REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 116 of 2010

LAWRENCE KAMAU MUNGA……..…..APPELLANT
VERSUS
REPUBLIC……..…RESPONDENT
(From original conviction and sentence in Criminal Case No.1933 of 2008 of the Senior Principal Magistrate's Court at Naivasha – T.W.C. WAMAE, SPM)

JUDGMENT

Lawrence Kamau Munga, jointly with another, were charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Lawrence Kamau was convicted and sentenced to death while his co-accused was acquitted. Aggrieved by that conviction and sentence, he filed this appeal. The grounds of appeal are found in the petition of appeal and further grounds were adduced in the submissions filed by the appellant. The grounds of appeal can be summarized as follows:-

(a) The trial magistrate did not comply with Section 200 of the Criminal Procedure Code;

(b) That the court relied on evidence of a single identifying witness under difficult circumstances without warning itself of the inherent danger;

(c) That the prosecution evidence was contradictory.

The brief facts of the case are that Josephat Waithaka Mureu (PW1) was guarding his garage at Kiambogo, on the night of 31/10/2008. About midnight, he saw somebody walk to his garage and start removing the iron sheets which make the perimeter fence of the garage. He flashed his torch at the person and he saw Kamau, whom he knew before. Kamau was with two others. One of the people hit the torch and the people started beating him, seriously injuring him. They then threw him in a pit and left. He managed to crawl out and called for help.

PW2, Francis Mbuti Ngure who owns a shop at Kiambogo heard the shouts for help, went out and found PW1 seriously injured. PW1 immediately lost consciousness. He helped take PW1 to Elementaita Police Station and then to Nakuru Provincial General Hospital where PW1 was admitted for 1½ months. PW1 was examined by Dr. Wainaina who found that he had sustained deep forehead cut wounds, compound fracture of the skull, multiple cut wounds on both hands with amputation of the left thumb and left foot.

PW3, PC Adembi of Elementaita Police Post is the one who received the robbery report on 31/10/08, and

on 8/11/2008, he recorded PW1's statement while he was admitted.

When called upon to enter his defence, the appellant denied committing the offence; that he was arrested on 8/11/2008, on his way home for no apparent reason.

Mr. Nyakundi, the learned State Counsel conceded the appeal.

We have considered the submissions and the evidence on record. Upon perusal of the record of appeal, we note that N. Njuki, Senior Resident Magistrate, substantively heard the case and on 29/9/09, he ruled that the appellant together with his co-accused, had a case to answer. The court adjourned to enable the defence counsel to prepare for the defence. On 27/1/2010, T.W.C. Wamae (Senior Principal Magistrate) took over the matter and on 24/2/2010, the appellant gave his defence. The trial magistrate who took over the case did not comply with **Section 200** of the **Criminal Procedure Code**. The trial magistrate should have explained the meaning and effect of the section to the appellant so that he could elect whether the trial magistrate could proceed with the hearing from where the predecessor left, or the case starts afresh or he may have opted to recall a witness. Failure to comply with that section prejudiced the defence case and amounted to a mistrial we do not find any need to consider the other grounds as this one disposes of the appeal. We hereby quash the conviction and set aside the sentence.

Can we order a retrial? Over the years the courts have outlined the principles that courts will consider before ordering a retrial. In **Ahmed Sumar v Republic [1964] EA 481 at page 483,** the Court of Appeal stated as follows as concerns a retrial:-

"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….

We were also referred to the judgment in PASCAL CLEMENT BRAGANZA (3) Vs R (1951) EA 152. In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentiality admissible evidence a conviction might result, … Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interest of justice required it, and should not be ordered when it is likely to cause an injustice to an accused person."

Mr. Nyakundi submitted that the trial court relied on evidence of a single identifying witness under unfavourable conditions and failed to warn itself of the inherent dangers. After considering the evidence on record, we agree with Mr. Nyakundi's submissions and are of the considered view that the admissible or potentially admissible evidence is unlikely to result in a conviction and it will be an exercise in futility if we were to order a retrial. For that reason, we direct that the appellant be set at liberty forthwith. It is so ordered.

DATED and DELIVERED this 23rd day of July, 2012.

R.P.V. WENDOH
JUDGE

-

-

ANYARA EMUKULE
JUDGE

-

-

PRESENT:

The appellant – in person
Mr. Omwenga for the State
Kennedy – Court Clerk