



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL APPEAL NO.76 OF 2016

MIKE EKAI LICHES.....APPELLANT

VERSUS

REPBLIC.....RESPONDENT

[An appeal from conviction and sentence in original Lodwar SRM CR 787/2014

delivered on 26.1.2015 by R.W Washika Senior Resident Magistrate].

JUDGEMENT

The appellant Mike Ekai Liches was the 1st accused in the subordinate court. He was charged jointly with David Ekai Eyanae (who has not appealed) with the offence of robbery with violence contrary to section 296 (2) of the penal code. The particulars of the charge are that, on the 23rd day of December 2014 at Kakuma Refugee Camp in Turkana West District within Turkana County, jointly robbed **ABRAHAM INYANG** off a bicycle make Nelaam valued at Kshs. 6,000 and cash kshs. 60 and at or immediately before such robbery struck the said **ABRAHAM INYANG**.

The prosecution evidence at the trial court was that on 23.12.2014, Abraham Inyang who runs a bodaboda business using a bicycle was requested by appellant Mike Ekai to carry him to a destination. Complainant agreed. He carried the appellant and on arrival at a destination, the appellant told him to give appellant Kshs. 60 so that he can pay him by a Kshs. 100 note. The complainant gave him Kshs. 60, as requested. Appellant then rode in the 2nd accused David Ekai's bicycle and went away. Later the complainant went to the refugee camp but found the appellant with the 2nd accused and appellant hit him with a stone and took away his bicycle. He however arrested accused David Ekai Nayenai with the help of the members of public and took him to the police station. Accused 2 helped police to trace appellant. The bicycle was recovered.

PW2 Stephen Lopua Milkiba testified that he saw appellant board the complainant's bicycle and saw complainant give him Ksh. 60 and appellant was to give him Kshs. 100 note to cover the fare for the ride. The appellant then walked off. The appellant hit complainant with a stone.

PW3 police constable Geoffrey Korir was at Kakuma police station when 2nd accused David Ekai Nayenae was at the police station when David was brought by the members of public in company of the complainant who had injuries. He re-arrested accused 2 David and referred the complainant to the hospital. The appellant was traced on information by the 2nd accused David and he was arrested. He led police to where he had hidden the bicycle which was recovered. The appellant after being put on his defence decided to keep quiet and call no witness. The learned trial magistrate after analyzing the evidence found him guilty of the offence of robbery with violence contrary to section 296 (2) of the penal code convicted him and sentenced him for life imprisonment.

The appellant filed this appeal on the following grounds:

- 1. THAT: the incident of robbery with violence did not take place as alleged by the complainant.**
- 2. THAT: the investigation officer failed to conduct identification parade.**
- 3. THAT: the witness failed to mention the names of the people they knew the suspected person.**
- 4. THAT: the learned trial magistrate erred in both law and facts when he convicted the appellant without considering that there were people who were being mentioned by some of the witnesses who did not avail to testify.**

5. THAT: the learned trial magistrate erred in both law and facts when he convicted me without corroboration of evidence.

The appellant filed written submission; he submitted that the prosecutor failed to prove the offence of robbery with violence. And that the complainant complain was an offence of assault and that the evidence was adduced as to how the bicycle was stolen.

The appellant submitted that the police investigations were shoddy and the police officer did not say how and where they recovered the stolen bicycle. Appellant further submitted that he did not follow proceedings as the language used was complicated for him and therefore did not cross-examine the witness adequately. Finally appellant submitted that the judgement was not supported by evidence and the sentence of life imprisonment meted out was unfair.

Mr. Kimanathi for the state opposed the appeal. He served the appellant a notice of intended application for enhancement sentence from life imprisonment to death sentence. He submitted that the evidence of the prosecution remains unchallenged as the appellant did not offer any evidence in his defence. He agreed with the appellant that the matter was heard in a day but submits that no prejudice was occasioned. The appellant besides the written submissions stated to the above addressed the court and complained that the matter was set for hearing on 21.2.2015, the prosecution evidence rendered on same day, he was put on his defence in the same day, and judgement delivered at noon on same day.

The constitution of Kenya (2010) provides for the rights of a fair trial. Article 50 (a) is devoted to what the tenets of a fair trial are. These include the right of the accused to be informed of the charge he faces with substantial detail, the right to have adequate trial and facilities to prepare defence; the right to be informed in advance the evidence of the prosecutor and have the same in adequate time.

Mr. Kimanathi submits that it has not been shown that the appellant suffered any prejudice by the hurried manner in which the hearing was conducted. I with respect do not agree. When an accused has right to fair trial and in particular the right to have the prosecutor evidence in advance by being served with witness statement and the same is not shown to have been done; he will be prejudiced. When an accused is not offered an opportunity to prepare and call his defence; by giving him adequate time; he is prejudiced.

I am of the view that in a case as this where the ultimate penalty is death; great care must be taken by court to ensure that tenets of fairness of the judicial process are adhered to. It will be a travesty of justice to rush the hearing and rob the accused the right to adequately prepare and adduce evidence on their behalf on the pretext that the matter must be concluded expeditiously. Where as in this case the prosecution evidence is heard in a day, defence on same day and judgment delivered on same day, it is upon the high court to examine if due process was followed, being alive while to the fact that prosecution should be done without undue delay, where the liberty of an accused is at stake, the same should not be decided in haste, as while justice delayed is justice denied, justice hurried is justice buried.

The court has considered the defect in the trial of the appellant and whether a retrial should be ordered. The grounds upon which a court can order a retrial are now well settled in Laban Kimaro Karenya- V-R Khamoni J held

The principles an appellate court should apply in determining whether an order for retrial should be made are as follows:

- 1. A retrial may be ordered only when the original trial was illegal or defective.**
- 2. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice required it and where it is not likely to cause an injustice to an accused person.**
- 3. A retrial should not be ordered unless the appellate court is of the opinion that on proper consideration of the admissible evidence of potentially admissible evidence a conviction might result.**

In this appeal I am of the view that the way the trial was concluded did not accord the appellant a fair trial. I am persuaded that the interest of justice will be served by ordering a retrial. I therefore set aside the conviction of the appellant of the offence of robbery and the sentence of life imprisonment imposed. I note that the appellant was charged in the lower court in 2014 and convicted in 2015. The prosecutor may not have difficulty in tracing the witnesses. I therefore, order that the appellant be presented to the principal magistrate for retrial by another magistrate other than R.W. Washika Senior Resident Magistrate. Appellant to be produced in the principal magistrate's court on 28.6.2017.

Dated signed and delivered at Lodwar this 23rd day of June 2017.

S.N RIECHI

JUDGE