REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 281 of 2005

YUSUF JUMA OSONYE ….....…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nairobi (Onyancha & Kubo, JJ) dated 2nd March, 2004

in

H.C. Cr. Appeal No. 939 of 1998)

****

JUDGMENT OF THE COURT

This is a second appeal. The appellant, Yusuf Juma Osonye, was charged before the Senior Principal Magistrate's Court at Kakamega with eight counts each of robbery with violence contrary to section 296(2) of the Penal Code. The first six counts of robbery with violence were alleged to have taken place on 9th June 1997 and, save for the different victims, the particulars of those charges were the same in every aspect. In the first two of those counts, the victims met their death as a result of the attack, whereas in respect of counts 3, 4, 5 and 6, the victims were wounded. In the last two counts namely counts 7 and 8 the robberies are alleged to have taken place on 8th June 1997 and the actual violence is alleged to have been used upon the victims in respect of each count. The appellant pleaded not guilty to the charges but after full hearing, the learned Senior Principal Magistrate (C.O. Kanyangi) found the appellant guilty in respect of counts 1, 7 and 8. He was acquitted on counts 2, 3, 4, 5 and 6. The appellant was not satisfied with that decision and he lodged an appeal with the superior court – Criminal Appeal No. 939 of 1998. That appeal was heard and was dismissed as that court (Onyancha and Kubo, JJ) found that the appeal did not have merit. The above is the genesis of this appeal before us which is premised on ten grounds of Appeal filed by the appellant in person and six grounds filed by the firm of advocates representing the appellant in the supplementary memorandum of appeal.

When the appeal came up for hearing before us, Mr. Ondieki, the learned counsel for the appellant, argued only one ground of appeal in the supplementary memorandum of appeal. As we also intend to confine our judgment to that ground only, we will not deal with other aspects of the appeal reflected in other grounds. That ground states as follows:

"**1. The convictions and sentence were a nullity the proceedings having been presided over by an**

incompetent prosecutor contrary to section 85(2) and 88(1) of the Criminal Procedure Code (Cap 75) Laws of Kenya."

Mr. Ondieki in his argument before us took us through the entire record and pointed out that the prosecution of the case was mostly done by one corporal Mwangala, a person who, though a police officer, was of the rank that is not specified in **section 85 (2)** of the Criminal Procedure Code and urged us to declare the trial a nullity. He asked us to release the appellant in view of the time he had taken in confinement since his arrest to date, which is slightly over ten years.

Mr. Kaigai, the learned Senior State Counsel, conceded that an incompetent person prosecuted the case and that being so, the trial before the subordinate court was a nullity. It is also clear that C.I.P Boiyo also prosecuted the case, and yet he was later called as a witness. This is undesirable and rendered the proceedings irregular.

We have perused the record before us. The salient aspects are that on 11th July 1997, when a new charge sheet was read to the appellant, the prosecutor was Chief Inspector Boiyo. After the charge was read to the appellant and he pleaded not guilty to all the eight counts, the first witness gave evidence and was led in his evidence by C.I.P Boiyo. PW 2 and PW 3 also gave their evidence. Hearing was then adjourned to 2nd, 3rd, 4th and 5th September 1997. When the hearing resumed, one Cpl. Mangala is shown on record as the prosecutor. He led the prosecution witnesses PW 4, PW 5, PW 6, PW 7 and PW 8. The hearing continued on 3rd September 1997 and Cpl. Mwangala continued as the prosecutor. On that date, PW 9, PW 10 PW 11, PW 12, PW 13 and PW 14 were heard. On 4th September, 1997, with Cpl. Mwangala as the prosecutor, PW 15, PW 16, PW 17, PW 18 and PW 19 were heard. Even on the next day i.e. on 5th September, 1997 when PW 20, PW 21, PW 22 and PW 23 testified, Cpl. Mwangala was the prosecutor. To cut the long story short, and as it was in any way conceded by Mr. Kaigai, Cpl. Mwangala, prosecuted most of the case. He was not an inspector of police. He was a corporal. **Section 85 (2)** of the Criminal Procedure Code states:

"**The Attorney General by writing under his hand may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspection of Police, to be a public prosecutor for the purpose of any case."**

That provision makes it clear that to prosecute as a public prosecutor, one has to be either an advocate of the High Court of Kenya or a person employed in public service who, if a police officer, must be above the rank of an Assistant Inspector of Police. As this Court observed when faced with a similar situation in the now well known case of **Elirema & another vs. Republic (2003) KLR 538** and particularly at page 542:

"**Going by the provisions of the code which we have already fully set out, it is clear that the Attorney General has no power to appoint a police officer below the rant of an Assistant Inspector to be a public prosecutor. Corporals Kamotho and Gitau were clearly acting as public prosecutors. They did not for example, ask the trial Magistrate to give them permission under section 88(1) of the Code to prosecute as private persons. They were clearly purporting to prosecute as public prosecutors pursuant to the provisions of section 86 of the Code. They were clearly not entitled to act as public prosecutors."**

The same goes for Cpl. Mwangala. He was clearly not entitled to act as a public prosecutor. The part of the trial before the learned Magistrate in which Cpl. Mwangala took part as a prosecutor is a nullity. We may also add that in addition to the irregularity we have pointed out above, the record also shows, as we have stated, that C.I.P Nelson Boiyo Makan was the prosecutor when the plea was taken. He also led three witnesses through their evidence and re-examined them in his capacity as a prosecutor. However, later he appeared as the ninth witness in the same case i.e. (PW 9). Clearly, one cannot be a prosecutor and a witness in the same case. This was an added irregularity. Apparently, the attention of the superior court was not drawn to these serious irregularities. On our part, we see no alternative but to declare the trial of the appellant a nullity. We do so with the result that all the convictions recorded against the

appellant must be and are hereby quashed and sentences of death set aside.

What next? Mr. Kaigai seeks a retrial on grounds that the offences were serious and going by the record, there was a good case against the appellant. Mr. Ondieki seeks release of the appellant citing his incarceration for over ten years which he submits has deprived the appellant of his rights. He relies on the case of **Ahmed Sumar vs. Republic (1964) EA 481**.

We have anxiously considered that aspect of the matter before us. In the recent case of **Richard Omolo Ajuoga vs. Republic - Cr. Appeal No. 223 of 2003**, this Court considered its decisions in the cases of **Pascal Ouma Ogolo vs. Republic - Cr. Appeal. No. 114 of 2006**, **Henry Odhiambo Otieno vs Republic - Cr. Appeal No. 83 of 2005**, **Ahmed Sumar vs. Republic (1964) EA 481** and the case of **Lolimo Ekimat v. Republic – Criminal Appeal No. 151 of 2004 (unreported)**. After full consideration of these cases and others it stated as follows:

"**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 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."**

We do agree that a retrial should only be made where interests of justice require it and every case must be considered on its own merit. In this case, where a life was lost like in the case of **Richard Omolo Ajuoga vs. Republic** (supra), it is necessary that whoever was or were responsible be brought to book. All we are saying is that a proper trial should be carried out so that the truth is ascertained rather than terminating the matter on technicalities. In the circumstances of this case, a retrial commends itself to us, and we do order a retrial of the appellant before another court of competent jurisdiction. We order that the appellant be produced before a competent court for his retrial within the next **fourteen (14) days** of the date hereof. This is the judgment of the Court.

Dated and delivered at Nairobi this 19th day of October 2007.

S.E.O BOSIRE

…….

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR