



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO. 33 OF 2010**

**(Being an Appeal Against the Original Conviction by the Honourable W. Nyarima, Senior Principal Magistrate at Kericho in Criminal Case No. 930 of 2009 in the Judgment Delivered on 12.5.2010 )**

**GEOFFREY NYAMBECHA MANYARA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya and Hon. Justice G.W. Ngenye on Thursday 24<sup>th</sup> October, 2013)**

**JUDGMENT**

The appellant is Geoffrey Nyambecha Manyara. He was charged together with his co accused James Mitianga Masila with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars were that on the 31.3.2009 at about 9.30p.m. at Kericho Township in Kericho District within Rift Valley Province, jointly with others not before the trial court, and while armed with metal bars robbed Leonard Kiprono Bett of Kshs. 1,550/=, driving licence, national ID Card, Electors Card all valued at Kshs. 7,000 and at or immediately before or immediately after the time of such robbery, maimed the said Leonard Kiprono Bett.

The trial court found that the offence had not been established against the 2<sup>nd</sup> accused but convicted the 1<sup>st</sup> accused now the appellant under Section 215 of the Criminal Procedure Code.

Counsel for the appellant Mr. Nyaingiri Advocate submitted that the trial court made an incurable error of law because after convicting the accused person, it failed to impose a sentence and instead the trial court stated thus, **“Section 25 (2) of the Penal Code is applied. The officer in charge prison, Kericho to forward the order to the Permanent Secretary concerned for implementation.”**

In the circumstances, there was no sentence and the appellant being 17 years at the time of the conviction had remained in jail for more than five years without knowing his fate. Thus, remitting the matter to the lower court for sentencing would be prejudicial for the appellant especially that Section 18 of the Children Act provides that, detention of a minor shall not be one of the sentences against the minor. Counsel submitted that the appellant having served five years irregular imprisonment was adequate deterrence of any affront to the law as the appellant must have learnt the lessons to obey the law.

Senior State Counsel for the respondent Mr. Mutai conceded that there was no sentence by the trial court;

the trial was incomplete as it was a mistrial.

In urging the court to set the appellant at liberty and not to order a retrial, counsel for the appellant further submitted as follows:

- a. The identification parade was defective because it was not clear how the accused person was identified.
- b. The testimony by PW2 was that he clearly saw two people on the night of the robbery yet he did not explain how he managed to see clearly in the darkness of the night and he did not attend an identification parade to identify the two persons he had seen.
- c. The appellant was said to have lived in the houses in room number 3 but the landlord was never called to testify and confirm that the appellant was his tenant.
- d. The appellant took himself to the police station and was then arrested as the arrest was not provoked by an investigation relating to the robbery in issue. He had gone to the police station to make a report that he had been attacked by two Kisii persons.
- e. PW3 testified that the assault was by known persons but he did not state that the appellant was one of them.

In view of the inconsistencies in the evidence before the trial court, breach of Section 18 of the Children Act and the prejudice the appellant would suffer in a retrial, counsel for the appellant submitted that the appellant should be given an opportunity by being set at liberty to grow and love our justice system.

Section 18 of the Children Act provides as follows:

**“18. (1) No child shall be subjected to torture, or cruel treatment or punishment, unlawful arrest or liberty, deprivation of liberty.**

**(2) Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.**

**(3) A child offender shall be separated from adults in custody.**

**(4) A child who is arrested and detained shall be accorded legal and other assistance by the Government as well as contact with his family).”**

It is not disputed that the appellant at the time of conviction, was 17 years of age, was not accorded legal assistance during the trial and has been in illegal detention. This court finds that the appellant's entitlements under Section 18 of the Children Act were contravened. The court further finds that the case against the appellant was founded upon his identification at the identification parade whose legality has been challenged. In such circumstances, the court finds that the appellant will be prejudiced if a retrial is ordered because it is impossible to undertake a regular identification parade in a situation whereby the appellant has already been exposed to the public including the complainant.

In conclusion, the appeal is allowed, the conviction is quashed and the appellant be set at liberty forthwith unless otherwise lawfully held. Those shall be our orders.

**Signed, dated and delivered in court at Kericho this Thursday, 24<sup>th</sup> October, 2013.**

**BYRAM ONGAYA**

**JUDGE**

**And**

**G.W. NGENYE**

**JUDGE**

**In the presence of**

1. .... for the Appellant
2. .... for the Respondent/State