



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 41 OF 2015.

BILALI HAMCHA LOKAIMOE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the original conviction and sentence in the

Chief Magistrate's Court at Makadara Cr. Case No. 6406 of 2012

delivered by Hon. V. W. Ndururu, PM on 5th February 2015).

JUDGMENT

Background.

1. Bilali Hamcha Lokaimoe, herein the Appellant, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 9th December 2012 at Gikomba Market within Nairobi Area County, while armed with a dangerous or offensive weapon namely a knife robbed Onesmus Everest Masawe of a mobile phone make Tecno valued at Kshs. 5,000/- and Kshs. 3,000/- all valued at Kshs. 8,000/- and at or immediately before or immediately after the time of such a robbery wounded the said Onesmus Everest Masawe. He was found guilty and sentenced to suffer death.

2. Being dissatisfied with the decision of the trial court he preferred the present appeal. In the supplementary grounds of appeal filed on 6th November 2017 he was dissatisfied that Section 200(3) of the Criminal Procedure Code was not complied with, that his defence was rejected and that he was not positively identified. **Submissions.**

3. The Appellant took issue with fact that Section 200 of the Criminal Procedure Code was violated when the trial was taken over by Hon. V. Wakumile, Ag. SPM from Hon. R. A. Otieno, SPM. He was of the view that although the record on 29th August 2013 indicated that Section 200 was complied with nothing on the record indicated the direction he chose, that is whether he wished to recall the prosecution witnesses or have the matter heard de novo. He submitted that this vitiated the entire trial. He urged the court in the circumstances to order a retrial.

4. With regards to non-compliance with Section 169(1) of the Criminal Procedure Code he submitted that his defence was rejected summarily without setting out the reasons for doing so.

5. Ms. Sigei who made oral submission conceded to the appeal on ground that Section 200(3) of the Criminal Procedure Code was not complied with. She urged the court to find that there was sufficient evidence to warrant an order for a retrial.

Determination

6. It is noble that the court, before reevaluating the evidence afresh, considers whether Section 200 of the Criminal Procedure Code was infringed. The same states:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

7. The provision confers upon a succeeding magistrate in a trial to explain to an accused his right to elect to recall or resummons witnesses who had testified or altogether demand that the case be heard *de novo*. In the present case, Hon. Wakumile, SPM took over the matter after PW1 had testified. The first time on the record is 13th August, 2013 when hearing was set for 29th August, 2013. At this point, directions under Section 200 were not taken. The proceedings were recorded as follows;

“Section 200 CPC complied with matter to proceed with the evidence on record.

Previous proceedings to be typed.

PW2 Duly Sworn and States in Swahili.”

8. It can be glimpsed that after the court noted that Section 200 had been complied with, it did not give the Appellant the opportunity to elect whether the matter would proceed from where it had reached or be heard *de novo*. He was also not asked whether in lieu thereof he intended to call any of the witnesses who had testified for purposes of further cross examination. This ultimately contravened the provision thereby presenting a defect in the entire trial. The defect can then only be rectified by ordering a retrial. But before this is done the court must take into consideration several factors including, whether a retrial would result in a conviction, whether it would aid the prosecution to fill up gaps in its case, whether it would prejudice the Appellant and whether it would serve the interests of justice. See **Mwangi v. Republic[1983] KLR 522.**

9. The prosecution’s case was that the complainant was on his way home when she encountered a man he knew from the neighbourhood. The man in question was in the company of others and ordered him to hand over his valuables. When he hesitated the man lunged at him with a knife and cut him on the neck. He fell down and as he writhed on the ground the man ransacked his pockets and took his phone and KShs. 3,000/- in cash. Since the complainant had let out a scream a colleague who was not far off arrived at the scene to find the man busy ransacking the complainant. When he confronted him he chased him away by brandishing the knife. The complainant and his colleague identified the man as the Appellant, a local busy body. Thus, the Appellant was identified by recognition by both PW1 and PW2. They no doubt witnessed that a robbery was perpetrated on PW1 in which he suffered a serious wound to the neck which was according to the doctor was caused by a sharp object. Further, the Appellant was arrested by PW1 and PW2, alongside others, who then forwarded him to Shauri Moyo Police Station. In the circumstances, this court is of the view that the evidence on hand would most likely result in a conviction.

10. On other factors, I take into account that the offence of robbery with violence is serious and may attract a heavy penalty. Further, the complainant sustained a serious injury for which he was admitted in hospital. The trial also only began in December, 2012 and was concluded in February, 2015. In addition, the interests of justice demand that even the complainant is satisfied that justice has been done in a fair trial process. I am of the view that no prejudice would be occasioned to the Appellant if a retrial is ordered.

11. In the result, the appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Shauri Moyo Police Station not later than 29th December, 2017 for purposes of preparing him to take plea. It is so ordered.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Miss Sigei for the Respondent.