IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Omolo, Tunoi & Lakha JJ A)

CRIMINAL APPEAL NO 67 OF 2002

ROY RICHARD ELIREMA

VINCENT JOSEPH KESSY ……..APPELLANTS

VERSUS

REPUBLIC…….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa,

Mr Justice Waki & Commissioner Tuthi dated 6th November 2001 in

High Court Crimnal Appeal No 271&273 of 2000)

JUDGMENT

Roy Richard Elirema, the 1st appellant, and Vincent Joseph Kessy, the 2nd appellant were tried and convicted on four counts of robbery with violence contrary to section 296(2) of the Penal Code by a senior resident magistrate at Voi and upon their conviction each of them was sentenced to suffer death in the manner authorized by the law. They then appealed against their conviction and sentence to the High Court at Mombasa but by its judgment dated and delivered on 6th November, 2001, the High Court (Waki J as he then was and Mrs Tutui, Commissioner of Assize) their appeals were rejected. The appellants now appeal to this Court for the second time.

When their appeals opened before us, their counsel Mr Bryant, simply confined himself to two basic grounds which really do not go into the merits or demerits of the evidence which was produced by the prosecution against the appellants. Those grounds, contained in what was' designated as "Second Supplementary Ground of Appeal" were as follows:-

"1. That the entire trial was a mistrial because the learned trial magistrate erred in law and misdirected herself in permitting the conduct of the prosecution of the case against the appellants to be conducted by corporal Kamotho, an unauthorized person contrary to section 85(2) of the Criminal Procedure Code. A grave failure of justice arose because the second appellant's alibi was not examined at all by the incompetent prosecutor and further due to the incompetent prosecutor, the question of the jurisdiction of the Court was not examined at all. Further, the incompetent prosecutor, failed to understand the law relating to negotiable instruments and in specific, travelers cheques. Also, the incompetent prosecutor failed, to appreciate section 70 of the Evidence Act. The learned Judges of the High Court erred in law in

failing to consider prosecutorial competence and the ensuing mistrial.

2. That the entire trial was a mistrial and incompetent and void *ab initio* as against the Penal Code because the learned trial magistrate erred in law and in fact in granting herself jurisdiction to hear this case contrary to section 5 of the Penal Code whereas the facts revealed that the Kenya courts had no jurisdiction in that the appellants were Tanzanian nationals charged with committing a crime outside of the boundaries of the Republic of Kenya against persons not shown to be Kenyan citizens traveling in a Somali vehicle outside of Kenya. The learned judges of the High Court erred in law in failing to consider jurisdiction and the ensuing mistrial."

These grounds are unnecessarily prolific and perilously come close to being argumentative in violation of rule 63(2) of the Court's Rules which provide that:-

"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided."

It is also right to point out that the complaints now raised before us in the two grounds were not raised either before the trial magistrate or before the learned judges of the High Court who heard and determined the appellants' first appeals.

Despite these shortcomings the points raised are clearly points of law and we cannot avoid dealing with them. If, for example, the magistrate had no jurisdiction to hear and determine the charges, we cannot refuse to deal with the matter because it was not raised either before the magistrate or before the High Court; each court is presumed to know its jurisdiction and it cannot be a valid answer for us to tell the appellants that they ought to have raised these issues before the two Courts below. Of necessity, we have to deal with the points of law raised for the first time before us.

As far as we were able to gather from Mr Bryant the complaint raised in ground one was that the prosecutor before the magistrate was not, in law, qualified to conduct the prosecution and because of that, there was a mistrial. We must start by pointing out that a trial is never conducted by a prosecutor but by the Court itself. The function of a prosecutor is to lead witnesses in presenting their evidence to the Court. When we say the prosecutor leads witnesses in presenting their evidence to a court, we do not mean to say that he is to coach them or train them in what to tell the Court. His role is merely to ask witnesses questions which are relevant to the matter under investigation by the Court and, to a large extent, to determine the order in which the witnesses are to appear before the Court.

But the law sets out who is qualified to be a public prosecutor, as opposed to a private prosecutor. A private prosecutor is simply any person prosecuting with permission of the Court granted under section 88(1) of the Criminal Procedure Code, "the Code" hereinafter. Public prosecutors, however, must meet the requirements set out in section 85 of the Code.

The full provisions of that section are as follows:-

"85(1). The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) 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 inspector of police, to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney General."

Then section 86 of the Code provides:

"A public prosecutor may appear and plead without any written authority before any count in which any case of which he has charge is under committal proceedings, trial or appeal; and if a private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution, and the advocate so instructed shall act therein under his direction."

The provisions of section 85(2) of the Code are that to be appointed a public prosecutor, one must be either an advocate of the High Court or a person employed in the public service. In the case of a person employed in the public service, that person ought to be a police officer not below the rank of an assistant inspector of police. We have looked at the Police Act, chapter 84 of the Laws of Kenya and section 3(2) of that Act states that:-

"The Force shall consist of the ranks set forth in the First Schedule and police officers shall have seniority according to their position in the schedule."

The First Schedule at Part II is headed "Inspectorate" and the ranks shown there are chief inspector, inspector and acting inspector. Part III is headed

"Subordinate Officers" and the ranks found there are senior sergeant, sergeant, corporal and constable. We presume that a subordinate officer cannot be equated to an assistant inspector.

The trial of the appellants was to open before EN Maina M/S, acting senior resident magistrate, on 19th May, 1995. The prosecutor on that day is shown as one corporal Kamotho. The matter was adjourned to the following day and when the hearing resumed at 2.15 pm, corporal Kamotho was the prosecutor. A total of five witnesses gave evidence that day and the matter was then adjourned and the hearing eventually resumed on 9th June, 1999 when the prosecutor is shown as one inspector Wambua, and another five witnesses testified after which the prosecution closed its case.

The matter was then adjourned to 14th June, 1999 for submissions. On that day, inspector Wambua was present but it was again adjourned to 22nd June, 1999. On 22nd June, 1999 corporal Kamotho was once again the prosecutor. The then advocate for the appellants, Mr Kyondo, made his submissions and corporal Kamotho replied on behalf of the Republic.

The magistrate then reserved her ruling to 30th July, 1999 when she ruled that the appellants had a case to answer.

The matter was once again adjourned, and for one reason or the other the hearing did not resume again until 23rd February, 2000 when corporal Gitau took over the prosecution. The 2nd appellant started to give his evidence and when he attempted to produce a copy of some document, corporal Gitau opposed the attempt and the magistrate once again adjourned the hearing to 1st March, 2000 in order to enable her "look up the law" and make her ruling. On that date, corporal Gitau was once again the prosecutor; the magistrate delivered her ruling, and she upheld corporal Gitau's objection. The hearing was once again adjourned and when it eventually resumed on 8th May, 2000, the 2nd appellant continued his testimony at the end of which corporal Gitau cross-examined him. Then the 1st appellant who was the second accused before the magistrate next testified and was cross-examined by corporal Gitau. No submissions were thereafter made and the magistrate reserved her judgment which she eventually delivered on 12th July, 2000 in the presence of inspector Wambua. As we have said, the magistrate convicted the appellants on all the four counts of robbery with violence and sentenced them to death.

This narrative shows that a large portion of the prosecution was conducted either by corporal Kamotho or by corporal Gitau. It is, however, true that an inspector Wambua also conducted part of the prosecution. But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid [i.e the part conducted by inspector Wambua] while at the same time holding that the other parts [ie the parts conducted by corporals Kamotho and Gitau] are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.

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 rank 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. What follows from this?

As we have said, Mr Bryant submitted on behalf of the appellants that their trial was incurably defective because they were "prosecuted" by persons who had no legal authority to do so. We must confess that we have not found this an easy question to deal with and we have not found any authority directly torching on the point. Part VI of the Code is headed

"Procedure in Trials Before Subordinate Courts" and the sub-heading is "Provisions Relating to the Hearing and Determination of Cases". There is no direct mention of a prosecutor, whether public or private. The parties named in section 202, for example, are the complainant and the accused person. If the "complainant" is aware of the hearing date and is absent without explanation, the Court may acquit an accused person, unless the Court sees some other good reason for adjourning the hearing. The

"complainant" in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic – see, for example, the majority judgment of the Court of Appeal for East Africa in *Uganda v Milenge and Another*, [1970] EA 269. In that case, the Court dealt with the role of a public prosecutor as follows:-

"It is essential to consider the powers of a public prosecutor such as the State Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence, and it is from this power that the practice has arisen for a prosecutor who does not desire to proceed with the prosecution against an accused person to offer during the course of the trial

'no evidence' or 'no further evidence'. This results in the evidence for the prosecution 'being closed' and the court then acts under section 209 {section 210 of the Kenyan Code} and if a case has not been made out sufficiently to call an accused person to make his defence then the Court dismisses the case and acquits the accused. ……"

- See pg 273 Letter I to Pg 274 Letters A to B of the Report. It is clear from this passage that in a criminal prosecution, there must be a prosecutor to discharge certain functions, which functions cannot be discharged by the Court before whom the prosecution is being conducted. That proposition is inherent in the fact that in Kenya the administration of justice is operated on the "adversarial system" in which it is assumed that each party or side to the dispute knows best what its case is and can and must be expected or assumed to know best how to present its side of the case to the court. That must be why section 77 (1) of the Constitution stipulates that:

"If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

If the court is to be "impartial" it cannot at the same time perform the role of either the prosecutor or a defence counsel so that the role of prosecuting can only be performed by a prosecutor, whether public or private. A private prosecutor has to get the permission of the Court. Corporals Kamotho and Gitau could not get and did not infact get permission of the magistrate to prosecute. As we have said, they were

obviously purporting to act as public prosecutors. In law, they could not so act because they were not qualified to be appointed as public prosecutors. We were not told that the

Attorney General had appointed them as public prosecutors but even if the Attorney General had purported to do so, such appointment would not be legally admissible or tenable so that for all practical purposes, the two officers were not entitled to act as public prosecutors.

What should follow this analysis?

In the Ugandan case of *Gamalieri Mubito v R* [1961] EA 244, a game warden who had been appointed a public prosecutor for the purposes of the then Game (Preservation Control) Ordinance of Uganda, had investigated the charge on which the accused was being tried, was also the prosecutor at the trial and gave evidence as well during the trial. The question was whether these various roles played by the warden had occasioned a failure of justice to the accused. The Court of Appeal for

Eastern Africa described what had occurred during the trial as grave irregularities but went on to hold that the said irregularities had not occasioned any injustice to the accused and maintained the conviction.

We, however, note that the game warden was an authorized prosecutor or had the permission of the Court to prosecute, which corporals Kamotho and Gitau were not. In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the

Constitution and the Code, there must a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial

Court, for if it does so there would be a serious risk of the Court losing its impartiality and that would violate the provisions of section 77(1) of theConstitution. For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a person a police officer not below the rank of an assistant inspector of police. We suspect the rank of assistant inspector must have been replaced by that of an acting inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.

Should we order a retrial as we were asked by Mr Gumo to do? We note that the alleged offences took place in January, 1999. That is a period of over four years. The main witnesses, ie The victims of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya. The mistakes which have led to our quashing the convictions were entirely of the prosecution's making. There is still the issue of whether the offences were committed within Kenya or within Tanzania and hence whether the Kenyan Courts had jurisdiction at all to try the appellants.

We do not think it is necessary or expedient for us to decide that issue but in considering the question of whether or not we should order a retrial, we are entitled to take that factor into account. Taking all these matters into consideration, we do not think that it would be just to the appellants to subject them to a fresh trial. Accordingly we refuse to order a retrial with the consequence that he appellants are to be released from prison

Dated and delivered at Mombasa this 5th day of August, 2003

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR