REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 6 OF 2009

Lesiit & Musyoka JJ

JULIUS MUTUMA…….APPELLANT

V E R S U S

REPUBLIC…….....RESPONDENT

(*From the original conviction and sentence in criminal case no. 1548 of 2008 of the Senior Resident Magistrate Meru Hon. K.W. Kiarie Principal Magistrate*)

JUDGEMENT

1. The Appellant JULIUS MUTUMA was charged with one count of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were on the 29th day of September 2008 at Meru Town of Meru Central District within Eastern Province jointly with other not before court robbed Francis Kirimi M'Inanga one mobile phone make J-MAX valued at Ksh.6500 and at or immediately before or immediately after the time of such robbery used actual violence to the said Francis Kirii M'Inanga.
2. The appellant was convicted of this offence and sentenced to death. Being aggrieved by the conviction and sentence he filed this appeal. He has raised six grounds of appeal in his supplementary grounds of appeal which can be summarized as follows:
    a. **That the learned trial magistrate erred in law in failing to make a finding that vital prosecution witnesses were not summoned for a just decision to be reached.**
    b. **That the learned trial magistrate erred in law in relying upon prosecution evidence that was contradicting and inconsistence.**
    c. **That the learned trial magistrate erred in law in failing to make a finding that the trial suffered several unprocedural irregularities.**
    d. **That the learned trial magistrate erred in law and fact and or misdirected himself in failing to observe that the complainant PW3 ought to have conducted an identification parade.**
    e. **That the learned trial magistrate erred in law in upholding the evidence on identification and or recognition while the same was not free from the possibility of error.**
    f. **That the learned trial magistrate erred in law in failing to sufficiently consider the defence statement (ALIBI) of the appellant without giving cogent reasons.**

3. The appellant challenges the learned trial magistrate by failing to take into account that vital witnesses and exhibits were not called as witnesses and adduced in evidence respectively. The

Appellant contended that the learned trial magistrate did not consider that Police Standing orders were violated during the Identification Parade and that the Appellant was forced to make his defence.

4. The Appellant raised a point of law when he urged that the Investigating Officer who was a constable did not qualify to handle a case of this nature.
5. The Appellant relied on his written submissions and grounds of appeal.
6. Mr. Moses Mungai, the learned State Counsel represented the State in this appeal and opposed the appeal. The learned State counsel submitted that the Appellant was well recognized at the scene of crime. In regard to the ingredients of the offence, the learned State counsel urged that the Prosecution had proved that the Appellant was both armed with an offensive weapon and used violence at the time of the robbery and that he was in the company of another who was not arrested. In regard to his defence, the learned State Counsel urged that it was a bare denial.
7. We are a first Appellate Court and as such we are mandated to re-analyse and evaluate the entire evidence adduced before the trial court while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case of **Okeno Vrs. Republic** 1972 EA 32. It was stated in that case as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

8. The brief facts of the prosecution case were that the complainant was PW3 was sitted on a verandah of Gakoromone Bar admiring PW1'S Phone when the Appellant confronted PW2. PW2 was the daughter of pw3 and wife of PW1. According to the prosecution case the Appellant confronted PW2 and demanded for "something small saying that it had been a long time since PW2 gave him something. It is the prosecution that when PW2 said that she did not have anything to give him that the Appellant kicked the complainant on the neck and then snatched PW1'S phone from him. The Appellant ran away after tossing the phone to an accomplice.
9. The Appellant denied the offence in one sentence In his statement in defence.
10. We are a first appellate court and as expected of us by law we have subjected the evidence adduced before the lower court to a fresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses and have given due consideration. We are guided by the court of appeal This is the first appellate court and as such our duty was stated in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-**
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> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and**

draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for that fact that the trial court has had the advantage of hearing and seeing the witnesses."

11. We have carefully considered the appeal together with the submissions by Appellant and the state. We wish to begin by considering a point of law that was not raised by either the Appellant or the State. The proceedings are very clear that after the prosecution closed its case there is no record to show that the learned trial magistrate complied with the provisions of section 211 of the Criminal Procedure Code. That section provides

"211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but

that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

12. It is the duty of the trial court to explain to the accused person of its rights under section 211 of the CPC. The court must inform the accused of his right to give evidence under oath from the witness box in which case the accused will be cross examined and may be asked questions by the court or his right to make an unsworn statement from the dock in which case the accused is not liable to be cross examined or the accused may also elect to keep quite. The court is then required to find out from the accused whether he wishes to call witnesses or other evidence in his defence.
13. The leaned trial magistrate did not inform the Appellant of his rights under the section under consideration and that violated his Constitutional right to a fair hearing as envisaged under Article 80 of the Constitution and in particular (2) (i) to (l). For this reason, the requirement not merely being procedural in nature but has constitutional underpinning failure to observe the statutory requirement rendered the trial defective *ab initio.* We accordingly declare the case was a mistrial quash the conviction and set aside the sentence.
14. Regarding whether to order a retrial or not the law is settled as to what the court should consider before making an order for retrial. There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic H.C. Criminal Appeal No. 223 of 2003.** They are as follows:

"**In the case of Ahmed Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-**

'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.'

The Court continued at the same page at paragraph II and stated further:

> "We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:

> "There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

15. The principles applicable are very clear. Before a retrial is ordered the court must consider whether a conviction may result if the same evidence is presented before the court at the retrial. In that regard we have considered the evidence which was adduced before the trial court. It was the evidence of 3 eye witnesses. That evidence clearly established that an offence of robbery with violence contrary to section 296(2) of the Penal Code was not proved. This is because it was clear the Appellant acted on his own. He was not accompanied by any other person neither was he armed during the commission of the offence. The evidence cannot therefore sustain a conviction for the offence preferred.
16. Regarding whether it will be in the interest of justice to order a retrial. The Appellant was arraigned in court on 13th October, 2008 that was five years ago even if in the wildest stretch of imagination we were to order the Appellant to be charged with Robbery contrary to section 296(1) of the Penal Code he would have served a substantial part of the sentence for which he will be liable to face were he convicted for that offence. We are satisfied therefore that it would cost the Appellant extreme difficult if we ordered a retrial in this case. It is our view that a retrial will not serve the interest of justice. We therefore decline to order the same.

17. Having come to the conclusion we have in this case. We order that the Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE

W. MUSYOKA

JUDGE