REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 204 of 2005

PATRICK KUBALE WESONGA ……...…… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kakamega (Sergon & Kariuki JJ) dated 28th April, 2005

in

H.C.CR.A. NO. 133 OF 2002

****

JUDGMENT OF THE COURT

This is a second appeal. The appellant *Patrick Kubale Wesonga* (appellant in this judgment) was charged before the subordinate court 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 22nd day of October, 2000 at Maraba village, Makunga sublocation, East Wanga location, in Butere – Mumias District of the Western Province robbed Washington Wasia Muyale cash Ksh.8,200/= and one wallet and at or immediately before or immediately after the time of such robbery used actual violence to the said Washington Wasia Muyale".*

The record before us does not indicate whether the charge as drawn was read to the appellant and a plea taken, but that is the subject of further consideration in this judgment. It suffices to say that the record shows that he was tried for the offence and at the end of the trial, the then learned Senior Resident Magistrate (N. B. J. W. Nyamategandah, Esq.) found him guilty of the offence as charged, convicted him under ***Section 215*** of the *Criminal Procedure Code* and sentenced him to death. The appellant felt dissatisfied with that conviction and sentence and appealed to the superior court on his own in *High Court Criminal Appeal No. 133 of 2002*. Later, he had the services of an advocate and the firm of that advocate filed on his behalf, *Criminal Appeal No. 136 of 2002*. On the date of hearing, both appeals were consolidated and heard together as indeed both were in effect one appeal by one person from one conviction and sentence. The superior court (Sergon and Kariuki JJ) after hearing the appeal dismissed it stating in pertinent part as follows:

"***The evidence adduced clearly showed that the appellant was armed with a knife which he used to stab PW1. In any case he wounded PW1 and used personal violence on him.***

We are satisfied that the prosecution proved the guilt of the accused beyond any reasonable doubt and in our view the conviction was well founded. We find no merit in the appeal. We dismiss it and uphold the conviction and sentence".

The appellant was still not satisfied with that decision and hence this appeal premised on nine supplementary memorandum of appeal, filed on his behalf by L. G. Menezes, Advocate. Before the supplementary grounds of appeal was filed, the appellant had in person filed five grounds of appeal but as they were abandoned during the hearing of the appeal before us in preference to the supplementary grounds of appeal, we treat them as abandoned and will not make any reference to them.

Washington Wasia Muyale (PW1) (the complainant) in his evidence, said he is a farmer in Makunga, East Wanga, Mumias. On 22nd October 2000 at 6.10 p.m. he was on his way to Makunga where he resides. After he had gone 100 metres from Maraba, the appellant emerged from a bush and cut him with a sword on the left side of his back. Patrick Nato (PW3) came to his aid; held the attacker's chin and the appellant's cap fell off. The complainant asked the appellant why the appellant would kill him (the complainant). The appellant then stabbed him on his chest and as he was about to run away, the appellant held his pocket and took away his (complainant's) wallet with Ksh.8,200/= together with the complainant's business card. The complaint ran to the house of James Shisia (PW4) (wrongly recorded as PW3 but this was a repetition and so we will call him pW4) who carried out first aid on the complainant before he was taken to Makunga hospital for treatment. On his way to Makunga, he reported the incident to the police. At Makunga hospital he was admitted for one day. He later went to Kamusiri Health Centre, and Kakamega Hospital as an out patient. On 31st October 2000, he returned to the police station and recorded his statement. He was issued with a P3 form which was filled and produced in court by Isaiah Thomas Odira (PW2), a Clinical Officer at Makunga Health Centre. Another witness Wycliffe Wesonga (wrongly referred to as PW6 in the record) found the complainant at the house of James Shisia being treated. PC. Ken Osando (PW5) was attached to the police at Mwinami. On 22nd October 2000, he was on duty when he received a report through K.H.F. from Makunga Police Post on the matter. That report was made to him by the officer in charge, Makunga Police Patrol, who had been asked by PC. Philip Chiboni (PW7) to make the report. He, together with other police officers, went and saw the complainant who gave the name of the appellant as his attacker. They searched for the appellant but in vain till 3rd November 2000 when he was identified to the police at Mumias Court where he had gone for another matter. He was arrested and taken to Police Station. Later he was charged with the offence. His defence was that of alibi and he called two witnesses in support of that defence.

