REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 81 of 1999

1. **JOHN ANDREA RIZIKI**
2. **PAUL NJUGUNA NG'ANG'A**
3. **JULIUS PAUL KANGETHE**
4. **PETER MWANGI NG'ANG'A**
5. **STEPHEN NJOROGE MUCHERU**
6. **KAMAU MWANGI GERALD**
7. **JAMES ERERE NJINE**
8. **FREDRICH MARITHI NJERU**
9. **PATRICK CHEGE GITHUMA**
10. **DAVID GIKUMA WAWERU**
11. **DANIEL KAMAU KIMANI**
12. **AMOS NJOROGE**
13. **DAVID MUYA KARIUKI**
14. **JOSPHAT MUCHORI WAWERU**
15. **WILSON MWANGI KIGUME**
16. **PETER MWANGI KAHUTA**
17. **JAMES KABIRO MUCHORI.....APPELLANTS**

AND

REPUBLIC.....RESPONDENT

(Appeal from an Order of the High Court of Kenya at Nairobi (Mr. Justice V.V. Patel) dated 4th

August, 1999

in

CRIMINAL REVISION NO. 9 OF 1999)

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JUDGMENT OF THE COURT

This is an appeal against an order for Revision made by the superior court (V.V. Patel, J) on 4th August, 1999 by which he, suo moto, set aside the proceedings which followed the entry of plea of guilty by all the seventeen appellants here.

The order for Revision was made in respect of the 'conviction' and sentence entered by Mr. A. El-Kindy, a Senior Resident Magistrate at Kibera. The history of the matter is that the seventeen appellants were charged before the said court at Kibera on two counts particulars whereof are as follows:

Count 1:On the 31st day of December, 1998 the seventeen accused persons, along Duruma Road, in Nairobi, within Nairobi area, jointly with others not before the court broke and entered to (sic) KEBERE SHOW MAKERS SHOP and stole therein five doors, 3 tables, a chair, a National T.V., two radio cassettes, one video tape, three suit cases, 5 sufuria, 30 spoons, one form bench and assorted clothes all valued K.shs.332,000/= the property of Mr. Antony Mwangi Njoroge.

Count 2:On the 31st day of December, 1998 the seventeen accused persons along Duruma Road in Nairobi within Nairobi area, jointly with others not before court broke and entered AMMOKAH ELECTRONIC SALES and stole from therein cash Kshs.50,000/= and assorted electrical goods all valued Kshs.1,520, 85O/= the property of MR. AMOS KIBUCHA KANAI.

The appellants appeared before the Magistrate on 4th January, 1999 and pleaded not guilty to both the counts. They were released on bond of Kshs.50,000/= each with one surety of like amount and the hearing was fixed for 1st March, 1999.

On 1st March, 1999 all the appellants appeared before Mr. El-Kindy and after an order for adjournment of the hearing of the case to 8th April, 1999 sought to change their plea, from not guilty to guilty. The learned Magistrate then entered a plea of guilty for all of them and recorded the facts relating to the offences in question as nerrated by the prosecution. The appellants accepted such facts as correct. The learned Magistrate thereafter did not record a conviction as mandated by section 207(2) of the Criminal Procedure Code (the Code) which reads:-

"(2)If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon him or make an order against him, unless there appears to it sufficient cause to the contrary."

Instead of first recording a conviction the magistrate listened to the appellants' plea in mitigation which plea by each one of them monotonously reads "I ask for leniency."

The learned magistrate then ruled:

"Mitigation is considered. Each is given a conditional discharge under Section 35(1) P.C. Right of appeal explained."

What the learned Magisirate did can be clearly faulted in two ways. One, he did not record a conviction. Two, under section 35(1) of the Penal Code conditional discharge ought to set out the condition imposed.

The file of the magistrate was brought to the attention of Patel, J. who was then in charge of criminal appeals in the High Court. Upon reading the file, he ordered the Revision and ordered a re-trial of all the appellants.

It is against that order of re-trial that this appeal is primarily all about. Dr. Khaminwa argued, forcefully, that an order of re-trial is an order to the prejudice of the appellants especially when they were given a conditional discharge by the Magistrate. Mr. Okumu who appeared for the Republic conceded that an order for re-trial is indeed an order made to the prejudice of the appellants but urged that the nature of the order being such as to call upon the appellants to appear and answer charges the order made was within the jurisdiction of the superior court and hence correctly made. Dr. Khaminwa also urged that it was the duty of the superior court to hear not only the appellants but also the prosecution before making the orders as were made.

Dr. Khaminwa took this Court through the meaning of the word "prejudice" in an attempt to show that the re-trial order is indeed to the prejudice of the appellants. Prejudicial error, means, according to Blake's Law Dictionary, 4th Edition, "an error outstanding affecting the appellant's rights and obligations". According to Jowitt's Dictionary of English Law the word "prejudice" means "injury". Section 364(1) of the Code mandates the superior court to make no orders on revision which may prejudice an accused person unless he has had an opportunity of being heard personally or by an advocate in his own defence.

On the issue of the jurisdiction of this Court to hear an appeal against an order for Revision made by the superior court, Dr. Khaminwa pointed out Section 361(7) of the Code which expressly confers such right of appeal to this Court. Mr. Okumu did not take issue thereon and there is no doubt that this Court has appellate jurisdiction in regard to orders made by the superior court on revision. Sub-section (7) of section 361 of the Code reads:-

"(7) For the purpose of this section, an order made by the High Court in the exercise of its revisionary jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction."

Such an appeal, as is before us now, is therefore to be treated as a 'second appeal'.

The prime issue that falls for decision is whether or not an order of re-trial is an order made to the prejudice of the appellants. Mr. Okumu's concession however does not bind us. It was held in the case of R vs. Norbert S/O Mchakatu (1942) 9 E.A.C.A. 79 that an order of re-trial on revision is not an order to the prejudice of the accused and accordingly it is not necessary that the accused be heard before such an order is made. The Court said:-

"Shortly we may say that having given further thought to the matter the view of this Court is that an order directing a re-trial where the accused has been convicted of murder should not be construed as an order to the prejudice of the accused if only for the reason as Mr. Justice Wilson pointed out that the effect of the order is to set aside the conviction of murder and restore the accused to the position in which he was previously to his being tried."

That in our view is the position here. The convictions of the appellants have been set aside by the order and a re-trial has been ordered. Setting aside a conviction is not an order made to the prejudice of the appellants.

There is no requirement that a judge of the High Court must hear parties before making an order for revision. Section 364(1) of the Code clothes the High Court with power to alter or reverse an order other than an order of acquittal, even in cases where the proceedings in the Magistrate's Court come to its knowledge otherwise than in the course of calling for the proceedings or report made thereon.

The most amazing aspect of the proceedings before the magistrate is the manner in which the sentencing was done. We cannot but concur with what Etyang, J. said when dealing with an application

before him by the appellants, for bail pending their arrest. That was a two-pronged application. The orders sought were:

"That execution of the order issued on 4th August, 1999 been (sic) stayed pending the hearing of an appeal in the Court of Appeal. In the alternative, the applicants be released on bail pending their arrest and preferring of fresh changes."

Etyang, J. pointed out pertinently:-

"That concluded the trial and the applicant and his co-accused walked out of court, virtually free man having, as I have already stated above, admitted to have broken into the two shops and stolen cash and property worth K.Shs. 1,902,850/=."

The Ag. Senior Principal Magistrate Mr. M.M. Muya's attention was drawn to the manner in which the sentencing was done. He, very properly, forwarded the file to the judge in charge of Criminal Appeals section of the High Court for "appropriate orders". We must point out that was the proper thing to do. Mr. Muya pointed out, inter alia, as follows:-

"(3) The sentence meted out, which is a discharge under section 35 of the Penal Code, is grossly unproportional to the gravity of the offence."

Mr. Muya, was in our view, justified in thinking that the sentences meted out by Mr. El-Kindy had occasioned a failure of justice which concern had led the complainants to fear that the said Magistrate had been compromised.

Having said all that has transpired and having considered submissions of both counsel, the law and the facts we are unable to find any fault on the part of the learned Judge in ordering a re-trial. Whilst he may have arrived at his decision by a different route we think it was clearly a case where a re-trial ought to have been ordered on the grounds that there was no conviction recorded and that the sentence meted out was grossly inadequate.

The upshot of all this is that this appeal is dismissed.

Dated and delivered at Nairobi this 31st day of March, 2000.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.