REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 211 OF 2005

BERNARD WANJALA ……. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Wanjiru Karanja, J) dated 21st April, 2005 in H.C. Cr. Appeal No. 63 of 2002)

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JUDGMENT OF THE COURT

The appellant in this appeal, Bernard Wanjala, was charged in the Senior Principal Magistrate's Court at Kitale with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were:-

"On 18th day of August, 2001 in Kitale Township in Trans-Nzoia District within the Rift Valley Province, while armed with a dangerous weapon namely a knife robbed Emily Nafula of Kshs.1,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Emily Nafula."

He pleaded not guilty to the charge and the matter proceeded to hearing before the Senior Resident Magistrate (D.K. Gichuki) who, after full hearing, found the appellant guilty of a lesser charge of robbery under **section 296(1)** of the Penal Code. In doing so, the learned Senior Resident Magistrate stated in pertinent part of his judgment as follows:-

"**In the circumstances of this case, I find that under the provision of section (sic) 179 – 191 of CPC I would reduce the charge to that of robbery under section 296(1) of the Penal Code. I find that there is evidence that accused had used personal violence against PW1. She was injured as per the P3 form produced in court (exhibit – 3). Accused was also armed with a knife (Exhibit - 1). The knife is a dangerous and offensive weapon.**

Having concluded the foregoing I find that there is sufficient evidence to proof (sic) an offence under Section 296(1) of the Penal Code. The offence had been proved against the accused person

beyond any reasonable doubts. Consequently, I find the accused person guilty for (sic) the offence as charged and convict him for the same accordingly."

He then proceeded to sentence the appellant to serve 7½ years imprisonment and to receive 8 strokes of the cane. The appellant was also ordered to be subject to five (5) years mandatory police supervision under **section 344 A** of the PCP.

The appellant was not satisfied with the conviction and the sentence. He appealed against both conviction and sentence to the superior court at Kitale in Criminal Appeal No. 63 of 2002. The record shows that the appeal was filed at the High Court Registry on 7th March, 2002. It was admitted to hearing on 1st November 2002 and at the time of the admission it was directed that it be heard by a single Judge. That was, in our view, proper as at that time all that was before the superior court was an appeal against conviction and sentence meted out under **section 296(1)** of the Penal Code. That direction was made pursuant to **section 359(1)** of the Criminal Procedure Code. After the appeal had been thus admitted to hearing, the record shows that on 19th December, 2003 when the matter came up for hearing, the superior court (Gacheche, J) cautioned the appellant that the sentence might be enhanced if it was found that the evidence produced in court warranted a conviction under **section 296(2)**. The appellant in response to that caution stated that he wished to proceed with the appeal despite that caution. The court then made the following entry:-

"**Court: Stood over to 5.5.2004 and it will be heard by a 2 Judge Bench due to the above caution."**

That in effect meant that the direction given on 1st November , 2002 that the appeal be heard by a single Judge was substituted by a fresh direction that the appeal be heard by a two Judge Bench because it became clear that the original charge of robbery with violence under **section 296(2)** might be reinstated on the hearing of the appeal with the inevitable consequence of the death penalty being awarded in case the superior court after hearing the appeal found that the offence as charged was proved.

The appeal then came up for hearing before the superior court (Wanjiru Karanja, J). The record shows that the appellant admitted that he had been served with the notice (presumably notice of enhancement of sentence) but he still wished to proceed with the appeal and he was ready with his appeal. The appeal was then heard by a single Judge and in her judgment dismissing the appeal she stated, *inter alia as* follows:-

"**In this case, as rightly found by the learned magistrate, the appellant was armed with a knife, which is a dangerous and offensive weapon. He used violence on the complainant and injured him as supported by the P3 form.**

There is therefore no circumstances to militate for the reduction of the offence for robbery (sic) under Section 296(2) to robbery under Section 296(1). The learned trial Magistrate has no basis in law to reduce the said charge and I agree with the learned State Counsel therefore that the sentence of 7 years (sic) imprisonment with 8 strokes of the cane, which was meted out by the trial Magistrate is illegal. Following a conviction for an offence of robbery (sic) under Section 296(2) of the Penal Code, there is only one lawful sentence. Thus the accused must be sentenced to death. My finding therefore is that the evidence on record proved the offence of robbery (sic) under Section 296(2) and it was incumbent on the learned trial Magistrate to impose the appropriate sentence as provided by law.

Consequently, I quash the conviction on the charge of robbery under Section 296(1) of the Penal Code and set aside the sentence imposed for the same.

In its place, I substitute a conviction for the offence of Robbery (sic) under Section 296(2) of the Penal Code and impose the only sentence allowed by the law – i.e. that the appellant should suffer death in a manner prescribed by law."

