REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 114 OF 2005

REMICUS LIGAVO MUHARIA ……..…….....…… APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Kariuki, J) dated 10th December, 2004

in

H.C. Cr. Appeal No. 42 of 2002)

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JUDGMENT OF THE COURT

REMICUS LIGAVO MUHARIA, the appellant, was tried before the Principal Magistrate, Kakamega (Ms Thuita), on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that on the 5th day of October, 2000 at Savane village, Savane Sub-location, Iguhu Location in Kakamega District within Western Province jointly with others not before court the appellant robbed Aggrey Livoko Musindi, the complainant, of cash Kshs. 500/= and a pair of shoes valued at Kshs. 1,400/= and at or immediately before or immediately after the time of such robbery wounded the said Aggrey Livoko Musindi.

The trial magistrate in her judgment found that the motive of the attack by the appellant was not robbery. However, she made a finding that the appellant and other persons not before the court did attack and cause serious bodily injuries to the complainant. Consequently, she found the appellant guilty of and convicted him on a reduced charge of causing grievous harm contrary to **section 234** of the Penal Code. She then sentenced him to 3 years imprisonment. We note from the record that although the trial magistrate did not clearly spell it out, **section 179(2) of the Criminal Procedure Code, Cap 75** of the Laws of Kenya allows a trial court to convict an accused person of a minor offence where the facts proved sustain a conviction on a reduced minor offence although the accused was not charged with it in the first place.

The appellant being aggrieved by the decision of the trial magistrate preferred an appeal to the High Court of Kenya at Kakamega (Kariuki, J) who after re-evaluating the evidence held:-

“The conclusion by the trial magistrate that the evidence did not disclose that the motive of the attack

could have been robbery was not supported by evidence. It was a misdirection that led the trial magistrate to reduce the charge from one of robbery with violence under section 296(2) of the Penal Code to one of grievous harm contrary to section 234 of the Penal Code. The ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code with which the appellant had been charged had been proved."

The learned Judge then set aside the appellant's conviction on the minor offence of grievous harm and substituted it with a conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced the appellant to death.

Before us the appellant's counsel, Mr. Ragot, submitted, in the main, that the first appellate court had failed to observe the mandatory provisions of **section 359(1)** of the Criminal Procedure Code (the "Code") in that the hearing of the first appeal by one judge was without jurisdiction to do so.

Mr. Ragot also submitted that the learned Judge erred in enhancing the conviction of the appellant from the lesser offence of causing grievous harm contrary to **section 234** of the Penal Code in the absence of sufficient evidence to sustain the offence of robbery with violence.

The response of Mr. Musau, the learned Senior Principal State Counsel, was brief. He conceded the appeal and did not support the enhancement of both the conviction and sentence on the ground that the learned Judge had breached the provisions of **sections 354 and 359** of the Code.

As this Court held in **Anguko v. Republic** [**1985] KLR 755**, an appellant on a first appeal is entitled, as of right, to have the appellate court composed of two judges unless the Chief Justice or a judge having the Chief Justice's written authority directs that his appeal shall be heard by one judge under **section 359(1)** of the Code. However, the entitlement to a two-judge bench does not depend on the particular appellant or on the offence for which the appellant has been convicted.

We have been unable to ascertain from the record that the Chief Justice had delegated his powers under **section 359(1)** of the Code to the first appellate judge; and in the circumstances, the judge may well have had no power to direct that the appeal be heard by one judge. We cannot assume that in this case he had such authority. We would agree with the holding in **Anguko's** case **(supra)** that without a valid direction or written authority under **section 359(1)** of the Code, the hearing of an appeal by one judge may well be without jurisdiction to do so.

We would think, therefore, that it was doubtful whether the first appellate judge had jurisdiction to enhance the conviction of the appellant from the lesser offence to one of robbery with violence contrary to **section 296(2)** of the Penal Code.

In the result, this appeal is allowed, the conviction under **section 296(2)** of the Penal Code is quashed and the sentence of death set aside.

Mr. Ragot did not challenge the conviction and the sentence passed by the trial magistrate. However, we think that there is sufficient evidence to sustain the conviction on a charge of grievous harm. The synopsis of the evidence shows that the complainant was on his way to Ikuyo at about 7.30 a.m. when the appellant, whom he knew very well as his cousin, together with others who were tried on a charge of robbery with violence and who are appellants in Criminal Appeal No. 242 of 2005, attacked the complainant and savagely cut him with a panga inflicting serious injuries all over the body and severing the wrist.

The complainant in the attack in Criminal Appeal No. 242 of 2005 is the same complainant as in this appeal. The incident involved also in this appeal is the same incident as in Criminal Appeal No. 242 of 2005. The appellants in that appeal have had their convictions reduced by this Court to the one of grievous harm contrary to **section 234** of the Penal Code and sentenced to seven (7) years imprisonment.

We think that the sentence of three years imposed by the trial magistrate upon the appellant herein was

manifestly too low in view of the grave injuries inflicted upon the complainant. We shall interfere with it and we do so in the interest of justice. Accordingly, acting under **section 361(4)** of the Code, we enhance the sentence to **seven (7)** years imprisonment to run from the date of the conviction by the trial magistrate. These shall be our orders.

Dated and delivered at Kisumu this 31st day of March, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR