REPUBLIC OF KENYA

IN THE HIGH OCURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 704 OF 2010

JOSEPH MWANGI MUTUA …………………......…………….. APPELLANT

VERSUS

REPUBLIC…………………………………………………….. RESPONDENT

(From the original conviction and sentence in criminal case no. 973 of the Principal magistrate's court at Limuru before Hon. M.A. Murage)

JUDGMENT

The appellant Joseph Mwangi Mutua was charged in count I with the offence of Robbery with violence Contrary to Section 296 (2) of the Penal code. In count II he was charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. He denied both offences but after a full trial he was convicted and sentenced to death on count I and four years imprisonment on count II.

Aggrieved by the said conviction he filed this appeal. Our first observation is that the learned trial magistrate having sentenced the appellant to death on count I failed to order that the period of four years imprisonment with respect to count II should have been held in abeyance. Be that as it may, this appeal was opposed by the Republic but when it came up for hearing before us, it transpired that the judgment of the learned trial magistrate was not dated.

This is a fatal omission which cannot be cured under Section 382 of the Criminal Procedure Code. At that point the learned counsel for the Republic asked the court to order a retrial because there was sufficient evidence on record to sustain a conviction and the offence was serious. The request for a retrial was opposed by the appellant who submitted that he was framed and has been in custody for a long time and therefore a retrial will be oppressive.

We have decided to address the issue of a retrial first because the issue of whether or not there was sufficient evidence is one of the reasons why a retrial should or should not be ordered. A retrial would be ordered to meet the interest of justice and in this case the rights of the appellant, the complainants and public interest come into play.

Before that order is made, the court must be satisfied that there exists sufficient evidence upon which a conviction may be founded, that the witnesses are available and that the exhibits can be accessed.

Another consideration is whether or not the appellant or the prosecution is to blame for the state of affairs. In this case, neither the appellant nor the prosecution is to blame for the omission to date the judgment. The responsibility to do so rests squarely with the trial court as mandated by Section 169 (1) of the Criminal Procedure Code.

As at the time the judgment was delivered, the appellant had been in custody for about three years and three months. The evidence adduced was that one Jonathan Kimanzi Munyoki was guarding Mirangi Primary school on the night of 13th September, 2010 when some people attacked and robbed him of a mobile phone and one pair of safari boots all valued at Kshs. 3,600/= and at or immediately after the time of such robbery wounded him.

The same people were said to have broken into the school offices and stole 83 text books and a gas cooker all valued at Kshs. 80,000/=. On the following morning some suspects were said to have been seen at a matatu stage and on being informed the police went there and found three people with some luggage. When these people saw the police they started running and the police fired in the air. One suspect was shot on the leg others ran away and the appellant was allegedly arrested. Some goods suspected to have been stolen were recovered.

P.W. 5 and P.W. 6 were the police officers who accosted the suspects. P.W. 5 P.C. Robert Nganga Mwema told the court that they recovered a gas cooker, shoes and books. P.W. 6 Corporal George Ikhisa said they recovered 83 books, a pair of safari boots, pliers, a torch and a gas cooker. When he produced the exhibit he mentioned a gap but surprisingly never produced any pliers or torch.

It is clear therefore that the recovered items mentioned by P.W. 5 and P.W. 6 varied substantially. If the two officers went to the scene and recovered the goods together then their record should agree in all material particulars. We are not surprised that the appellant raised this issue.

The appellant gave a sworn statement in his defence which appeared plausible and from the record the prosecution did not seriously cross-examine him on material particulars relating to the offences.

We have addressed the issue of the evidence deliberately because in our view if we were to order a retrial, the prosecution would have a chance to fill in the gaps and or correct the contradictions to the prejudice of the appellant. We have also noted from the record that the court ordered the release to the exhibit to the complainant. Considering the nature of the exhibits it is doubtful that they would be available if a retrial were to be ordered.

After considering the entire record, we are of the view that this appeal should be allowed, conviction quashed and sentence set aside. We decline to order a retrial because this would be prejudicial to the appellant and in any case the conviction was based on shaky evidence. No conviction may be founded after a retrial. The appellant shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 15th day of April, 2014.

A. MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**