



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
CRIMINAL APPEAL NO 67 OF 2005

PATRICK NGESA OGAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (L. Kimaru & D.K. Musinga JJ.) dated 18th May 2004

in

H.C.CR.A. NO.36 OF 2001)

JUDGMENT OF THE COURT

In this second appeal by Patrick Ngesa Ogama against his conviction and sentence for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, four main issues of law have been raised. Firstly, that the appellant's conviction was improperly based on the doctrine of recent possession as on the facts and circumstances of this case it did not arise. Secondly, that the trial court record is silent on whether or not the court prosecutor was present at the time of plea. Consequently, the proceedings for that day were fatally defective and thus rendered the entire trial invalid. Thirdly, on the day the court rendered its ruling that the appellant had a case to answer, neither the date of the ruling nor the coram is shown, and that omission invalidates the entire trial of the appellant. Lastly, that at the close of the prosecution case, the trial magistrate did not comply with the provisions of **section 211** of the Criminal Procedure Code, and that omission too invalidated the entire trial within a trial.

There is no doubt that the plea to the charge by the appellant was properly recorded. The appellant, who was charged jointly with another person whose appeal is not before us, pleaded not guilty to the charge and subsequently went through the full motions of a trial. True, on the date of plea, there is no

indication as to whether or not there was a competent prosecutor present. However, the appellant having not pleaded guilty we are unable to discern the prejudice that he might have suffered by that omission.

Likewise, the failure to indicate the coram on the day the court ruled that a prima facie case had been disclosed against the appellant, in no way caused the appellant any prejudice. His counsel, Mr. Cheche, submitted before us that that omission was fatal because it is not possible to say whether or not the court was manned by a competent officer and whether the court prosecutor was present in order that it could be said that the ruling was a ruling of the court and that the court was properly constituted. We looked at the original record of the trial court, and we noticed that the ruling is signed by the same magistrate who had conduct of the case, or at least the signature resembles that of the magistrate who was seised of the case. That being the case we are of the view that learned counsel is making heavy weather on an issue which in nowise prejudices his client. Besides the appellant is shown to have, thereafter, proceeded to make a statutory statement in his defence without much ado. It is errors of this nature which in our view, **section 382** of the Criminal Procedure Code is intended to cure being merely of a minor nature and which do not fundamentally affect the proceedings. That section provides that:

“382. Subject to the Provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

It is quite clear that the appellant did not raise these issues before the superior court on first appeal. His only complaint regarding the ruling is that the trial magistrate erred in ruling that a prima facie case had been made out. If indeed the court was improperly constituted, the issue could have but was not raised then. Clearly no discernible prejudice was caused to the appellant.

As regards the alleged failure by the trial magistrate to comply with the provisions of **section 211** of the Criminal Procedure Code during the trial within a trial, the Criminal Procedure Code (CPC) has no provision with regard to trials within a trial. Trials within a trial are held on the basis of the Judges Rules, which are rules of practice which are intended to guide police officers where an issue of the voluntariness of an extra judicial statement by an accused to the police arises during his trial. In holding a trial within a trial the court is conducting inquisitorial proceedings to determine whether the accused voluntarily made the statement in issue. So when an accused person is called upon to make a statement in regard to the admissibility of that statement he is not putting forward a defence. That is because in that trial there is no accused person. The proceedings are confined to the circumstances under which the statement was made with reference to the ground or grounds the appellant has proffered for objecting to its admissibility. The Court of Appeal for East Africa stated in **Dafasi Magayi and Others v. Uganda** [1965] EA 667, relying on the case of **Kinyori Karuditu v. R** [1956] 23 E.A.C.A 480, that trial within a trial, is a rule of practice. And adopting a dictum by Lord Devlin in **Connelly v. D.P.P** [1964] 2 ALL ER 401 at 446, that court held that it is a practice which must be followed until it is declared to be obsolete.

In our view, the basis upon which trial within a trial is held is the objection which an accused raises as to the admissibility of an extra judicial statement. In such trial therefore, if an accused person elects to say nothing the court might not have a basis for exercising its discretion on the admissibility of the statement unless of course the circumstances are such that it would be clear even without him saying anything that the statement was not voluntary which is highly unlikely.

In the circumstances therefore, in trials within a trial while it is trite law that as a general rule the prosecution have the duty of showing that the statement was voluntarily obtained, an accused person has the duty of presenting to the court reasons and circumstances for objecting to the admissibility of the extra judicial statement. He cannot appropriately do so unless he makes a statement in that regard. In such

proceedings the court exercises judicial discretion and like all judicial discretion such discretion must be exercised on the basis of facts and law. So an accused cannot elect to keep quiet in a trial within a trial, because if he keeps quiet what the Court will be left with is what the prosecution has presented and such a trial would not then serve any useful purpose.

Appropriately the proceedings being inquisitorial in nature the accused's statement ought to be made on oath but because there is the danger that in the course of his cross-examination he might be led to incriminate himself on the charge or charges against him, it is undesirable, unless the accused himself elects to make a sworn statement, to mandatorily require the accused to make the statement on oath in such proceedings. It is our judgement, therefore, that in trials within a trial, an accused who raises objection to the admissibility of an extra judicial statement, and wishes the court to exclude such a statement, is obliged to make a statement, either on oath or not on oath as to the basis for his objection. That being our view of the matter, it is our judgment that **section 211** CPC has no application in proceedings in a trial within a trial.

The remaining legal point raised in this appeal is whether the doctrine of recent possession was properly invoked in this case. To answer this question, a resume of the background facts is essential.

On the night of 31st July and 1st August, 1998, the premises of Full Gospel Church, Ronda estate, in Nakuru district of the Rift Valley Province, were broken into by a gang of people who were armed with simis, swords, and iron bars. A watchman Julius Obuti Okinda, who was in a neighbouring building belonging to the same church was attacked and set on fire. He died from the burns he sustained. Several items were stolen, namely, two horn speakers, keyboard, amplifier, wall clock, 200 spoons, four kettles, five microphones, electrical cables, two water buckets, 200 plates and 300 cups; all valued at Kshs.160,000/=. On 13th August 1998, the appellant was found in possession of three microphones and wall clock, which were positively identified by an official of Full Gospel Church, as part of the properties which were stolen from the church on the night of 31st July, 1st August, 1998. The appellant explained that the items had been left there by two people, Kisa and Otieno. Kisa was the appellant's co-accused, but in his defence he denied having left those items with the appellant.

While in police custody the appellant allegedly recorded a statement under inquiry in which he made a clean breast of the robbery. During his trial, however, he denied he made the statement and alleged that the police who allegedly took the statement from him forced him to sign a statement which had been pre-recorded. In a trial within a trial the trial magistrate ruled that he was satisfied that the statement was voluntarily given and admitted it in evidence.

In his defence the appellant said nothing about the recovery of some of the stolen items from his house. All he did was to deny the offence and gave a short account as to how he was arrested.

Counsel for the appellant asked what period of time may be regarded as recent. In his view 13 days cannot be referred to as recent. In our view what period may be regarded as recent depends on the circumstances of each. In one case 13 days may be too long as to be regarded as recent, and yet in another it might be regarded as recent.

In the Ugandan case of **Zus v. Uganda** [1967] EA 420 Sir Udo Udoma CJ, held, relying on the English case of **R. v. Partridge** [1836] 7 C & P. 551 or 173 ER 243, that the question of what is or what is not recent possession of stolen property must be considered with reference to the nature of the articles stolen. In that case the theft complained of related to a bicycle which was found in possession of the appellant 7 months after its theft. It was held on appeal that seven months lapse of time cannot be said to be recent.

In **Jethwa v. R.** [1969] EA 459, the Court of Appeal for East Africa, held obiter, that the doctrine of recent possession which is a presumption of fact, only arises when the court sitting as a jury believes that a person in possession of the goods knew or had reason to believe them to have been stolen or otherwise feloniously obtained. It is a presumption of fact which arises under **section 119** of **The Evidence Act; Cap 80 Laws of Kenya**.

In our case what items were found in the possession of the appellant? Police constable James Mwangi (PW5) testified that he was among the police officers who arrested the appellant, searched his house and recovered three microphones and a wall clock. A clock is a common item, but not the microphones. Such an item is not in common circulation. It does not change hands quickly because not many people or institutions use it. For such an item 13 days cannot be said to be too long as to exclude the application of the doctrine of recent possession.

Besides, the appellant having made a clean breast of his participation in the robbery in his inquiry statement, we are left with no doubt that he participated in the robbery complained of. The voluntariness of that statement is a matter of fact and there are the concurrent findings of the two courts below that the said statement was voluntarily given. As we find no basis for interfering with the findings in that regard, the only conclusion we are left with is that the appellant participated in the robbery complained of and his conviction for its commission was proper.

In the result we dismiss the appellant's appeal in its entirety. Order accordingly.

Dated and delivered at Nakuru this 29th day of September, 2006

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR