



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NOS. 22,23 and 24 OF 2009

**(Being an Appeal Against the Original Conviction and Sentence by the Honourable W. Nyarima,
Senior Principal Magistrate at Kericho in Criminal Case No. 944 of 2008 in the Judgment
Delivered on 1.04.2009)**

GEOFFREY KIPKEMOI SIGEY.....1ST APPELLANT

RICHARD KIPKURUI LANGAT.....2ND APPELLANT

PETER OCHIENG OYANDO.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Before Hon. Justice J.K. Sergon and Hon. Justice Byram Ongaya on Friday 25th October, 2013)

JUDGMENT

The 1st, 2nd and 3rd appellants are Geoffrey Kipkemoi Sigey, Richard Kipkurui Langat, and Peter Ochieng Oyando respectively. They were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of four counts against the three appellants, as set out in the charge sheet, are that on 29.06.2008 at Sambret Tea Estate in Kericho district within Rift Valley Province, jointly with others not before the trial court, while armed with offensive weapons namely bows, arrows and pangas robbed Joseph Munari, Catherine Mogutu, Alfred Nyamweya Onsomo, and Hellen Kerubo Ongata of Kshs. 1,150, Kshs.900, Kshs.1,300 and Kshs.850 respectively, and, at or immediately before or immediately after the time of such robbery used actual violence to the enumerated complainants.

In the judgement, the learned trial Magistrate found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellants as charged pursuant to section 215 of the Criminal Procedure Code. Each appellant was sentenced to death and each has appealed against the conviction and sentence.

Mr. J.K.Kirui Counsel for the 2nd Appellant relied on the supplementary ground of appeal filed on 04.07.2012 stating thus,

“1.THAT the learned trial magistrate erred in law and in fact by not appreciating the fact that the plea taken on 8th July by Hon. D.O Rabala – Resident Magistrate who in law was not competent.

No fresh plea was taken by the honourable trial magistrate Nyarima Acting Senior Principal Magistrate on 24th of November 2008 when the case came up for a full hearing hence all the proceedings are null and void ab initio.”

It is clear that the offence of robbery with violence contrary to section 297(2) of the Penal Code and with which the appellants were charged is triable by a subordinate court of the first class presided over by a chief magistrate, a senior principal magistrate, a principal magistrate or a senior resident magistrate as per the provisions of the first schedule to the Criminal Procedure Code. Thus the plea taken before the resident magistrate was defective and in absence of plea taking before the senior principal magistrate, the proceedings were null ab initio. The learned senior state counsel Mr. Mutai correctly conceded that the appeal should succeed on that ground. Accordingly, the court finds that the appeal is allowed on that ground.

The next issue for determination in this appeal is whether, consequential to allowing the appeal, the case should be remitted for retrial or the appellants should be discharged forthwith.

For the respondent it was submitted that the case should be remitted for retrial because:

- a. the offence in issue is serious attracting a capital sentence;
- b. there was sufficient evidence before the trial court to convict and other than for the mistrial, a conviction is sustainable in view of the evidence on record; and
- c. if a retrial is ordered, there would be ready witnesses to be recalled during the retrial and 2009, the year of the challenged conviction, is not a long time ago for the witnesses to be recalled.

The appellants have submitted that they should be discharged and retrial should not be ordered on account of the following grounds:

- a. The mistrial was not attributable to their mistake.
- b. The initial report to the police did not state the description of the appellants and it was the appellant's case that their case was not one of recognition as found by the trial court; that the victims failed to describe and assert the fact of recognising the assailants in the initial reports to the police and the medical officer.
- c. The appellants urged that it was unfair for a retrial to be ordered in circumstances whereby they had been in custody for over 4 years. Relying on the decision in **Manji –Versus- Republic (1966) EA 343**, it was submitted that the court should order a retrial if the lower court proceedings are defective or illegal and that if no prejudice will be occasioned to the accused person. Further, as held in **James Kieti Musau –Versus- Republic [2004]eKLR 3**, for the court to order a retrial it should consider the evidence adduced in the lower court to be such that on a careful consideration of the evidence, the court can find a conviction.

The court has considered the evidence on record. The evidence of PW1 does not state that he recognized the appellants at the time of the offence. He merely states that some suspects being the appellants were arrested and after they were arrested and as they appeared in the dock he knew them as persons who lived with him in the same estate. He stated that he never saw the accused persons (the appellants) on the night of the robbery and those who robbed him escaped and are at large.

The court has examined the P3 forms exhibits 1, 2, 3 and 5. All the complainants did not inform the medical officer the names of the persons who had attacked and robbed them. This contradicts the evidence of PW2 and PW3 who stated that they identified the three appellants on the night of the robbery. PW4 stated in his evidence that he identified the first and third appellants.

It is not explained why the complainants failed to mention the appellants by name when they appeared for

medical examination and if at all the complainants recognised the assailants as testified before the trial court.

The court further notes that the investigation officer PW9 does not testify that the complainants reported the identities of the accused persons at the commencement of the investigation. Instead, the evidence shows that PW9 received a report that a group of about 10 people had targeted complainants of Kisii origin in a robbery attack on the night of 29.6.2008.

PW9 further states thus, **“I sent for the complainants for an identification parade but there was no need because they worked in the same place and knew each other.”**

In the circumstances of the case, the court finds that in absence of an identification parade, the complainants saw the appellants after the arrest and in the dock before the trial court as persons they recognised. In the opinion of the court, the record before the trial court shows that prior to the arrest and the trial, there is no evidence that the complainants knew or recognised the appellants as the persons who had attacked them on the night of 29.6.2008.

Accordingly, the court finds that the evidence before the trial court casts a shadow of reasonable doubt in the prosecution’s case to sustain a conviction for the offence the appellants were charged with. In the opinion of the court, the evidence on record is such that a conviction could not be sustained because it was not ascertained that the appellants are the persons who committed the robberies with violence on the night of 29.6.2008.

The final issue for determination is whether the appellants will be prejudiced by an order for retrial. The court has found that a proper identification parade was crucial in this case. If an order for retrial is made, the appellants are already recognised by the complainants and the failure to undertake a proper identification parade cannot be cured.

Thus, the court finds that the appellants will be prejudiced by an order for retrial. The court has also considered the over four years’ imprisonment the appellants have already served.

In conclusion, the court orders that the appellants be released forthwith unless otherwise lawfully held.

Signed, dated and delivered in court at Kericho this Friday, 25th October, 2013.

J.K. SERGON

JUDGE

And

BYRAM ONGAYA

JUDGE