



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 35 OF 2019

DOMINIC GATI RANGE

JAMES CHACHA CHENGE..... APPELLANTS

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence by Hon. L. N. Mesa, Senior Resident Magistrate in Kehancha Principal Magistrate's Court Criminal Case No. 714 of 2018)

JUDGMENT

1. I must allow this appeal for the reason that the trial court did not deliver any judgment.
2. The record is clear that upon close of the defence cases on 08/04/2019 the court scheduled the matter for judgment on 23/04/2019.
3. The record has no proceedings of the 23/04/2019. There are no any other proceedings on when the judgment was delivered.
4. From 08/04/2019 the case came before court on 30/04/2019. The proceedings for the two days appear on the same page of the hand-written proceedings.
5. The Appellants herein tendered their mitigations on 30/04/2019. Sentencing was set for 08/05/2019 and the court made an order for Pre-Sentence Reports. The Appellants were eventually sentenced on 14/05/2019.
6. In the absence of a court judgment the Appellants were not convicted of any offences. Consequently, the Appellants could not be sentenced. There is absolutely no basis for the Appellants to serve any sentences.
7. Should the Appellants therefore be set at liberty or be retried? The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;

8. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**:

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction

might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

9. The error on the record was squarely on the part of the trial court. The offences facing the Appellants were very serious and there are victims who wished to see justice rendered. On the other hand, the Appellants can only be sentenced upon being rightly found guilty of known offence(s) in law.

10. I have considered the evidence on record and I am satisfied that this is a perfect case for a retrial. The witnesses are family members and government officials. They will therefore readily attend court.

11. I hence make the following final orders: -

(a) The appeal is hereby allowed and the sentences against the Appellants set-aside.

(b) The Appellants shall be retried. To that end they shall be arraigned before the Chief Magistrates Court at Migori within 10 days of this judgment.

(c) The Deputy Registrar shall serve this judgment upon Hon. L. N. Messa, Principal Magistrate and accordingly advise this Court.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Dominic Gati Range and James Chacha Change, the Appellants in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant