



IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 265 of 2003
AMOS GITUMA KINYUA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Mulwa, JJ) dated 11th July, 2002 In

H. C. Cr. Appeal No. 89 of 2001)

JUDGMENT OF THE COURT

Mr. Orinda, learned Principal State Counsel, concedes that the trial of the appellant in this matter was a nullity as the prosecution of it was conducted by a person or persons who had no authority to do so. We agree.

The appellant faced two counts of robbery with violence contrary to section **296(2)** of the Penal Code and was tried before the Senior Resident Magistrate's court in Nkubu. It was alleged in count 1 of the charge sheet that the appellant, on the 24th of November 1999 at about 3.00 a.m. at Nkubu market in Meru Central District within Eastern Province, jointly with others not before court being armed with a rifle and axes, robbed Johnson Kimathi of cash Kshs.40,800/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on the said Johnson Kimathi. Count 2 of the charge was on the same facts but the robbery was against Danston Mugambi from whom a sum of Kshs.2500/- was stolen.

The trial commenced before Hon. Nduku Njuki (SRM) on 12th January, 2000 after the appellant's arrest on 10th January, 2000. Appearing for the prosecution at the time was Inspector of Police Makanya and the plea was taken. After several adjournments, the hearing resumed on 24th August, 2000 when, again, IP Makanya, led the prosecution of the case and called the first witness, C.I. Francis Sang (PW1). The matter was adjourned to 3rd October, 2000 when IP Makanya as prosecutor called the second witness, Johnson Kimathi Itonga (PW2) after which it was again adjourned to 21st November, 2000. On that day I.P Makanya led the third witness, Danston Mugambi Githinji (PW3) in giving his evidence in chief and the witness was partly cross-examined by the appellant before the hearing was adjourned to 11th January 2001. PW3 then continued to be cross-examined by the appellant, but the prosecutor who took charge of the case on that date was Police Constable Nderitu. P.C. Nderitu also called, and led, P.C. Fredrick Isinga (PW4) in evidence before closing the prosecution case. The case was then adjourned for hearing the appellant in his defence. At the resumed hearing on 25th January, 2001, the prosecution was represented by Corporal Kabogo as the defence case was presented and closed.

The manner of conducting the trial was neither raised before the trial court nor the superior court. The appellant who drew up and filed the memorandum of appeal in person before this Court did not raise it either. It is nevertheless an issue of law which goes to the jurisdiction of the court and it is the duty of this Court to deal with it. At the hearing of the appeal, Mr. Kinyua Kiama, learned counsel appointed by the court to assist the appellant, sought an adjournment to consider the filing of a supplementary memorandum of appeal raising that issue. We found it unnecessary however to grant such adjournment in view of the concession by the State, as stated at the beginning of this judgment.

The trial obviously took place long before the decision of this Court in **Elirema & Another v. Republic [2003] KLR 537**. But the **Elirema Case** did not introduce anything new in the law nor have subsequent cases which have followed that decision. They merely restate the law as it has always existed in the Constitution of Kenya **section 77 (1)**, the Criminal Procedure Code **sections 85, 85 (2), 86, 88 (1), 202** and the Police Act (**Cap 84**) **Section 3 (2)**. The combined effect of those provisions is that where an incompetent police officer prosecutes a Criminal Case before a magistrate's court, the proceedings therein will be a nullity. Both P.C. Nderitu and Cpl. Kabogo who conducted the prosecution's case in this matter were not Public Prosecutors. The trial in which they purported to be such prosecutors was therefore a nullity, and we so declare.

What is the consequence of that declaration?

Ordinarily an order for retrial should ensue. In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person. All those are familiar guidelines and we repeat them from **Fatehali Manji vs. Republic [1966] EA 343**. It was also stated by this Court in **Mwangi vs. Republic [1983] EA 522** that:-

“We are aware that a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza vs. Republic [1957] EA 469, Pyarala Bassan v. Republic [1960] EA 854.”

Mr. Orinda informed us that the State was not pursuing any order for retrial for the reason that the evidence on record was materially deficient and a retrial would merely afford an opportunity to the prosecution to fill up the gaps left out in the original trial. Once again, we respectfully agree with Mr. Orinda.

The prosecution called four witnesses to prove the two counts laid against the appellant. Only two of those witnesses, however, were material. They were the two complainants - Johnson Kimathi Itonga (PW2) in respect of the first count, and Danston Mugambi Githinji (PW3) in respect of the second count. The other two witnesses were the police officer who conducted an identification parade, C.I Francis Sang (PW1) and the officer who received the report of the alleged robbery, P.C. Frederick Isinga (PW4).

Itonga was a businessman in Nkubu town where he operated a hotel known as Tea Room. The hotel building adjoins his residential house. At about 3.00 a.m. on 24th November, 1999, he was sleeping in his house alone when he heard a knock on his bedroom window. He drew the curtain and saw about seven people; all strangers, holding axes, rungs and a gun. They ordered him to open the door and he did. Three of those people then entered the house and demanded Kshs.250,000/-. He said he did not have such money but showed them some Kshs.40,800/- he had kept under his sofa seat. They took it and disappeared. Itonga says there were lights on when all that was happening but does not say how long it took.

Shortly before the robbers knocked on Itonga's bedroom window, his worker in the hotel, Githinji (PW3) was sleeping in an upstairs room at the hotel. He heard footsteps going up a ladder into the room and

shortly he saw three people enter the room armed with a panga, rungu and a small axe. They demanded money and he gave them Kshs.2500/-. They asked him whether there was a telephone to make a report to the police and he said there was none. He was ordered to lock his door and the robbers left. He then heard them knocking at the window of his employer's house shortly thereafter.

After the robbers left, Githinji went and opened the door for Itonga and both headed for Nkubu police station to report the incident. P.C. Isinga (PW4) says they informed him that they could identify one of the robbers if they saw him again. According to them, the robber was a very tall young and black person wearing a leather jacket with brown patches, black jeans trousers with patches on the knees, and black shoes. All that information, however, was not in the first report to the police and was not recorded in the occurrence book which was produced in court at the instance of the appellant. Itonga added in his evidence that the robber had a clean shaven head because he had a cut on the top of his head. Githinji for his part said the robber had a small scar on top of his left eye.

The appellant was arrested in connection with other alleged offences in Meru town on 8th January, 2000, 45 days after this incident. He is then alleged to have led the police to several houses and to one house at Gakoromone which an alleged landlord told the police was the appellant's house. The police recovered several items from the house including a jacket similar to one worn by one of the robbers at the time of the robbery. It is not clear where the police recovered the other items of clothing alleged to have been worn by the appellant at the time of the robbery which were exhibited and which the two witnesses purported to identify him with.

An identification parade was arranged at Nkubu police station by C.I. Francis Sang (PW1) but only Itonga was invited to participate in the exercise. Githinji did not take part although he said he did, and no other evidence confirmed that assertion.

Upon considering the evidence on record the trial court convicted the appellant on the strength of the evidence of Itonga (PW2) and Githinji (PW3). The superior court, on appeal, acquitted the appellant on count 2 as it was conceded that the identification by Githinji was merely dock identification and therefore evidentially worthless. There was prosecution evidence also that he was suspected by Itonga, his employer, as the person who told the robbers that he had money with him that night. His evidence was therefore of doubtful credibility. The conviction on count 1 was upheld, but as is evident from the analysis we have attempted to relate above, the sole evidence of the complainant was not free from reasonable doubts. The sentiments expressed by Mr. Orinda are not therefore wholly unfounded.

In the result, we allow the appeal, quash the conviction and set aside the sentence of death imposed on him. We order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 26th day of October, 2007.

S.E.O. BOSIRE

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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 a true copy of the original.

DEPUTY REGISTRAR.