REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 87 & 88 of 2006

CYRUS MURIITHI KAMAU ……. 1ST APPELLANT

MOSES KIBAARA MARUTA ……. 2ND APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

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

at Meru (Lenaola & Sitati, JJ) dated 14th February, 2006

In H.C. Cr. A. No. 77 & 76 of 2004)

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JUDGMENT OF THE COURT

Cyrus or Silas Muriithi Kamau (the 1st appellant) and Moses Kibaara Maruta (the 2nd appellant) come before us by way of a second appeal, their first appeal to the superior court having been dismissed on *14th February, 2006* by Lenaola & Sitati, JJ. The two were among a total of seventeen persons who were tried before the court of the Chief Magistrate at Meru on two counts of robbery with violence contrary to *section 296 (2)* of the Penal Code. The particulars of count one were that on 27th May, 2001 at Irimba village, Nkondi Location, Tharaka District within Eastern Province the appellants, with the other fifteen named persons and jointly with others not before the court and while armed with dangerous or offensive weapons, namely pangas, axes and rungus, robbed Mwangangi Ndii of cash K.shs.2000/-, plough, a spraying pump, Philips radio, two lamps, one sufuria, one she goat, a bow and 30 arrows, phoenix bicycle F/No. UM 382546, a sword and two sacks of millet, all valued at K.shs.25,750/- and at or immediately before or immediately after the time of such robbery, they killed the said Mwangangi Ndii. The second count stated in its particulars that on the same date, time and place and while armed in the same manner, the appellants and their colleagues robbed Muthengi Mwangangi of a bicycle make Raleigh F/No. V 29224, a radio make Trident, a small radio of two bands and two sufurias, all valued at K.shs.8250/- and at or immediately before or immediately after the time of such robbery, they killed the said Muthengi Mwangangi.

In addition to the two charges of robbery, the 1st and the 2nd appellants were each separately charged on an alternative count of handling stolen property contrary to *section 322 (2)* of the Penal Code. The

alternative charge against the 1st appellant was that on 25th May, 2001 at Gatithini market in Kanjoro Location within Tharaka District of Eastern Province, otherwise than in the course of stealing he dishonestly "handled" a phoenix bicycle F/No. UM 382546 knowing or having reasons to believe it to be stolen goods. The alternative charge against the 2nd appellant was that on 25th August, 2001 at Gatithini market, otherwise than in the course of stealing, the 2nd appellant dishonestly "*handled*" a bicycle make Raleigh F/No. V 29224 knowing or having reasons to believe it to be a stolen goods.

These being second appeals, we are only entitled to deal with issues of law. Mr. Mburu, learned counsel for both appellants, raised three issues which he considered to be issues of law. Those issues are stated thus in his supplementary memorandum of appeal filed on 11th May, 2007:-

"***1, THAT the learned judges of the superior***

court erred in law in failing to appreciate that a miscarriage of justice occurred as a result of the learned trial Magistrate failed to comply with the provisions of section 200 of the Criminal Procedure Code and this was prejudicial to the appellants.

2. THAT the learned trial Magistrate erred in law in convicting the appellants for the offence of robbery with violence , contrary to section 296 (2) of the Penal Code Cap 63 , whereas they were placed on their defence for the offence of handling stolen goods contrary to section 322 (1) of the Penal Code. This was tantamount to condemning the appellants unheard and a gross miscarriage of justice occurred.

3. ***THAT the learned trial Magistrate erred in law in failing to record the pleas of the appellants and the learned Judges of the superior court erred in law in upholding a conviction based on the said proceedings of the lower court which were defective***."