That is the decision that has prompted this appeal before us which was originally premised on six grounds

of appeal filed by the appellant in person and later the supplementary memorandum of appeal filed by his advocates on 30th January, 2007. At the time of hearing this appeal, Mr. Kariuki, the learned counsel for the appellant, while not specifically saying he abandoned the grounds of appeal filed by the appellant in person, confined himself to the supplementary grounds of appeal. For what will be clear in this judgment later, we consider the last ground in the supplementary grounds of appeal relevant. This was the sixth ground which stated as follows:

"**6. That the learned Judge erred in law and fact in failing to abide to the orders of 19th December 2003 and have the appeal heard by a 2 Judge Bench."**

In his submission before us, Mr. Kariuki stated that as there were two conflicting directions as to the hearing of the appeal in the superior court, the direction given on 1st November 2002 stating on the admission of the appeal that the appeal was to be heard by a single Judge and another direction given on 19th December 2003, one year later, stating that the appeal be heard by two Judges, the subsequent direction which was based on the gravity of the matter after it became clear that the sentence might be enhanced to that of death should have been complied with and the appeal should have been heard by a two Judge bench as was directed. In hearing the matter as a single Judge despite that direction, the appellant was prejudiced in his appeal. Mr. Omutelema, the learned State counsel conceded the appeal on that ground stating in his submission that the appellant should have been given a chance to have his appeal heard by two Judges. He stated further that the notice of enhancement of the sentence came into the record after the matter had been admitted to hearing before a single Judge and so the gravity of the matter could not have been envisaged when the appeal was admitted to hearing but was clearly there after the notice had been served upon the court and the appellant. In conceding the appeal, Mr. Omutelema however pleaded that the appeal be remitted to the superior court for hearing afresh before a two Judge bench.

We have considered the entire appeal before us. Again for what will be clear in this judgment, we do not intend to go into the merits or demerits of the appeal that was before the superior court, neither do we intend to dwell on the facts of the case that was before the subordinate court and the analysis and evaluation that was done by the subordinate court and the superior court as a first appellate court. In our view, we do agree that even though at the time of admission of the appeal to the superior court it was directed that it be heard by a single Judge, at that time it appeared as a normal appeal from the conviction and sentence under **section 296(1)** of the Penal Code. However, subsequently, after the single Judge (Gacheche, J) had perused the file, she noted that the superior court on hearing the appeal could possibly interfere with the decision of the lower court to the detriment of the appellant. She rightly cautioned the appellant of that possibility and as the appellant after caution still insisted on going on with his appeal notwithstanding the warning, the learned Judge rightly, to our mind, made fresh direction based on the gravity of the matter that the appeal be heard by a two Judge bench. Unfortunately, when the matter came up before Lady Justice Karanja, she was a live to the gravity of the matter and again warned the appellant of the possible consequence of his proceeding with the appeal and the possible outcome of the appeal should the court find the original charge proved. Her attention was apparently not drawn to the order made on 19th December 2003 which was that the appeal would be heard by a two Judge bench and so she erroneously heard the appeal as a single Judge.

We do agree that as there was already an order in the file that the appeal be heard by two Judges, the same should have been complied with. **Section 359(1)** of the Criminal Procedure Code states:

"**359 (1) Appeals from subordinate courts shall be heard by two Judges of the High Court, except when in any particular case the Chief Justice, or a Judge to whom the Chief Justice has given authority in writing, directs that the appeal he heard by one Judge of the High Court."**

Hearing of criminal appeals by one Judge of the High Court is departure from the requirements of **section 359(1)** and can only proceed after the exception under the same section is complied with.

In this matter before us, the gravity of the appeal became apparent after the first single Judge perused the

record and cautioned the appellant of the possible consequences of the appeal, and the appellant insisting on going on with his appeal, the single Judge at that time (Gacheche, J) realised the need for a two Judge bench to hear the appeal and directed so. We feel this should have been heeded. Our view is that failure to afford the appellant a two Judge bench which had been ordered resulted into an injustice to him. We respectfully agree with the learned State counsel and the learned counsel for the appellant that the superior court acted improperly in hearing the appeal as a single Judge despite the order on record to the contrary.

The learned State counsel seeks rehearing of the appeal before the superior court. The learned counsel for the appellant has not opposed the same. We have perused the record. We feel the appeal that was before the superior court deserved proper hearing. We thus agree that a rehearing of the appeal is called for. That being our view of the matter, this appeal is allowed. In the result, the conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code is quashed and the sentence thereof set aside. The appeal that was before the superior court is remitted before the same superior court for hearing afresh by a two Judge bench that shall exclude Lady Justice Wanjiru Karanja. Judgment accordingly.

Dated and delivered at Eldoret this 23rd day of February, 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR