



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.189 OF 2011

MOSES KIREMBU MARIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nanyuki in Criminal Case No.1702 of 2009 by J.N. Nyagah – SPM)

J U D G M E N T

The appellant was charged with Robbery with Violence contrary to Section 296(2) of the penal code. The particulars of the charge were that on the 4th day of April 2009 at Mung'etho area of Nanyuki township in Laikipia District within the Rift Valley Province, jointly with others not before court, being armed with dangerous rifles namely rifles, bows and arrows robbed Charity Murugi Wachira of her cash Kshs.19500/=, a Nokia 2310 mobile phone, 2 gas cookers, a DVD machine, 5 crates of eggs, clothings, utensils, farm implements, beddings all valued at Kshs.250,000/= and at or immediately before or immediately after the time of such robbery wounded the said Charity Murugi Wachira.

The appellant seeks retrial as he never challenged the prosecution's witnesses because he was unwell during trial. He raised the issue but was not heard by the trial court.

It is trite law that a retrial can only be ordered if the appellant did not get a satisfactory trial. The court should be convinced that the appellant did not get a fair trial before conviction.

In this case the appellant was charged with the afore said offence and the plea taken on the 16/7/2009 in Kiswahili Language which he understood. The charge was read over and explained to the appellant before taking his plea and he was warned of the consequences of the offense being a death sentence. He pleaded not guilty to the two counts. The court ordered that he be supplied with the charge sheet and witness statements.

On the 1/3/2010 the prosecutor was ready to proceed however, the appellant applied for adjournment due to the fact that he did not have the statements. The court observed that the witnesses were present, but the appellant declined to proceed on the scheduled date despite the fact that the court had ordered him to get statements on the date of plea. The court adjourned the matter to 15/3/2010. On the said date, though the matter did not proceed, no complaint was raised by the appellant in respect of either sickness or witness statements.

On the 4/10/2010, again when the prosecutor was ready to proceed with three witnesses, the appellant stated that he had not received the witness statements. The court allowed adjournment and rescheduled the matter to the 16/11/2010. The matter did not proceed until the 18/1/2011 when both parties appeared

ready to proceed. The prosecutor was ready to proceed with three witnesses whilst the appellant did not apply for adjournment due to illness or statements, grounds that he now wants to rely on for a retrial. Further, the appellant cross-examined the prosecution witnesses namely PW1 and PW2 who testified on said hearing date.

On the 4/2/2011, Richard Kalenya based at Nanyuki District Hospital testified on behalf of the prosecution in the presence of the appellant but the latter did not ask any question despite being given an opportunity to do so .

On the 25/2/2011, PW4, Margaret Wambugu a victim of the robbery with violence testified and was adequately cross-examined by the appellant.

On the 19/4/2011 PW5 CPL Godfrey Chepkonga testified for the prosecution in the presence of the appellant and was cross-examined by the appellant.

On the 8/7/2011 PW6, No.66346 CPL Geoffrey Musumbe testified for the prosecution and was cross-examined by the appellant.

On the 8th of July 2011 the prosecution closed its case and the appellant was found with a case to answer and section 211 was explained to the appellant whereupon he was allowed to defend himself and did so by giving unsworn evidence. At no time did he complain that he was unwell.

This court finds that the appellant was afforded the opportunity to cross-examine the prosecution witnesses and did so. He was given an opportunity to defend himself and did so.

The court does not find any procedural impropriety in the way the trial court conducted the matter. No evidence has been availed to this court that the appellant was unwell as there is no doctors report.

The upshot of the above is that no basis for retrial has been established hence the appeal is dismissed.

Dated, signed and delivered at Nyeri this 21st day of January 2014

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE