IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA, & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 157 OF 2014

BETWEEN

DANIEL KARUMA alias NJALUO..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at NAIROBI (Ogola &Kamau,JJ) dated 18th November, 2013

In

HCCRA No. 336 of 2009)

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JUDGMENT OF THE COURT

[1] **Daniel Karuma alias Njaluo** who is the appellant before us was tried and convicted by the Chief Magistrate at Thika Law Courts for the offence of robbery with violence contrary to section **296(2) of the Penal Code.** He was sentenced to suffer death as by law prescribed. Being dissatisfied, he appealed against his conviction and sentence to the High Court. His appeal was dismissed by the High Court sitting at Nairobi (**Ogola and Kamau, JJ**). Undeterred the appellant has now come before us with this second appeal seeking to have his conviction quashed and sentence set aside. He filed his initial grounds of appeal in person, but subsequently an advocate, Ms Judith Ekin, who was assigned a pauper brief to represent him, filed supplementary grounds of appeal.

1. During the hearing of the appeal Mr Mogikoyo who was assigned the pauper brief after Ms Ekin

withdrew from the appeal, abandoned the initial grounds and argued the appeal based on six factors raised in the supplementary grounds. In a nutshell the appellant challenged the judgment of the High Court on the premises that the learned judges erred in confirming his conviction as his trial was vitiated by the gross violation of his constitutional and fundamental rights, to wit, right to a fair trial; that the prosecution did not prove the case against him beyond reasonable doubt; and that the judges did not reconsider or re-evaluate the evidence on record, or the circumstances and sufficiency of the evidence relating to his identification.

1. Mr Mogikoyo faulted the learned judges of the High Court in finding that the appellant was accorded a fair trial. He submitted that the learned judges did not interrogate the entire court record, nor did they take into account the delay in the prosecution of the appellant's case that had been occasioned mainly by the prosecution; that the learned judges did not consider the fact that the appellant's conduct may have been provoked by the trial court's insistence on proceeding with the trial when the appellant was unwell; that the trial magistrate neither acted reasonably nor properly exercised her discretion, or responded to the appellant's request to have the complainant recalled to testify; and that the appellant's right to a fair trial was thus violated. As regards the evidence adduced against the appellant, Mr Mogikoyo argued that the same did not meet the threshold for supporting a conviction, as the evidence was full of contradictions and was not subjected to cross-examination.

[4] Mr O'mirera, Senior Assistant Director of Public Prosecutions, who appeared for the State, opposed the appeal. He submitted that the court record was clear on the circumstances that led to the appellant's exclusion from the trial; that the appellant's conduct amounted to contempt in the face of the court, and his exclusion from the trial was justified under **section 77 of the repealed Constitution** of Kenya, as it made it impossible for the trial court to proceed with the trial. Counsel maintained that the evidence on record was sufficient to sustain the appellant's conviction, and that in any event an order for a retrial would not be appropriate as the offence having been committed in 2001, it would be practically impossible to get witnesses more than14 years later.

[5] In response to Mr O'mirera's submissions, Mr Mogikoyo argued that if there was contempt in the face of the court the same ought to have been dealt with under the law as a separate offence and should not have been used to exclude the appellant from the trial. He further faulted the trial magistrate for using evidence from the previous trial when the matter was being heard *de novo*.

[6] The appeal before us being a second appeal, our jurisdiction is limited under **section 361 of the Criminal Procedure Code** to consideration of issues of law only. The first pertinent issue of law that emerges from this appeal is whether the appellant was accorded a fair trial. The appellant was first arraigned in the Chief Magistrate's court on the 18th January 2002 when his plea was taken. The trial in the magistrate's court was finally concluded on 30th July 2009 when the appellant was sentenced to hang. The law in force during that period was the former **Constitution of Kenya (repealed through Article 264 of the Constitution of Kenya 2010**).

[7] **Section 77** of the former Constitution provided the right to a fair trial as follows:

"77. (1) 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.

(2)……

…. and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

[8] Applying these provisions to the appellant's trial, two issues arise with regard to the appellant's right to a fair trial. That is whether the appellant's trial was conducted within a reasonable time, and whether the exclusion of the appellant from the trial was a contravention of **section 77(2)(f)** of the former Constitution.

[9] With regard to the length of the trial the learned judges of the High Court had this to say:

"We have noted that the trial in the trial court took almost eight years and PW1 was in and out of hospital. At the same time the appellant did not give the trial court any easy time during the trial. The case was set for hearing on several occasions and adjourned because the complainant's injuries took long to heal to enable completion of P3 form."

[10] On our part, we have perused the record of the trial court and do find that there was clear evidence that the complainant suffered grievous injuries that left him in a coma resulting in his being hospitalized for a very long time. Indeed the trial magistrate observed that at the time the complainant testified before her, he had stumps on the left hand his fingers having been chopped off; he also had a deformed skull. We thus have no doubt that there was substantial delay that arose because of the complainant's condition.

[11] We note that the learned judges failed to take into account the additional delay that arose from the high turnover of the magistrates who handled the appellant's case. In total five magistrates handled the appellant's trial. Two of the magistrates retired during the pendency of the trial, two disqualified themselves from hearing the matter, and the fifth magistrate who finally convicted the appellant had to have the appellant's case heard *de novo.*

[12] On his part the appellant also caused the matter to be adjourned severally by insisting on the complainant being recalled to testify, under section 200 of the Criminal Procedure Code. This posed a challenge because of the complainant's ill health on account of the injuries suffered during the robbery attack. Further delay arose from the appellant's conduct when he refused to enter the court, and when he declined to proceed with the hearing on account of illness. On the whole the delay in the finalization of the appellant's trial was caused by factors that were outside the control of the prosecution and the court. The delay cannot therefore be said to have been unreasonable. Nor was the delay a contravention of section **77(1)** of the former Constitution of Kenya.

[13] As regards the appellant's exclusion from the trial, we note that unlike the position now taken by

Mr O'mirera Senior Assistant Director of Public Prosecutions who reiterates that the appellant's exclusion from the trial was justified, the State Counsel who appeared in the High Court took the view that although there was sufficient evidence in support of the appellant's conviction, there was a miscarriage of justice arising from the appellant's exclusion from the trial and the fact that the appellant did not have opportunity to present his defence.

[14] The appeal before us being a second appeal, this Court has a duty as stated in ***Adan Muraguri Mungara vs. Republic [2010] eKLR):***

"… to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

[15] In her judgment the trial magistrate stated at length the circumstances that led to the appellant's exclusion from the trial. This is well captured by the learned judges in the following extract of their judgment:

" 14. …There appears to have been several recorded misbehavior on the part of the appellant leading to a Ruling delivered by the trial magistrate on 27th November 2008. In that Ruling the trial court rejected the appellant's application for adjournment. To this Ruling the accused responded as follows:-

'I will not proceed with this case whatever orders are made.'

15. After this episode the accused continued to behave badly before the court making his continued appearance in the proceedings impossible. He also became violent and threatened the court proceedings with violence. The appellant accused the court of biasness, made loud noises banged on the metal door leading to the cells while standing with his back to the court cursing. Due to this disruptive conduct of the appellant the court was not able to conduct the proceedings. At that moment the court made a decision communicated in a Ruling to exclude the accused from the proceedings under section 77(2) of the former Constitution. After this decision the court was able to proceed with the trial.

16. The judgment of the trial court at pages 95 and 96 reveal the agony the court had to go through, and having to write a judgment without the accused person giving a defence…. In light of the circumstances and the behavior of the appellant during the trial, was there a miscarriage of justice because the appellant's defence was not heard in court" To that question the trial magistrate had this to say in her judgment:-

'The accused person was accorded the right to defend himself as provided under the Constitution. But he conducted himself in such a manner that the court was compelled to exclude him from the proceedings…No constitutional right is absolute hence the provisions of section 77(2) of the Constitution. I have drawn an analogy between the circumstances of this case and a situation where an accused

elects under section 211 of the Criminal Procedure Code to say nothing in his defence. That is a right but the burden to prove the case beyond reasonable doubt still remains with the prosecution. Equally an accused who so conducts himself in such a manner as to be excluded from the proceedings under section 77(2) of the Constitution must be derived (sic) to have made a constructive choice to abstain and cannot hope to suspend the proceedings indefinitely as the accused herein hope to do….'

17. After careful consideration of the circumstances and section 77(2) of the said Constitution, we are in agreement with the trial court that the appellant could not continue to participate in these proceedings, and that the trial court acted right in resorting to the said section 77(2) of the Constitution. We therefore dismiss the submission by the state counsel that there was a miscarriage of justice."

[16] Given the above exposition, we cannot fault the conclusion of the judges of the High Court that the conduct of the appellant was disruptive and made it impossible for the trial court to conduct the proceedings. The appellant's right to be present during the trial was dependent on his conducting himself in a manner consistent with the sobriety of the trial. That being the position the appellant compromised his right to be present during the trial by failing to treat the trial proceedings with the reverence and seriousness that it deserved. He cannot therefore be allowed to leverage on an outcome brought about by his own misconduct to vilify the proceedings of the trial court.

[17] Moreover, after the trial magistrate delivered the ruling on 27th November 2008 excluding the appellant from the proceedings, the hearing of the case continued until 9th April 2009. If indeed the appellant genuinely felt that he was excluded from the proceedings unfairly, he could have arrested the situation by appealing against the ruling before the proceedings were concluded. Yet the appellant only raised the issue as a ground of appeal following his conviction after judgment was delivered on 30th July 2009. For all these reasons, we come to the conclusion that the appellant was properly excluded from the proceedings, and that there was no violation of the appellant's right to a fair trial under **section 77(2)** of the former Constitution.

[18] In regard to the evidence adduced against the appellant the learned judges in addition to setting out the evidence, addressed the same as follows:

"As the first court of appeal we have carefully reviewed the evidence before the trial court to enable us reach our own independent opinion in this appeal. The evidence of PW1 Joseph Githuthu Mburu, the complainant and the main witness for the prosecution, was powerful on its own. The appellant was personally known to the complainant (sic) and the appellant lured the complainant to the appellant's car. There is no issue of misidentification. On its own PW1's evidence is convincing, However, there is further corroboration of this evidence by that of PW 2 who went to the river to collect PW1. However if there is any doubt, that must be erased by the evidence of PW 5 - CIP Isaac Njenga who testified that on 14th January he recorded a confession from the appellant. The appellant confessed to the crime he was charged with. Indeed the trial court also found that confession to be corroborative of the evidence provided by the prosecution witnesses. We have seen that confession in the court file produced as Exhibit 2. In that regard grounds1, 2, and 3 of the appeal are not tenable, are baseless and we hereby dismiss the same."

[19] The contention that the learned judges did not reconsider or re-evaluate the evidence is obviously not true, as the record as above reproduced reveals otherwise. As regards the appellant's identification we are alive to the fact that the evidence implicating him was that of a single identifying witness. Therefore the trial magistrate had not only to warn herself of the danger of relying on the evidence of a single identifying witness, but also subject the evidence to careful testing to rule out any possibility of a mistaken identification (see ***Maitanyi v Republic 1986 KLR 198***).

1. Both the trial magistrate and the learned judges subjected the evidence of identification to scrutiny. The evidence was that Joseph Githuthu Mburu (complainant) who had serious injuries was found in a river. He identified the appellant by name as one of the two persons who lured him into a vehicle, and together with other persons attacked, injured and robbed him of Kshs 1500/=, then threw him into a river. Although the incident occurred at about 8 P.M. the complainant testified that the appellant and one Mungai both of whom were known to the complainant, called him and asked him to accompany them to a vehicle claiming there were some people who wanted to talk to him. This interaction provided the complainant with an opportunity to see, recognize, and talk to the appellant and his colleague. In fact the initial contact was not acrimonious as it was only when the complainant reached the vehicle that he realized that he had walked into a trap.

1. The appellant's identification was thus one of identification through recognition, and as was stated in ***Anjononi & others v Republic [1980] KLR 57***:

"…; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."

1. Both the trial court and the first appellate court also took into account the evidence of **PW 2 CIP James Kilonzo (**the officer who fished the complainant from the river), that the complainant gave the name of the appellant as one of his assailants, as providing consistency and confirmation that the complainant did recognize the appellant as one of his assailants. In light of the above we are satisfied that the evidence of identification was properly addressed and that the evidence could be safely relied upon.

1. Finally, we note that although the trial magistrate heard the case *de novo*, in her judgment she made reference to evidence adduced before the previous magistrates in order to satisfy herself of the consistency of the testimony before her. This was wrong, as the essence of a *de novo* hearing is that the matter commences afresh and no reference can be made to the previous proceedings, as they cease to exist in so far as the new trial is concerned. However, this slip by the trial magistrate was an inconsequential infraction, as the evidence before the trial magistrate could stand-alone without reference to the previous proceedings. The bottom line is that the prosecution had discharged the burden of proof as there was sufficient evidence adduced that could sustain the appellant's conviction.

[11] For these reasons we find no substance in this appeal and do therefore

dismiss the appeal in its entirety.

Dated and delivered at Nairobi this 25th day of September, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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