As we have stated above, several grounds of appeal were preferred in the supplementary grounds of appeal filed by Mr. Menezes, the learned counsel for the appellant. For what will later be apparent in this judgment, we will consider mainly three matters raised in that supplementary memorandum of appeal.

The first two matters were raised in the second ground in the supplementary memorandum of appeal. That ground of appeal states:

"***2. The first appellate court misdirected itself grossly in not studying the record of the appeal before it with the anxious care it deserved; had it done so, the following glaring derelictions of the rule of law would have become apparent:***

(a) That no plea from the appellant was ever taken, either at the commencement of the trial or during the course of the trial. This negated the appellant's constitutional right to know what offence he was being charged with.

(b) That there is no record as to what language was used during the course of the trial and as to whether the appellant understood what was going on".

The third matter we need to consider is raised in ground 7 of the Supplementary Memorandum of

Appeal. That ground states as follows:

"***The Appellate Court should have, but did not, consider that the trial Magistrate swiftly discounted the Appellant's alibi and so misdirected himself by:***

(a) Putting the onus of proof on the appellant.

(b) Requiring the appellant's evidence to be beyond reasonable doubt.

(c) Treating it very cursorily".

Mr. Menezes in his address to us, submitted that there was no plea taken by the trial court and that throughout the proceedings, it was not indicated as to the language in which the witnesses gave evidence and the language in which the court communicated to the appellant and whether the appellant was throughout the trial aware of what was going on in court. He contended that even when an accused person is represented, the trial court still has a duty to the accused to ensure that a plea is taken and that the trial is conducted in a language the accused understands and the presence of and appellant's advocate does not take away that duty of the court. He further submitted that the court had a duty to consider fully the alibi that the appellant raised. In his view, the trial court failed in its duty and the first appellate court which had the duty to analyse and evaluate the evidence a fresh also failed in carrying out that duty with the result that the appellant suffered injustice. Mr. Musau, Senior Principal State Counsel, agreed with Mr. Menezes, adopted his arguments and conceded the appeal.

We have considered the record before us, the submission by both counsel and the law. First, we have perused the record exhaustively, and we, like both counsel have not been able to see at what stage the plea was taken by the learned trial magistrate. From the record, the appellant was first taken to court on 6th November, 2000. The charge sheet states so and the proceedings confirm it. He appeared before R. Rotich, D.M. II (Proff) who did not and could not have taken the plea because of the nature of the charge over which a DM II would have not jurisdiction. He correctly made an entry that:

"***Order***

File to be placed before Mr. Kaniaru – SRM Butere for taking of plea".

On the same day 6th November 2000, appellant appeared before A. K. Kaniaru SRM, who recorded as follows after coram:

"***Interpreter – English – Kiswahili***

Court:

Mention on 24-11-2000

Hearing on 8.12.2000 at Mumias Law Court".

On 23rd November 2000 the matter was placed before Rotich DM II (Proff) for mention. He mentioned it and made an order for hearing to proceed on 8th December, 2000.

Hearing did not take place on 8th December 2000 and there is no entry on the record as to what took place on 8th December 2000 but on 21st December 2000, the matter came up before Mr. Nyamategandah who fixed it for hearing on 12th January 2001. On that day, the case was heard, but even then no plea was taken before hearing. It is thus correct to state that going by the record before us, no plea was taken in the case that proceeded before the trial court and which is the genesis of this appeal.

Section 77 (2) (b) of the Constitution, states:

"***2. Every person who is charged with a criminal offence***

(a) ……

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged".

That provision is one of the constitutional provisions meant to protect fundamental rights and freedoms of the individual. It is a fundamental right of an individual that when he is charged with any criminal offence which might mean his being deprived of his other liberties such as that of freedom to move about as he likes, and in this case his very life, he be informed of the nature of the offence with which he is charged. Part VI of the Criminal Procedure Code provides for "*Procedure in Trials before subordinate courts"* and ***Sections 202*** to ***218*** set out provisions relating to the hearing and determination of cases. ***Section 207 (1) (2)*** and ***(3)*** state as follows:

"***207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.***

(2) If the accused person admits the truth of the charge his admission shall be recorded as nearby as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary.

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereafter provided".

The need for the trial court to take plea before hearing a criminal matter is mandatory and the provisions above clearly state so by the use of the word "*shall"*. The need for an accused person to be told in detail all the ingredients of a charge he is facing and the need to have him answer to that charge after ensuring that he understands the ingredients of the charge cannot be emphasized enough. It is true in the case before us, that the appellant was represented by an advocate, but we agree with Mr. Menezes that the person being charged, and for whom the provisions, we have cited above were made, was the accused and not his advocate. The case is against the accused and not the advocate. It is therefore, incumbent upon the trial court to ensure that not only is the plea taken but that the charge and all its ingredients are properly explained to an accused person in a language he understands and the trial can then proceed after the accused has pleaded not guilty to the charge or after the accused person has refused to plead and a plea of not guilty has been entered for him. In the case of ***R vs. Tambukiza s/o Onyonga*** [1958] EA 212 in the then Supreme Court of Kenya, Sir Ronald Sinclair CJ and Mc Duff J. considered a case where a magistrate had not drawn a formal charge and they said:

"***In our opinion a formal charge is of essence of criminal procedure and failure of the magistrate in present case to draw up and sign a formal charge to which the accused was required to plead was a defect which rendered the trial a nullity".***

Although that case was dealing with failure by the trial court to draw up and sign a formal charge, it also made it clear that such a charge is needed for purposes of plea to be taken. Here, there was a formal charge, but one requirement of it, namely that the accused's plea on it be taken was not accomplished. In the case of ***Adan vs. Republic*** [1973] EA 445 and particularly at page 446, the predecessor to this Court put the law beyond any doubt when it stated:

"***We think the practice is desirable and should generally be followed throughout East Africa ……***

When a person is charged, the charge and the particulars should be read out to him, so far as possible

in his own language, but if that is not possible, then a language which he can understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential ingredients, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty ……".

The importance that the law places on a plea being taken before a case is heard can be seen in the first proviso to ***Section 214 (1)*** of the Criminal Procedure Code where it is stated that at any stage of the trial, if a charge is altered, the court shall thereupon call upon the accused person to plead to the altered charge. We think we have said enough to demonstrate that the omission to take plea in the case as appears from the record before us, vitiated the entire trial before the subordinate court. The next point that was taken by Mr. Menezes and which was also conceded by Mr. Musau, is that the record does not show in which language the entire proceedings were conducted before the trial court. Again, we have perused the record. As indicated hereinabove, it was only on 6th November 2000 when Kaniaro SRM indicated that on that day the interpretation was English/Kiswahili. On that day the matter was before him but was not heard. Thereafter when the hearing proceeded, and witnesses gave evidence, it was not indicated in what language each witness gave evidence although they were each sworn and allowed to testify. It was not stated in what language, the accused gave his statement and in what language his witnesses gave evidence. As the court did not state the language used at the trial apart from English, one cannot state for certain that the appellant understood the language that was used to conduct the entire trial. ***Section 77 (1) (b)*** of the Constitution, which we have cited above, emphasizes that the offence is explained to an accused person in a language that he understands. ***Section 77 (1) (f)*** goes further and states that an accused person is entitled to have an interpreter if he cannot understand the language used in the trial. Thus, the need for the trial court to indicate the language in which the trial proceeded cannot be waived even if an accused person has an advocate. As we have stated, there is nothing in the proceedings except on one day when the case was not for hearing, to show the language in which the proceedings were conducted. That omission would also vitiate the trial before the subordinate court. The superior court, being the first appellate court had the duty to revisit the entire proceedings in the trial court afresh, analyse it, evaluate it and come to its own conclusion, of course always bearing in mind that it did not have the advantage of hearing the witnesses or seeing their demeanor and therefore giving allowance for the same – see ***Okeno v R*** [1972] EA 32. In this case, the superior court did not meet those requirements and hence did not pick up the above two matters, namely, that the trial proceeded without plea having been taken and that the language used at the trial by witnesses and the appellant was not indicated. As these are matters of law, we are bound to interfere on second appeal. Those two grounds are sufficient for allowing the appeal and Mr. Musau, learned Senior Principal State Counsel, did not ask us to order a retrial. But for the benefit of the trial court and the superior court, we think we should deal with the other matters raised by the appellant through his counsel. First is that his alibi defence was not given proper consideration as is required by law. In his defence the appellant stated as follows:

"***On arrest on 3.11.2000 I had come for a case of assault, I was outside the Law Courts when two officers with the complainant James Sisia came and arrested me. They then placed me in the cells. On asking why they said I had robbed one. And yet I was getting treatment at Butere and was staying with my uncle who leaves (sic) near Butere Hospital. That is all I have to state".***

His uncle Benjamin Wambaisi Masamba (DW II) in his evidence stated that the appellant went to his home on 16th October 2000 and was being treated at Butere District Hospital. The appellant stayed with him for 10 days and left on 26th October 2000. On 22nd October 2000 the appellant went to Kakamega for X-ray and returned to his home (uncle's) at 4.00 p.m. and never left the house thereafter. Robert Wanyonyi, a clinical officer at Manyala Sub District Hospital was at Butere District Hospital on 16th October 2000. He received the appellant for treatment. The appellant complained of assault. He treated the appellant and filled P3 form for the appellant on 17th October 2000. On 21st October 2000, this witness sent the appellant for X-ray. He produced P3, medical notes, and X-ray file as exhibits.

The learned magistrate considered that alibi defence and dismissed it stating:

"***The defence that he was away for treatment is not a strong alibi for it does not talk about the time the complainant was being injured on 22.10.2000 at 7.15 p.m.".***

The superior court in its judgment referred to the appellant's defence of alibi only in passing when setting out the submissions before it by Mr. Amasaka, the then learned counsel for the appellant. All that the court stated was:

"***He submitted that the trial court wrongly rejected the defence of alibi of the appellant".***

Otherwise, it did not direct its mind to that point. In our view, the trial court was plainly wrong when it rejected the defence of alibi raised by the appellant on grounds that it was not a strong alibi because it did not talk about the time the complainant was being injured which according to the learned magistrate was 7.15 p.m. This was in effect shifting the burden of proof onto the appellant and requiring the appellant to put up a strong defence of alibi. In the case of ***Ssentale vs Uganda*** [1968] EA 365, Sir Udo Udoma, CJ. held as follows:

"***An accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden resting on the accused in such a case".***

In any case, in this case, the complainant said in evidence that he was attacked at 6.10 p.m. on 22nd October 2000 whereas Benjamin Wambaisi Masamba said in evidence that on 22nd October 2000, the appellant who was living with him when attending treatment at Butere returned from Kakamega where he had gone for X-ray at 4.00 p.m. and never left home thereafter that day. In our view, if the trial court had addressed that aspect of the alibi defence and had he correctly directed that the burden on the appellant was to raise the defence and the duty then shifted to the prosecution to disprove the same, he might have come to a different conclusion on the issue. Unfortunately, as rightly pointed out by Mr. Menezes, the superior court did not consider the alibi defence and hence did not in our view carry out its duty of analyzing afresh and evaluating the evidence that was on record. Had it done so, it might also have come to a different conclusion on the entire case.

Before we conclude this judgment, there are certain matters we need to comment upon. First, is that the record shows that the trial court proceeded on to the case for the defence before the prosecution formally closed its case. What is in record is that after cross-examination of PC Philip Chiboni, wrongly referred to as PW6, the next entry is that the defence counsel told the court that he had no submissions and thereafter ruling date was fixed. It is clear, the prosecution must have closed its case but there was necessity to record that, as it was an important aspect of procedure in that ***Section 210*** of the Criminal Procedure Code could be invoked only after the close of the prosecution case and not before, though we are not saying such a failure vitiates the trial. Secondly, in his ruling which we believe was made pursuant to the provisions of ***Section 210*** of the Criminal Procedure Code, the learned trial magistrate stated, *inter alia*, as follows:

"***The evidence adduced on the charge, the identification and the time at which the complainant was attacked shows that it was a time the PW1 could identify the attacker. The same person robbed PW1 so I find the charge proved against the accused and under section211 of the CPC he is put on his own defence".***

This was not proper, neither was it necessary. It gave the impression that the court had made up its mind on the matter before the appellant's case was advanced. All that the court needed to state in compliance with the requirements of ***section 210*** of the Criminal Procedure Code was, if he was minded to, that a prima facie case had been made out requiring the appellant to answer and then proceed to put him on his defence without indicating whether or not the case against the appellant had been proved. That stage could only be reached after the accused's defence was on record and considered.

The totality of all the above is that we are far from being satisfied that the case against the appellant was proved as required by law. The appeal is allowed, conviction quashed, sentence set aside. The

appellant is set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 15th day of June, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR