



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 228 of 2008

MOSES NGICHU KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.)
dated 21st October, 2008**

in

H.C.CR.A. NO. 176 OF 2006)

JUDGMENT OF THE COURT

The appellant was charged in the trial court with robbery with violence contrary to **Section 296 (2)** of the Penal Code and upon trial was convicted and sentenced to death.

The particulars of the offence are that on 12th February, 2006 at Mukima in Laikipia District in the Rift Valley Province, the appellant jointly with another not before the court robbed **Simon Leken Lokanya** of one bicycle make Atlas, three long trousers, three shirts, one coat and a suit and Kshs.700/= cash all valued at Kshs.5,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Leken Lokanya.

Dissatisfied with the judgment of the trial court, the appellant filed *Criminal Appeal No. 176 of 2006* in the superior court at Nyeri and after a full hearing, the same was dismissed on 21st October, 2008. The learned counsel for the appellant, Mr. Kiget informed this Court that the family of the appellant had engaged an advocate for the appellant and that, that advocate had also filed *Criminal Appeal No. 167 of 2006* in the superior court at Meru and that the appeal is still pending.

As is apparent from the above, *Criminal Appeal No. 176 of 2006* in which judgment was delivered by the superior court (Kasango and Makhandia, JJ.) on 21st October, 2008 at Nyeri is the subject matter of the appeal before us.

The appellant relied on the following grounds of appeal as set out in the supplementary memorandum of appeal filed on 11th May, 2009:

“1. THAT the trial in the High Court was a nullity as the Appellant was not allowed a fair trial in accordance with Section 77 (2) (d) of the constitution of Kenya thus

(a) **The Appellant was not represented by a legal representative of his choice as required by Section 77 (2) (d) of the Constitution despite filing Appeal in the High Court of Kenya at Meru Criminal Appeal No. 167 of 2006 and instead matter was brought to High Court of Kenya at Nyeri without prior notice to the Counsel of the Appellant and or the Appellant.**

(b) **The Appellant conducted his appeal on his own and the Appellant not permitted/denied to defend his appeal through Counsel of his choice.**

2. **THAT the Judge/Deputy Registrar High Court of Kenya at Nyeri/Senior Resident Magistrates at Nanyuki their actions/omissions left the Appellant unrepresented and deprived of the benefit of the services of his Advocate of choice.**

3. **THAT the sentence was manifestly excessive. The trial Court/Magistrate went ahead and expressed her own views instead of confining herself to the particulars of the sentence and influenced by the particulars of the charge.**

4. **THAT in the event of the conviction being quashed a retrial would not be fair and should not be ordered”.**

In his submission, the learned counsel for the appellant has raised several grounds including failure by the prosecution to specify in the charge sheet the weapon used contrary to **Section 137 (f)** of the Criminal Procedure Code and that if the weapon had been specified, the appellant’s defence would have been different; failure by the court to indicate the language in which the plea was taken; that before the close of the prosecution case, the appellant had applied to have the complainant recalled for him to cross-examine him further and despite an order by the trial court allowing the appellant to further cross-examine the complainant, the opportunity to do so was never availed at all; and finally that the appellant’s advocate in *Criminal Appeal No. 167 of 2006* at Meru was never notified by the Deputy Registrar of the hearing of *Criminal Appeal No. 176 of 2006* at Nyeri in which the appellant proceeded to represent himself and was thereby denied the right of representation by counsel of his choice. In the circumstances, Mr. Kiget concluded that, the appellant’s rights under **Section 77 (1) (b)** and **Section 77 (2) (d)** of the Constitution were violated.

On her part, Miss Ngalyuka, the learned State Counsel who appeared for the State, submitted that the technicalities raised by the appellant’s counsel did not in any way weaken the case for the prosecution. She contended that even without specific mention of the weapon used in the charge sheet, the ingredients of the offence of robbery with violence were still present and that there was no proof of violation of **Section 77 (1) (b)** and **Section 77 (2) (d)** of the Constitution.

As regards the alleged violation of **Section 77 (1) (b)** of the Constitution, there is no such provision in the Constitution and therefore we cannot make any determination on that submission. However, as regards the alleged violation of **Section 77 (1) (d)** of the Constitution, we have carefully considered the effect of the failure on the part of the court to recall the complainant for the purpose of further cross-examination by the appellant and we are of the view that failure to accord the defence that opportunity is a violation of **Section 77 (1) (e)** of the Constitution. In this regard, the trial court had made an order for further cross-examination but the complainant whose evidence was critical to the final outcome was never availed. We do not know and we are unlikely to know the questions the appellant wanted to put to the complainant and the likely effect the answers thereof would have had on the prosecution case.

Concerning the anomaly of the filing of the two appeals in the superior court over the same matter, namely, *167/2006* and *176/2006*, nothing turns on this for the reason that the appellant never drew the attention of the superior court in Nyeri of the existence of the other appeal in Meru. Besides the appellant caused the problem by filing two separate appeals over the same matter. In the circumstances, the appellant is in our view deemed to have waived his right of representation. The superior court whether in Nyeri or Meru could have conducted only one appeal. Consequently, we find no violation of **Section 77 (1) (e)** of the Constitution by dint of this ground.

In respect of the right to cross-examine the complainant, **Section 77 (1) (d) and (e)** states:

“Every person who is charged with a criminal offence –

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice.

(e) 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”.

Section 77 of the Constitution defines what a fair trial under our legal system means and where as in the matter before us, it is clear from the record, that an important facet of the right to a fair trial has been infringed the Court must make such orders are appropriate to remedy where possible the breach. In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. In our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in **Section 77** in that the entire provision is entitled *the provisions to secure protection of law*. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.

Concerning the other grounds and submissions, this being a second and final appeal, our mandate is to deal with issues of law only. (See **Section 361** of the *Criminal Procedure Code*.) In this regard, we note that the two courts below had made concurrent findings of fact on those grounds and we cannot therefore intervene.

In the result, we are inclined to allow the appeal on the ground of violation of **Section 77 (1) (e)** of the Constitution alone because the requirements of a fair trial constitutes the cornerstone of any judicial process especially a criminal trial.

Accordingly, we hereby quash the appellant’s conviction for the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code and set aside the sentence imposed by the trial court and further order that the appellant shall be forthwith released unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nyeri this 6th day of November, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR