case, raised, before the superior court, lacks merit.

Moreover we have in the interest of justice considered the appeal on the merits and we are satisfied that the superior court reached the correct decision.

Consequently we find that the superior court was correct in dismissing the appeal.

In the result the appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 2nd day of December, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR