REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, ONYANGO OTIENO & DEVERELL, JJ.A)

Criminal Appeal 253 of 2004

BETWEEN

DUNCAN KAMAU NJENGA

GRACE NG'ENDO KAMAU ……..…….. APPELLANTS

AND

REPUBLIC ……..…… RESPONDENT

H.C. Cr. Appeal No. 74 & 75 of 2004 (Consolidated))

JUDGMENT OF THE COURT

The two appellants in this appeal, Duncan Kamau Njenga and Grace Ng'endo Kamau, are husband and wife. They were both charged in the subordinate court at Githunguri with the offence of grievous harm contrary to **section 234** of the Penal Code. The particulars of the charge were that on the 25th day of June, 2003 at Ngenia village in Kiambu district within Central Province, they jointly unlawfully did grievous harm to Stephen Waweru Njenga. The victim, Stephen Waweru Njenga was the eldest brother of the first appellant and thus was brother-in-law to the second appellant. They pleaded not guilty but after full hearing, they were both found guilty, convicted and sentenced to a jail term of seven years with hard labour. They filed Criminal Appeals No. 76 of 2004 and 75 of 2004 respectively in the superior court. The appeals were consolidated and were heard together by Kimaru, J. sitting as a single judge. The superior court dismissed both appeals as against conviction but allowed the appeals on sentences stating as follows:

"On sentence, I find that the sentences meted out on the appellants was (sic) manifestly excessive considering thecircumstances of this case.

He then proceeded to reduce the sentences and the second appellant, Grace Ng'endo Kamau, was sentenced to pay a fine of Ksh.200,000/= or in default to serve one year imprisonment whereas the first appellant, Duncan Kamau Njenga, was sentenced to serve a term of three years imprisonment. These reduced sentences were imposed on 23rd April, 2004 about two months seventeen days after the appellants were originally sentenced by the subordinate court. In short, by the time their sentences were reduced on appeal, they had served prison term for two months seventeen days. They moved to this Court and filed Notice of Appeal on 4th May, 2004. On 30th August, 2004, about four months after the superior court's decision, they applied to the same superior court for admission to bail pending the second appeal,

notice of which they had filed as stated hereinabove. Lesiit, J. heard the application and granted the application filed by Grace Ng'endo Kamau. The payment of Ksh.200,000/= fine was suspended and/or stayed and the same appellant was released pending the hearing of the appeal to this Court. That was on 6th October, 2004 after the same Grace Ng'endo Kamau had served a total of exactly eight (8) months imprisonment. The application of Duncan Kamau Njenga was dismissed.

In the appeal before us, the appellants have set out ten grounds. Grounds 1, 2, 3, 7 and 8 stated as follows:

"1. That the proceedings before the learned Acting Judge did not comply with the provisions of section 359(1) of the Criminal

Procedure Code, which non-compliance vitiates the entire proceedings.

2. That the learned Acting Judge erred in failing to appreciate that the judgment of the subordinate court was a judgment in defence of the Magistrate rather than a judgment as to the guilt or innocence of the appellants.

3. That the learned Acting Judge erred in grossing (sic) over the complaint against the conduct of the Magistrate which complaint went to the very root of the proceedings and judgment.

4. ……..

5. ……..

6. ……..

7. That the appellants did not have a fair trial nor were their appeals conducted in a fair and impartial manner contrary to the

provisions of section 77 of the Constitution of Kenya.

8. That the proceedings both before the trial magistrate and the learned Judge do not amount to a "square deal" and were a

miscarriage of justice."

We have considered all the grounds of appeal preferred before us, but we do feel that the above five grounds merit detailed consideration. As we have stated, the learned Acting Judge (as he then was) heard the appeal before him as a single Judge. The record shows that he is the Judge who admitted the same appeal and directed it to be heard by a single Judge. There is no evidence that as at that time when he heard the appeal (i.e. in April 2004) he had authority to hear criminal appeals from subordinate courts as a single Judge. Further, there is no evidence that the Hon. the Chief Justice had authorized him to do so and to direct that such appeals be heard by a single Judge, neither had he authority to direct the appeal to be heard by any Judge as a single Judge. Indeed, the learned Senior State Counsel, Mr. Kaigai, who appeared before us did confirm that the learned Acting Judge had no such authority when he heard the appeal. If there was to be any doubt, the same is removed by a document issued under the Hon. the Chief Justice's hand dated 9th September, 2004 which was the authority given to the same Acting Judge to hear appeals from subordinate courts as a single Judge. That in effect means that in April 2004, when he heard the two criminal appeals No. 75 and 76 of 2004, as a single Judge, he had no authority to do so. Section 359 (1) of the Criminal Procedure Code Chapter 75 Laws of Kenya states as follows: "Appeals from subordinate courts shall be heard by two Judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one Judge of the High Court."

As we have stated, there was no evidence that the acting Judge was given the authority to hear the appeals from the subordinate court as a single Judge. There is no evidence that another Judge to whom the Chief

Justice had given authority in writing did direct the acting Judge to hear the appeals. He admitted the appeals to hearing himself and without authority directed them to be heard by a single Judge and heard them himself. In our minds, the provisions of section 359(1) cited above were not complied with. This Court, comprised of Hancox, Nyarangi, JJ.A and Platt, Ag. J.A, heard a similar complaint in the case of **ANGUKO VS. REPUBLC** (1985) KLR 755 and stated as follows: **"There is of course no special entitlement that a particular appellant on a first appeal, or one who has been convicted of a particular type of offence shall have an appellate court comprised of two judges. He is entitled to it as of right unless there is a direction under Section 359(1) of the Criminal Procedure Code. This provides that all criminal appeals shall be heard by two High Court Judges except where the Chief Justice or a judge to whom he has delegated the authority, directs that it be heard by one Judge."**

The learned Judges continued and stated further as follows: **"After careful consideration, we are prepared to assume in this case that he did, but in future it must be carefully borne in mind by judges that without a valid direction or authority of the kind we have indicated, the hearing of an appeal by one judge may well be without jurisdiction to do so."**

In the more recent case of Peter Ndung'u Kihiko vs. Republic - Criminal Appeal No. 162 of 2003, this Court allowed the appeal on similar grounds. This was in September 2004. We have no doubt in our minds that the learned Acting Judge had no jurisdiction to hear the appellants' appeals before the superior court as a single Judge and the judgment that ensued from the same hearing was a nullity. That would have been the end of this appeal, but the nature of the entire case that was before the superior court i.e. the conduct of the proceedings in the subordinate court raises certain disturbing aspects and demands that we comment on the same, particularly in consideration of the treatment given to the same by the superior court and hence our consideration of grounds 2, 3, 7 and 8 of the memorandum of appeal. The learned Magistrate, in the judgment, while proceeding to convict the appellants stated inter alia as follows: **"The court cannot fail to comment on the demeanour of the 2**

accused persons who we have received report that they continue to threaten the complainant who is their brother.

These accused persons are militant and remorseless throughout their trial and are trying to drug (sic) the Magistrate into their family squabbles. They did file a very malicious application in High Court Misc. 46/04 where they have accused her of bias, associating with complainant's wife and other unimaginable allegations to have the matter removed from Githunguri Law Courts. The allegations are malicious and baseless.

The upshot is that on 9th January 2004, the 2 accused sent one Francis Muraya a court clerk to the Trial Magistrate seeking that the Magistrate should dismiss the case. The clerk attempted to bribe the Magistrate with the amount of Ksh.10,000/= and she refused and advised the clerk to tell accused persons to reconcile with their brother who is the complainant. On Saturday 10.1.04 at 10.30 a.m. the Magistrate received a phone call from the 2nd accused introducing himself as Kamau Muraya's friend and the said Magistrate responded that she was in a noisy matatu she could not hear a thing and switched off mobile. Monday 12.1.04 I called Mrs. Kingo Executive Officer and informed her of the misconduct of Francis Muraya, court clerk who had the guts to give a mobile number to the 2nd accused. The same number had been left to Muraya around December 2002 when

Magistrate's father died in case a staff was to join funeral. The Magistrate called even prosecutor, Kiarie, and complained about the conduct of Francis Muraya and the issue of giving mobile phone upset Magistrate most. After the Magistrate refused the 10,000/= bribe the accused had lodged very grave and serious allegations against the Magistrate.

The accused knows that Magistrate has full facts that he committed the offence."

The appellants in their appeal before the superior court, attacked these sentiments maintaining that the trial Magistrate conducted the hearing in a biased manner and referred to the remarks set out above as

extraneous matters which did influence the mind of the trial Magistrate in her decision both on conviction and on sentence. The learned Judge of the superior court after considering the same did not make any specific remarks on the comments of the Magistrate made as part of the judgment but in an apparent approval of the Magistrate's attitude, stated as follows:

As regards the ground that the trial Magistrate conducted the proceedings in a particular and biased manner as to be against

the appellants, I find the same to be without merit. From my www.kenyalaw.org Duncan Kamau Njenga & another v Republic [2006] eKLR 8 perusal of the proceedings it is evident from the onset that the tactic assumed by the appellants and their counsel was to put all sought (sic) of impediments to frustrate the hearing and conclusion of the case. To further this course of action, the appellants appear to have adopted a belligerent attitude towards the trial court. …….. The court below and this

court can only give decision based on evidence on record and nothing else. I also find this ground of appeal to be without

merit and the same is dismissed."

> The part of the judgment of the subordinate court we have quoted extensively above does not in our minds support the learned Judge's assertion that the subordinate court based its decision on the evidence on record only. What the learned Magistrates referred to such as attempts to communicate with her through the cell phone to corrupt her were certainly not matters in evidence before her. They were extraneous matters. Nonetheless, they were incorporated as part of the judgment and were therefore relied on in arriving at the decision that the learned Magistrate made. The learned Judge had a duty, in looking at the evidence a fresh as he was duty bound to do (and as he readily appreciated in his judgment) to consider the same and the effect of it upon the entire case. In our view, these were serious extraneous matters that clearly vitiated the conviction entered by the subordinate court. In the well known case of Okethi Okale and Others vs. Republic (1965) EA 555 the predecessor to this Court held inter alia as follows:
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> **"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches".**

It is clear to us from the part of the subordinate court's judgment we have quoted above, that the learned Magistrate was completely unhappy with the appellants and that situation prevented her from looking at the entire case pragmatically. Her annoyance with the appellants clearly made it difficult for her to do justice to the entire case. She, for example, stated in that part that after she refused the 10,000/= bribe the accused lodged very grave and serious allegations against her and added: "The accused knows that Magistrate has full facts that he committed the offence." If that was the position before judgment was written, then the best the learned Magistrate ought to have done to ensure justice and fair trial would have been to disqualify herself from proceeding any further with the case. We feel the trial before the subordinate court was a mistrial. Unfortunately, the learned Judge of the superior court did not direct his mind to the same and also proceeded as we have stated above to hear an appeal when he had no jurisdiction to do so, with the result that judgment on appeal was also a nullity. The result is that the appeal is allowed, the conviction recorded against the appellants must be and is hereby quashed and the sentences set aside. The next issue to consider is whether a retrial should be ordered in this matter. Mr. Kaigai did not support conviction on the grounds we have stated above and, in our view, he was plainly right. He also did not press for retrial on account of prison terms already served by both appellants. We were told from the bar that the first appellant was to complete his prison sentence on 6th February, 2006 and the second appellant had served 8 months of the defaulting sentence which was one year. In the case of Ahmed Sumar vs. Republic (1964) EA 481 and particularly 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, paragraph H and stated: **"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."**

> Further, in the case of Bernard Lolimo Ekimat vs. Republic – Criminal appeal No. 151 of 2004, this Court, accepting the above principle, stated:
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> **"There are many decisions on the question of what appropriate case would attract an order of retrial but in the main, the principle that has been acceptable to court 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 present case, can one say that the interests of justice require a retrial? In our view, the answer is clearly No. The offence that both appellants faced was grievous harm. The sentence awarded by the subordinate court was manifestly excessive but that was reduced by the superior court. The first appellant has completed the sentence imposed by the superior court while the second appellant has not paid the fine imposed but has served a substantial part of the defaulting sentence i.e. eight months out of the twelve months imposed. Under these circumstances, we feel the learned Senior State Counsel was right in not pressing for retrial. This is not a suitable case for an order of retrial. In the result, we order that both appellants be and are hereby set at liberty unless they are otherwise lawfully held. Judgment accordingly.

Dated and delivered at Nairobi this 10th day of February, 2006.

P. N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

..……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR