



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 11 OF 2017

BETWEEN

GEORGE MUDERWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.E. Muleka, SRM dated 17th June 2016 at the Senior Resident Magistrate's Court at Hamisi in Criminal Case No. 851 of 2014)

JUDGMENT

1. From the record before this court, it appears that the appellant, **GEORGE MUDERWA**, was convicted of the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He had also been charged with the offence of gang defilement contrary to **section 10** of the **Sexual Offence Act**. At the hearing of the appeal the parties relied on written submissions whereupon I reserved judgment.

2. As I was preparing the judgment, it became apparent that the judgment, both handwritten and typed before the trial court, was incomplete as there was no finding on all the issues the trial magistrate had framed for determination and there was no record of conviction or acquittal of the appellant or the other accused.

3. After setting out the facts of the case and framing the issues, the trial magistrate, in the judgment, stated as follows before proceeding to sentence the appellant:

I have therefore carefully analysed the evidence before me and I have no doubt that this robbery took place. This is evidenced by the items that were received from the home of Newton Nyaliku accused No. 2 herein. In his defence he failed completely to challenge the prosecution evidence on how he came in possession of the stolen items.

4. The decision is bereft of the ingredients of a carefully considered judgment and does not comply with the mandatory requirements of **section 169 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of

the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

5. It is also clear that trial magistrate failed to comply with **section 169(2) and (3)** of the **Criminal Procedure Code**. He did not state or specify the counts on which the appellant and his co-accused were either convicted or acquitted. In **James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR** the Court of Appeal expressed following view;

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

6. For all intents and purposes, there was no judgment contemplated in law hence I have no option but to quash the conviction and sentence.

7. I must now turn to consider whether I should order a re-trial. The Court of Appeal in **Muiruri v Republic [2003] KLR 552**, observed that:

It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's.

8. At the end of the day the principal duty of the court is to strike a balance between the interests of justice on the one hand and those of the accused person on the other. In this case the trial magistrate did not express any view on the evidence and given the serious nature of the charge and the fact that slightly over a year has elapsed since the judgment was delivered, I think a re-trial would be possible and the appellant would receive a fair trial. In these circumstances, I will order a re-trial.

9. For the reasons I have set out, I make the following orders:

(a) The appeal is allowed and the conviction and sentence are hereby quashed and set aside.

(b) The appellant shall be re-tried on the same charges before any other magistrate other than Hon. E. Muleka, SRM.

(c) The appellant shall remain in custody pending trial and shall be taken before the Magistrates Court at Hamisi to take plea on a date directed by the court.

(d) This judgment to be brought to the personal attention on Hon. E, Muleka, SRM.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 15th day of November 2017.

R. N. SITATI

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.