



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 223 of 2003

RICHARD OMOLLO AJUOGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nairobi (Mbogholi & Mutitu, JJ) 14th August, 2003 in H.C. Cr. Appeal No. 171 of 1999)

JUDGMENT OF THE COURT

This is a second appeal. The appellant, **Richard Omollo Ajuoga**, together with one Omolo Ojwang’ Gumbo, faced three counts of robbery with violence under **section 296(2)** of the Penal Code before the Senior Resident Magistrate at Kisii (J. Wanjala). They both pleaded not guilty but after full trial, the learned Magistrate found them guilty on all the counts of robbery with violence, convicted each of them and sentenced each of them to death as by law provided. They each appealed to the superior court. The appeal by the appellant was Criminal Appeal No. 171 of 1999 while that by Omolo Ojwang’ Gumbo was Criminal Appeal No. 340 of 1999. The record shows that on 11th June, 2002, the appeal by Gumbo abated as he was reported to have died. The appellant’s appeal however proceeded to hearing and was fully heard.

In a judgment delivered on 14th August, 2003, that appeal was dismissed both on convictions and sentence, hence this appeal. We deem it necessary as will be demonstrated later in this judgment to set out the particulars of each of the charges that the appellant and his former co-accused faced in the subordinate court. They were as follows:

On first count;

“On the night of 26th of August 1997 at Kisii town in Kisii District of Nyanza Province, being armed with one home made gun and a knife, jointly robbed THOMAS MONGARE NYARICHO of a motor vehicle Reg. No. KQU 625 make Toyota Saloon valued at Ksh.120,000/= and at or immediately before or immediately after the time of such robbery, threatened to use violence on the said THOMAS MONGARE NYARICHO.”

The particulars of the second count were:

“On the night of 26th of August, 1997 at Kisii town in Kisii District of the Nyanza Province, being armed with a home made gun and a knife, jointly robbed JOSEPH NYAMIRA KERONGO of a motor vehicle Reg. No. KAA 417V make Toyota Pick-up valued at Ksh.600,000/= and at or immediately before or immediately after the time of such robbery, used actual violence on the said JOSEPH NYAMIRA KERONGO”

and the particulars of the last count were:

“On the night of 26th of August, 1997, at Kisii Town in Kisii District of the Nyanza Province, being armed with a home made gun and a knife, jointly robbed HASSAN OKILLA OKWEMBA of a motor vehicle Reg. No. GK V 575 make Mitsubishi Pajero valued at Ksh.1.9 Million and at or immediately before or immediately after the time of such robbery murdered the said HASSAN OKILLA OKWEMBA.”

The appellant filed, on his own, six grounds of appeal initially. Later, however, on 30th November 2006, his learned counsel, Mrs. Rashid, filed supplementary grounds of appeal composed of thirteen grounds. When the appeal came up for hearing however, only one ground of appeal canvassed in the supplementary ground of appeal was urged as by dint of that ground, the other grounds became unnecessary. That was the second ground which read:

“2. That the learned Judges erred in law by upholding the conviction without consideration that part of the proceedings were conducted by an incompetent prosecutor contrary to the law to wit section 85(2) as read with section 88 of the Criminal Procedure Code.”

Mrs. Rashid urged and Mr. Kaigai, the learned Senior State Counsel, readily conceded, that part of the proceedings before the subordinate court were prosecuted by an unqualified person and that violated the entire trial before the subordinate court in view of the provisions of **section 85(2)** of the Criminal Procedure Code as read with **section 88** of the same code.

We have, on our own, perused the record before us as we must do, that point taken being a point of law suited for a second appeal as this appeal before us is. The entire trial started before the then Chief Magistrate at Kisii (Babu Achieng – now deceased) and the prosecutor was Chief Inspector Opanga. That was on 11th September, 1997 when pleas were taken. Thereafter, the matter was transferred to the Senior Resident Magistrate, Mr. J. Wanjala, and remained in his court throughout except on few occasions when the matter came up for mention or for re-allocation. The hearing was conducted by an inspector of police upto 13th March 1998 when the seventh prosecution witness gave evidence. He was examined in chief by Inspector Towett. Thereafter the record shows that the case came up for mention on several occasions when the prosecutor was recorded as an inspector of police. That scenario continued till 21st September 1998 when the record shows that Cpl. Juma was the prosecutor. That would not have been important as on that day, the matter came up for mention only and so Cpl. Juma could not have conducted any hearing of the matter. However, come 25th September, 1998, the matter came up for hearing and the record shows that the prosecutor who led the 8th prosecution witness through his evidence was the same Cpl. Juma. As if that was not enough, the record shows that thereafter, Cpl. Juma was the prosecutor throughout the rest of the case.

Having on our own perused the record, we do respectfully agree with the learned counsel for the appellant and the learned Senior State Counsel that part of the proceedings in the subordinate court was conducted by Cpl. Juma, a police officer of the rank below that of an inspector of police. The provisions of **section 85(2)** of the Criminal Procedure Code are now a matter of common knowledge within the legal corridors and we need not repeat the same here. However, in a summary, Cpl. Juma who conducted part (in fact most part) of the case before the subordinate court was not a qualified public prosecutor. There was no evidence that permission was obtained for him to conduct the case. This Court, in considering a similar situation in the now well known case of **Roy Richard Elirema & Another v. R. (2003) KLR 537** stated, *inter alia*, as follows:

“For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences set aside.”

To bring it even closer to the case before us, in that same case of *Elirema* (*supra*), this Court also stated, *inter alia*:

“It is, however, true that an Inspector Wambua also conducted part of the prosecution. But if a police corporal does not in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. the part conducted by Corporals Kamotho and Gitau) are valid. There was only one trial and if any part of it was materially defective, the whole trial must be invalidated.”

The foregoing is the law and as we have stated, we agree with the two learned counsel on that aspect of this case. The matter was apparently not raised before the superior court and the same court did not address itself to it even on its own motion as would have been expected. However, as it is a point of law, it was rightly raised before us in this second appeal. We do feel however that the first appellate court in its legal duty of revisiting the matter afresh, should, even on its own, pick on such points to avoid delays invariably occasioned by further appeals to this Court on such matters which the first appellate court could deal with at the earliest opportunity.

We think, we have said enough, to indicate that the trial before the subordinate court was a nullity. We declare it a nullity with the result that all the convictions recorded must be and are hereby quashed and the sentences set aside. As the second accused in that court died, this order only affects the appellant who is, in any case, the only appellant before us.

As we have stated, Mr. Kaigai rightly conceded that the trial before the subordinate court was a nullity. He asked for a retrial while at the same time admitting that the appellant has been confined either in remand or in prison for a total of close to ten years and it might be difficult to trace the witnesses. He, however felt, in seeking retrial that the matter was serious as one of the victims lost his life in the course of his duties as a government servant. Mrs. Rashid submitted that the length of time the appellant has been in confinement militates against retrial. This aspect of the case has caused us considerable concern. It is true the appellant has been in confinement from 27th August 1997 when he was arrested to to-date and that is one of the matters we need to consider. The other matter we need to consider as well is justice to all parties in this case as well as whether, looking at the record before us, a *prima facie* case existed (without in any way prejudicing the retrial) so as to enable us order a retrial. Mrs. Rashid referred us to the case of **Pascal Ouma Ogolo vs. Republic – Criminal Appeal No. 114 of 2006** where this Court stated as follows on the pertinent aspect:-

“We have considered whether or not we should order a retrial. The alleged offences were committed on 9th February, 2000 and the appellant has already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal to the superior court were as to identification and recognition in the circum-stances in which both the State Counsel and the court found out to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Musau that this is not a suitable case in which to order a retrial.”

It cannot escape our observation that in that case, the learned Senior Principal State Counsel, Mr. Musau, submitted that the case was not suitable for retrial as he felt that even if a retrial was ordered, it would be

futile as the question of identification of the appellant was not properly resolved even before the superior court. Further, there was no indication as to the state of the victim in that case and, lastly, it is clear that that case was decided on its own circumstances. The other case she referred us to was that of **Henry Odhiambo Otieno v. R. - Criminal Appeal No. 83 of 2005**. That again was decided on the circumstances of that case as the appellant was convicted of the offence of grievous harm and sentenced to 3 years imprisonment and by the time his second appeal came up for hearing, long lapse of time had occurred since the first trial was conducted.

We have anxiously considered all the cases to which we were referred and the law on this point. In the case of **Ahmed Sumar vs. Republic (1964) EA 481, at page 483**, the predecessor to this court stated as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.”

The Court continued at the same page at paragraph II and stated further:

“We are also referred to the judgment in Pascal Clement Braganza vs. R. (1957) EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

Taking the cue from that decision, this Court in the case of **Benard Lolimo Ekimat v. R – Criminal Appeal No. 151 of 2004 (unreported)** had the following to say:

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

In the case before us, it would appear from the record that on the night of 26th August, 1997, robbers had a free hand in Kisii town robbing people of their vehicles at will and ending up in killing one victim of such robbery who was on public duty. Even though we agree that a considerable time has lapsed since the appellant was apprehended and tried for the same, we are of the view, nonetheless, that the circumstances that prevailed as far as this case is concerned demand that justice be done, not only to the appellant but also to the victims of the same robbery and the family of the deceased victim who was killed in cold blood. In our view, justice must be even handed and it must be ensured that all consumers not only receive it but also see it being done.

Thus, in our view, having carefully considered the various aspects of the case including the above plus the evidence that was before the subordinate court, a retrial commends itself to us and we do order a retrial of the appellant before another court of competent jurisdiction. The appellant will be produced before a competent court for his retrial within the next **fourteen (14)** days of the date hereof. That is the judgment of this Court.

Dated and delivered at Nairobi this 2nd day of February 2007.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR