



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

KIMARU, NGENYA JJ

CRIMINAL APPEAL NO.111 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. Bidali - SPM delivered on 18th April 2012 in Nairobi CMC. CR. Case No.790 of 2009)

CHARLES NGUMI NJUGUNA.....1ST APPELLANT

PETER WAMITHI WAITHERERO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Charles Ngumi Njuguna (1st Appellant) and Peter Wamithi Waitherero (2nd Appellant) were charged with two others (who were however acquitted by the trial court) with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 31st October 2008 at Royal Sky Hotel along New Pumwani Road in Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons, namely knives, robbed John Wachira Wainaina of Kshs.2.8 million and two mobile phones and at or immediately before or immediately after the time of such robbery killed the said John Wachira Wainaina. The Appellants were each separately and alternatively charged with **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 1st November 2008 along Mama Ngina Street and Kangemi Village within Nairobi County respectively, the Appellants, other than in the course of stealing, each dishonestly retained a Nokia mobile phone knowing or having reason to believe it be stolen property. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted of the main charge of **robbery with violence**. They were sentenced to death as is provided by the law. The Appellants were aggrieved by their conviction and sentence. They each filed a separate appeal before this court challenging their conviction and sentence.

During the hearing of the appeal, it emerged that the record of the trial court was incomplete. This court did, on 4th March 2015, direct the Deputy Registrar of this court to ensure that the record is complete. However, in a memo written to the court, the Deputy Registrar informed the court that part of the record of the trial court was missing and could not be traced. The Deputy Registrar attributed this loss to the fact that National Youth Service Secretarial trainees who had been temporarily hired to clear the backlog of pending typed proceedings may have misplaced sections of the proceedings. The best effort of the

registry staff to trace the particular section of the proceedings was in vain. It became apparent to this court that the appeal lodged by the Appellants could not be heard by this court in the absence of such complete record. It was on that basis that the Appellants counsel and the prosecution were directed by the court to make submissions in regard to whether or not the Appellants should be retried.

During the hearing, Mr. Mugu and Koome for the Appellants urged the court to acquit the Appellants in view of the fact that there was no basis or sufficient evidence upon which this court would make a determination that the Appellants be retried. On her part, Ms. Nyauncho for the State submitted that the prosecution had adduced sufficient evidence in the vitiated trial which would have resulted in this court upholding the conviction of the Appellants were it not for the fact that part of the proceedings were missing. She was of the view that the prosecution had adduced sufficient overwhelming evidence to enable this court order the Appellant's to be retried.

As stated earlier in this judgment, the issue for determination by this court is whether the Appellants should be retried in view of the loss of part of the record of the trial court that incapacitated this court from hearing the appeal. The principles to be considered by this court in determining whether or not to order a retrial is well settled. In **Sinaraha & another –vs- Republic [2004] 2KLR 328 at page 330**, the court held thus:

“The principles governing whether or not a retrial should be ordered was enunciated in Fatehali Manji –versus- Republic [1966] EA 343 Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:

“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 insufficiency of evidence 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should be ordered where it is likely to cause injustice to the accused person.”

In M’Kanake –versus- Republic [1973] EA 67, it was held that a retrial should not be asked for to fill gaps in the evidence or to rectify faults of the prosecution’s case. In Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza versus R [1957] EA 469, Pyarala Bassan versus Republic [1960] EA 854.”

In the present appeal, we have reviewed the evidence that was adduced before the trial court. The Appellants were found in possession of mobile phones which were robbed from the deceased during the robbery incident. This was soon after the robbery incident. In the course of the robbery, the deceased killed. The trial court evaluated the evidence and reached the conclusion that the prosecution had adduced sufficient evidence to sustain the conviction of the Appellants. One of the issues that this court must consider before ordering a retrial is whether there is sufficient evidence by the prosecution to secure the conviction of the Appellants should a retrial be ordered.

Having carefully re-evaluated the evidence, this court is of the view that there is sufficient potential evidence for the Appellants to be convicted if this court were to order a retrial. From all indications, the witnesses who testified during trial will be available to adduce evidence if a retrial is ordered. The retrial will not offer the opportunity to the prosecution to re-jig its case. Although the Appellants have been in custody for more than six (6) years, taking into consideration that the Appellants face the ultimate penalty i.e. the death penalty, they will not be prejudiced if they are retried. We hold that it is in the interest of justice that the Appellants be retried.

In the premises therefore, the conviction and the sentence imposed on the Appellants by the trial court is

set aside. The Appellants shall be retried before the Nairobi Chief Magistrate's Court by any other magistrate with jurisdiction other than Hon. K.A. Bidali, Senior Principal Magistrate. The Appellants shall appear before the said court on 3rd November 2015 to take plea in the retried case. The exhibits produced by the prosecution shall be returned to the prosecution. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE