



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 52 OF 2010

PANGA ADMONGURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal arises from the decision of the Hon. Nyaga Resident Magistrate Kabarnet from the conviction and sentence of the Appellant for the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code.

On the 1st day September, 2009 at Sitale Village in East Pokot District within Rift Valley Province together with others not before the court being armed with dangerous or offensive weapons AK 47 Rifles robbed Alex Lopetel, Elgoi Omari and Lorieng Ekidor of 244 goats all valued at Kshs 300,000/=.

On the 9th April, 2010 judgment was delivered and mandatory sentence of death was meted out to the Appellant.

The Appellant being aggrieved with both conviction and sentence filed the appeal herein and listed seven (7) grounds of appeal as listed hereunder;

- (1) That I did not plead guilty at the trial.
- (2) That the learned trial magistrate erred in law and fact when he convicted me on prosecution case which was poorly investigated especially when they failed to conduct identification parade to execute (sic) any form of mistaken identity and to check whether PW1, 2 and 3 identified the Appellant and in what circumstance.
- (3) That the learned trial magistrate erred in law and fact when he relied on prosecution case which was uncorroborated in both material particulars and facts.
- (4) That your lordship the learned trial magistrate erred in law and fact when he convicted me without considering that there was no prompt report or names of the alleged thugs given to anybody in authority.
- (5) That the learned trial magistrate erred in law and fact when he convicted me without accounting that the prosecution failed to call some crucial witnesses especially those who is (sic) alleged to have recovered the goats from the Appellant.

(6) That your lordship the learned trial magistrate erred in law and fact when he convicted me without considering that there was no exhibit that I was photographed with.

(7) That your lordship the learned trial magistrate erred in law and fact when he convicted me while rejecting my alibi defense without any cogent reason.

At the hearing of the appeal the State was represented by Learned State Counsel Mr. Chirchir and the Appellant appeared in person.

The Appellant opted to put in written submissions in support of his appeal.

The State conceded the appeal mainly on the issue of identification of the Appellant and that key witnesses were not also called to testify so as to solidify the prosecution's case.

It was the Appellants contention that the investigations were poorly carried out and that the identification of the Appellant was flawed as no identification parade had been carried out to positively identify the Appellant as one of the robbers.

The Appellant merged grounds of appeal number 3, 4 & 5 and argued that the charge was defective as it did not contain all the elements and ingredients of the offence of robbery with violence. In that no mention is made to the use of force upon the complainants by the Appellant during the robbery incident.

The Appellant contends that Section 85(2) of the Criminal Procedure Code was contravened as the prosecutor was below the rank of Assistant Inspector of Police and the Appellant referred to the authority of **ROY ELIREMA –VS- REPUBLIC CR. APP 67 OF 2003** where the Court of Appeal held that prosecution of a criminal case by an unlawful prosecutor renders the proceedings nullity.

The Appellant also argued that the stolen goats were recovered and photographs taken of the same yet the said photographs were not produced in court as part of the evidence in support of the prosecution's case.

In the light of the above the Appellant prayed that the appeal be allowed that the conviction be quashed and the sentence set aside.

The Learned State Counsel Mr. Chirchir conceded the appeal on the grounds that from the evidence on record there had been no positive identification of the Appellant by the prosecution witnesses.

Counsel contended that it would have been difficult for PW1, PW2 and PW3 to identify the Appellant as they all adduced evidence that upon hearing gunshots each fled in different directions. The circumstances they were in were dire, shocking and frightening and it would have been impossible to properly observe the Appellant at length and to positively identify him.

Counsel further submitted that no identification parade was carried out and that the police ought to have carried out the same.

The prosecution also failed to call the Investigating Officer to testify and other key and important witnesses.

Counsel therefore conceded the appeal on these grounds and prayed that the appeal be allowed.

We have heard the submissions of Learned Counsel for the State and read the written submissions of the Appellant and we have also had the opportunity of perusing the Record of Appeal.

We find that this is not an appeal that warrants re-evaluating and re-examination of all the evidence on record so as to come up with an independent decision. See **OKENO –VS- REPUBLIC (1972) E.A 32.**

We have come to this conclusion in the light of the Appellant's submissions relating to persons qualified

to prosecute a criminal case. We have perused page 6 of the Record of Appeal and indeed find that the case was prosecuted by an unqualified person.

Section 85 and 88 of the Criminal Procedure Code sets out that person of the rank of acting Inspector of Police and above or an advocate of the High Court as persons qualified to prosecute criminal cases or persons appointed by the Attorney General.

In this instance we concur with the Appellant that Corporal Kirimi as set down in the Coram was a person not qualified to conduct the prosecution of the case. The Court of Appeal held in the case of **ELIREMA -VS- REPUBLIC CR. APP.NO. 67 OF 2003** that where prosecution of a criminal case is by an unqualified person the proceedings are rendered as a nullity.

We therefore find that the proceedings in the trial court were nullity. The appeal is hereby allowed and the Appellants conviction on the charge of robbery with violence is hereby squashed and the sentence set aside.

We find that this is an ideal case for retrial and we also find that there is sufficient evidence on record to support the charge that will warrant conviction of the Appellant.

We find that the Appellant will suffer no prejudice as the sentence that had been meted out by the lower court was that of death and he has only been incarcerated for a short period of two (2) years.

We hereby order that the Appellant and the case be referred back to the subordinate court of competent jurisdiction for retrial for the charge of robbery with violence contrary to Section 296(2) of the Penal Code and that the matter to proceed afresh.

Matter to be mentioned on the.....day of.....at the Chief Magistrates Court, Eldoret.

Dated and delivered at Eldoret this 29th day of March 2012.

F. AZANGALALA
JUDGE
CORAM:

A.MSHILA
JUDGE

Before: Hon. F Azangalala J, A Mshila J

CC: Oscar, Andrew

Counsel for Appellant.....

Counsel for Respondent.....

F. AZANGALALA
JUDGE

A.MSHILA
JUDGE