Mr. Mburu urged ground three first. The substance of that ground was that various of the accused persons had been charged in different and separate files before the trial Magistrate. They had all pleaded not guilty to the charges in respective files. On 17th September, 2001, Inspector Njeru who was prosecuting before the Chief Magistrate, Mr. Muchelule, asked the Magistrate to allow him to consolidate the file then before him with Criminal Case No. 1843 of 2001 and Criminal Case No. 1866 of 2001. There was no objection to the request for consolidation and an order granting the consolidation sought was made. Mr. Muchelule then proceeded as follows:-

"***------- Fresh charge accepted. New charges read and explained to each and who denies (sic).***"

If we understood Mr. Mburu correctly, his contention was that in taking the plea on the new charges, the trial Magistrate should have recorded the separate answer of each appellant to each charge. We think there is no merit at all in this submission. There can be no doubt from the record of the Magistrate that each of the appellants and the other persons charged with them pleaded not guilty to the charges they faced. After their pleas, a trial ensued and apart from the two appellants, the other accused persons were acquitted under ***section 210*** of the Criminal Procedure Code. As far as we are aware, there is no law, except as provided in ***sections 207*** and ***208*** of the Criminal Procedure Code, which provides that even where an accused person is pleading not guilty to a charge, the magistrate recording that plea must record it in the exact words used by the accused in pleading not guilty. In recording a plea of "*not guilty*" all a court is required to do is to make sure that the accused person understands the charge upon which he is being called to plead to. The position is wholly different where an accused person is taken to be pleading guilty to the charge. In such a situation, the principles set out by the Court of Appeal for East Africa in **ADAN V. REPUBLIC [1973] EA 445** are applicable. Those principles do not apply in situations where a plea of not guilty is being entered. As we have already said, there is no merit in ground three of the grounds of appeal and the same must fail.

Mr. Mburu next argued ground one which involves the application of the provisions of ***section 200***, particularly subsections ***(3)*** and ***(4)*** of the Criminal Procedure Code. The trial of the appellants

commenced before Mr. Muchelule on 29th October, 2001 when P.C. Jasons Kamathi of Divisional CID, Marimanti (PW1) testified; he was cross-examined and re-examined by the prosecutor and at the end of the re-examination, the prosecutor applied for the re-call of this witness. The application to recall him was opposed but in the end the Magistrate allowed the application and the witness testified afresh. The effect of the witness' evidence as regards the two appellants was that he and other officers who investigated the robbery were led by a suspect to Gatithini market where they arrested the 1st appellant. They interrogated the 1st appellant and according to the witness,

"*the 1st appellant volunteered to take us to Gatithini where we found the bicycle. He led us to another place where we arrested 13th accused and recovered a bicycle from him (13th accused), belong (sic) to Muthengi Mwangangi*."

It is to be remembered the two appellants were each charged with handling bicycles allegedly stolen during the two robberies.

After the evidence of the first witness, the matter was adjourned to 20th November, 2001 and on that day, Mary Nchura (PW2) started to testify but before long, the prosecutor applied to have her declared hostile and the Magistrate did declare her a hostile witness. Having been declared hostile, her evidence became virtually worthless and neither side was entitled to rely on it. She was next followed by Mbogo John Mwangangi Ndii (PW3) who also said he was one of the people who went to the 1st appellant's place and that the 1st appellant led to the recovery of a bicycle. A fourth person was called but before he could testify, an application for an adjournment was made and granted. Mr. Muchelule adjourned the hearing to the 18th/19th February, 2002 but he was apparently not available on those dates and the hearing before him did not resume until 12th March, 2002 when PW3 was further examined and cross-examined. Then Inspector Francis Ngugi (PW4) took the witness stand and the purport of his evidence was that he had taken a cautioned statement under inquiry from the 2nd appellant. The statement was challenged by the 2nd appellant and a trial within the main trial as to the admissibility of the statement ensued, and went on upto 13th March, 2002 when it was adjourned to 27th March, 2002.

On 27th March, 2002, a new Magistrate, Mr. Njeru Ithiga, mentioned the matter and stood it over to 10th April, 2002. On the latter day Mr. Muchelule again stood the matter over to 15th April, 2002 when once again Mr. Ithiga said Mr. Muchelule was not sitting and that the matter would be heard on 16th April, 2002. On 16th April, 2002 Mr. Muchelule made an order that:-

"***The Presiding Officer is proceeding on transfer. The case will be taken over by another Magistrate. In the meantime proceedings be typed and case mentioned on 29th April, 2002."***

This order was repeated by Mr. Muchelule on 29th April, 2002 when he fixed the hearing dates for 20th and 21st May, 2002. There were subsequent attempts to have the matter finalized by Mr. Muchelule, but it appears that it was not possible and so, on 1st July, 2002, the advocates appearing for the accused persons told the new Magistrate Mr. W.M. Muiruri, Senior Principal Magistrate, that they all felt the matter should proceed before him. Mr. Mwenda, Advocate, told Mr. Muiruri:-

"***We feel this case may require a resident magistrate here. If this court cannot take up the matter we can have it reallocated in court No. 2. We plead with court to have the matter proceed without having to wait for Mr. Muchelule. This is also because we have trial within trials which will require rulings."***

All the other advocates on record and the prosecutor agreed with Mr. Mwenda and the prosecutor stated:-

"***It is the wish of prosecution that the case is dispersed (sic) of within shortest time possible . I have witnesses who come from Isiolo. The prosecution will not be jeopardized if the matter goes to another court. We will abide by the decision of this court."***

Mr. Muiruri then ruled:-

"***The case will then proceed on (sic) for trial in this court. Hearing to proceed on (sic) from 2nd August, 2002. ----------"***

We have checked the typed record we have against the hand-written notes of the Magistrate and it is clear that the trial Magistrate mistakenly wrote "*August*" instead of "*July*". The hearing of the case proceeded before him on 2nd July, 2002 and not on 2nd August, 2002. On 2nd July, 2002 a witness in the trial within the trial straightaway began testifying before Mr. Muiruri. It is clear that Mr. Muiruri did not comply with the requirements of ***section 200 (3)*** of the Criminal Procedure Code. That section provides:-

"***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right." – emphasis added.***

This section is clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial Magistrate and the burden to inform an accused of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. Pronouncing itself on that section, this Court, differently constituted (Madan, Kneller and Nyarangi, JJA) had this to say:-

"***No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration" -***

See **NDEGWA V. REPUBLIC, [1985] KLR 534** at pg. 537 paragraph 15.

The language used in the passage is flamboyant , but with respect, it summarizes well the purpose of ***section 200 (3)*** of the Criminal Procedure Code. It is true that in the case of these appellants, it was their counsel who pleaded with Mr. Muiruri to proceed with the trial from the stage where Mr. Muchelule had left it, but we do not understand the advocates' plea to have meant that they were waiving the appellants' rights under ***section 200 (3)*** of the Code and that the succeeding Magistrate was relieved of his duty to inform the appellants of their rights. As we have seen, the evidence of PW1 was not merely formal; he directly connected the two appellants with the two bicycles . Mr. Muiruri did not have the benefit of seeing and hearing that witness. In our view, the failure by Mr. Muiruri to inform the appellants of their rights under ***section 200 (3)*** of the Code, was in the circumstances of the case, fatal and on that ground we must allow the two appeals.

What ought we to order in the circumstances? We note that the victims of the two robberies were killed in a very cruel manner and that on the entire evidence a conviction could well be had. We are aware that the alleged offences took place some six years ago but the trial of the appellants was not concluded until 10th June, 2004 when each of them was sentenced to death by the Magistrate. Their first appeals to the superior court were dismissed on 14th February, 2006. In those circumstances, we think a retrial is still feasible. We accordingly allow the appeals, set aside the convictions and sentences imposed on each appellant and order that the appellants shall be retried on the charges as originally drawn against them before a different Magistrate. Pending their new trial, the appellants shall continue to be detained in prison custody. Those shall be the orders of the Court on the two appeals.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OFA PPEAL

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

DEPPUTY REGISTRAR.