



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 6 OF 2011

(J.A. MAKAU AND W.M. MUSYOKA JJ)

ROSEMARY NKATHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant in this matter was charged in Meru Chief Magistrate's Court criminal case number 1380 of 2010; on one count of robbery with violence contrary to **section 296(2) the Penal Code**. She was tried and convicted of the offence by Hon K W Kiarie, Senior Principal Magistrate, on 14th February 2011. The appellant appeals from conviction and sentence of death for robbery with violence.
2. The factual background of the case is that the appellant was in a group of five that confronted the complainant. She was identified by the complainant as the person who removed a phone and money from her clothes. There was a police officer nearby, to whom the complainant reported the matter. The officer gave chase and arrested the complainant. It is said that there was sufficient light at the time and therefore there was no difficulty in the identification of the appellant..
3. The appeal raises a number of grounds. We have, as is our duty as a first appellate court, gone through the record, and evaluated the material placed before the trial court as against the grounds of appeal filed in this matter and the submissions made at the hearing by both Mr Riungu, counsel for the appellant, and Mr Mungai for the state. Both were agreed that on one occasion, the trial proceeded in the absence of the appellant. The state conceded the appeal on that ground and urged us to order a retrial.
4. We have noted from the record that when the matter came up for trial on 29th December 2010 and 31st January 2011 the matter proceeded and evidence was taken from witnesses. Of concern is the recording of the coram. It indicates that the appellant was in custody. Counsel have interpreted this to mean that the appellant was not present in court when evidence was recorded. We are of a contrary view. We believe that the appellant was in court, and what the record seeks to show is that she was in court, but that she was in custody as opposed to being out on bond. The record of 31st January 2011 shows that she did in fact cross-examine one of the witnesses. She could not possibly have done that in absentia.
5. We must however concede that the recording of the coram on those two dates was not without confusion. The wording is not accurate. It is open to a variety of interpretations, and it is matter in respect of which we hold that the appellant did not receive a fair and proper trial.

6. There is also another issue which counsel did not raise. The record does not indicate whether the appellant was given opportunity to cross-examine PW 1 and PW 3. It is not indicated whether these two witnesses were cross-examined, or that the opportunity was availed but the appellant did not take it up. The omission would suggest that the appellant was not given a chance to confront her accusers. .

7. Cross-examination of prosecution witnesses affords an accused person an opportunity to confront his accusers. A breach of the rule relating to cross-examination is fundamental. To our mind this is a fundamental breach in the criminal process which should vitiate the trial if the testimonies in question are of crucial witnesses.

8. In this case, PW 1 was the complainant, while PW 3 was the officer who arrested the appellant and the only other eyewitness. They were crucial witnesses against the appellant. The alleged robbery was allegedly committed against PW 1, and it was her who pointed out the appellant to PW 3 as the person who robbed her. It was the appellant's fundamental right to confront these two witnesses. **The Constitution** guarantees this right in **Article 50(2) (k)**, to challenge and adduce evidence. The failure by the trial court to have these two critical witnesses cross-examined by the appellant makes nonsense of the constitutional provision in **Article 50(2) (k)**. We hold that the failure to indicate whether the appellant was afforded opportunity to cross-examine the said witnesses totally vitiated the trial against the appellant.

9. The trial of the appellant was fundamentally flawed for the reasons given above, and a conviction founded on such a flawed process cannot, in our humble view, hold. There is therefore no need for us to consider the substance of the appeal. We allow the appeal on the basis of the fundamental procedural flaws, quash the conviction and set aside the sentence of death imposed on the appellant.

10. Mr Mungai invited the court to consider a retrial should the appeal be allowed. The principles governing the making of the order for a retrial have been stated in a number of cases. Sitati Ag J in **Koome vs. Republic (2005) 1 KLR 575**, summarised the principles that should guide the court in determining whether to order a retrial or not into five. That, in general a retrial will be ordered when the original trial was illegal or defective. That, a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial. That, it does not follow automatically that a retrial will be ordered where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. That, each case must depend on its own particular facts and circumstances. And that, an order for retrial should only be made where the interests of justice require it and it should not be ordered where it is likely to cause an injustice to the accused person. This decision followed earlier decisions, such as **Fatehali Manji vs. Republic (1966) EA 343** and **Aloys vs. Uganda (1972) EA 469**, where similar principles were stated. The foregoing clearly indicates that the power to order for retrial is discretionary and should be exercised judicially.

11. We are persuaded that this is a proper case for a retrial. There are several reasons that explain this view. One, the very serious nature of the offence that the appellant faced. Two, the fact of its prevalence in this part of the country. Three, the evidence on record appears to us fairly strong to require that the appellant explain herself. The matter shall be remitted to the lower court for retrial, to be conducted by a magistrate other the one who tried and convicted the appellant in the first instance. The appellant will appear before the Chief Magistrate Court at Meru On 2nd December, 2013 for plea taking. Meanwhile the appellant will remain in custody at G.K. Prison awaiting plea taking and further orders by the court.

J A MAKAU

W. M. MUSYOKA

JUDGE

JUDGE

Delivered, signed and dated on 3rd December, 2013 in open court at the High Court of Kenya at Meru.

