REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU
CRIMINAL APPEAL 201 OF 2005

1. **JOSEPH VICTOR ACHOKA**
2. **GODFREY OJIAMBO ANDOLO**
3. **GEORGE MARK OUMA ……..…… APPELLANTS**

AND

REPUBLIC …… RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kakamega (Sergon & Kariuki, JJ.) dated 28th April, 2005

in

H.C.CR.A. NOS. 274 – 276 OF 2002)

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JUDGMENT OF THE COURT

From the "***petitions of appeal"*** filed by the three appellants in person, and from the elaborate supplementary memorandum of appeal filed by the advocate who now appears for them before us, Mr. Menezes, this appeal promised to raise some weighty issues of law at the hearing. But it was an anticlimax. It turned out, and learned Senior Principal State Counsel Mr. Musau conceded it, that a crucial part of the trial was conducted by a prosecutor who was not qualified to do so, thus vitiating the whole trial. The only issue was therefore whether there ought to be a retrial of the appellants.

The appeal arose from the conviction and sentence of the three appellants, who with four others, were convicted of a series of robberies with violence which occurred between 22nd and 23rd March, 1998 in Busia District, Western Province. It was alleged that the gang of seven robbers, while armed with dangerous or offensive weapons, namely, pangas, rungus and axes, robbed four different complainants of their personal property and money and used personal violence against them immediately before, during and immediately after the robberies. Although the trial of the appellants before Busia Senior Resident Magistrate's court and the ensuing appeals in the superior court may not have been a "***travesty"*** as Mr. Manezes bluntly dubbed it, there was indeed a comedy of errors committed in those courts which tainted the whole trial and the criminal justice system. Sample this:

The charge sheet was amended three times after the commencement of the trial on 14th April, 1998 before Mrs. W. A. Juma, (SRM). On the first two amendments, the amended charges were put to the accused persons for plea on all five counts. On the third occasion however, no plea was taken from any of the seven accused persons on the first three counts, but the record shows that there was a plea taken on count 4 and an alternative count relating to one accused. The record also shows that the trial magistrate recorded that there was a "***plea of not guilty in all counts"*** but that, in our view, did not cure the lackadaisical manner the pleas were taken. To compound the matter, the error was noticed by a different trial magistrate, W. M. Muiruri, Esq. (SPM) who took over the hearing of the case upon the transfer of Mrs. Juma at the stage where the defences of the accused persons were being heard in July, 1999. The succeeding magistrate said nothing about ***section 200*** of the Criminal Procedure Code and proceeded to take fresh pleas from all the accused persons before making an order for delivery of judgment on 15th June, 2000.

Section 200 of the Criminal Procedure Code as far as is relevant to this appeal, provides as follows:

"***200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –***

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) ……

(3) 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".

The succeeding magistrate, Mr. Muiruri, proceeded to analyse the evidence on record and convicted the three appellants before us on two counts, but acquitted three of the accused on all counts. He noted that the first accused person had died during the course of the trial. That judgment was made on 24th August, 2000.

When the matter went on appeal against the judgment, the superior court (Tanui & Waweru JJ) set it aside on the basis that the first trial magistrate had not ceased to exercise jurisdiction in the case. They ordered that a fresh judgment be written by Mrs. Juma. That was on 16th August, 2002.

The matter then went before Mrs. Juma who wrote another judgment on 11th December, 2002 convicting the three appellants on all counts together with two others who had been acquitted in the first judgment and the first accused who had died in the course of the trial! The judgment was delivered by A. O. Muchelule, Esq. (C.M.) on 17th December, 2002 and he proceeded to sentence all of them to death on all counts. Needless to say, it was erroneous to sentence a person to be hanged four times over! It is not clear what became of the persons who had been acquitted in the first judgment but were convicted subsequent to their release from prison custody.

The three appellants then appealed again before the superior court (Sergon & Kariuki JJ) but their appeals were dismissed on 28th April, 2005. Surprisingly, the superior court was of the view that it was dealing with the judgment of Muchelule, (C.M.) who, they stated had "*reviewed the evidence and rightly found as proved the fact that the robberies in the four counts had been proved"*. As stated earlier, Mr. Muchelule only delivered the written judgment and imposed sentences. Nothing was said by the superior court about the sentences or the other persons who had been convicted by Mrs. Juma. The hearing of the appeal was also adjourned midstream after discovery that the record of evidence from two witnesses was

not in the record of appeal. There was no note at the resumed hearing however, to indicate whether the evidence had been located and included in the record.

All the above unfortunate chronicle of events took place over a period of seven years from the arrest of the appellants in April, 1998 to the judgment of the superior court in April, 2005. Needless to say, it is the undesirable side of our criminal justice system and we must deprecate it as strongly as we can since it impinges on the constitutional rights of accused persons to a speedy and fair trial. Having made those observations, we must now revert to the reasons for our decision in the appeal before us.

As stated earlier, the trial was conducted before Mrs. Juma, SRM) who heard some 12 prosecution witnesses whose evidence was led by ***Inspector of Police Ndeto*** (IP Ndeto) between June 1998 and April 1999 when the prosecution case was closed. A date was then set for a ruling as to whether the accused persons had a case to answer. On the day of the ruling, the prosecution was taken over by ***Corporal Mwangala*** (Cpl. Mwangala) who took the ruling on behalf of the Republic that all the 7 accused persons had a case to answer. They all proceeded to present their evidence but three of them reserved further evidence pending production of the Occurance Book (O.B.) containing the first report of the alleged crimes to the police. The O.B. was never produced.

It is clear to us that a substantial part of the defence case was conducted by an unauthorized person in the name of Cpl. Mwangala, contrary to ***section 85*** of the Criminal Procedure Code. As this is a matter conceded by the State, we need not belabour it. The whole trial was therefore vitiated and must be declared a nullity on the authority of ***Elirema & Another vs. R*** [2003] KLR 537.

Should we order a retrial?

As was stated by the this Court in ***Muiruri vs. R*** [2003] KLR 552, generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. The Court further stated:

"***It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zedekiah Ojuondo Manyala v Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's".***

Mr. Menezes strongly opposed an order for retrial because the appellants have been incarcerated for more than 8½ years which was a substantial part of their lives for no fault of their own. The proceedings were being nullified at this late stage due to the prosecution's fault in appointing an unqualified person to prosecute. A retrial, which may take another lengthy period, was therefore not in the best interests of either the appellants or the State. For his part, Mr. Musau did not press for a retrial for the main reason that it would be difficult, if not impossible, to trace the prosecution witnesses.

We have considered the entire circumstances of this case and we do, with respect, agree with both counsel that a retrial is not desirable in the matter. The grave irregularities in the original trial as we have seen encroached on the appellants' constitutional rights. They were arrested in March, 1998 and have now spent more than eight years in incarceration. Even if the prosecution witnesses were available, and we have it from the State itself that they are not, one cannot speculate on their physical or mental state. There may well not be a meaningful trial. For those reasons, we are not inclined to order a retrial.

The upshot is that the appeal is allowed and the conviction of each of the appellants is hereby quashed. The sentences of death imposed on all of the appellants are set aside and the appellants are set at liberty unless they are otherwise lawfully held.

Dated and delivered at Kisumu this 1st day of December, 2006.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR