



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HCCRA. NO.83 OF 2009

STEPHEN KINUTHIA.....1ST

APPELLANT
PAUL OGADA

AYUGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDE

NT

JUDGMENT

(1) Stephen Kinuthia (the first Appellant) and Paul Ogada Ayugi (the second Appellant) were jointly charged with **stealing goods in transit contrary to Section 279(c) of the Penal Code**. The particulars of the offence were that on diverse dates between the 7th and the 13th March, 2007 along the Nairobi/Busia Highway at unknown place, jointly with others not before the court the Appellants stole two containers serial No.TRLU 2527120 and CLHU 2262207 of twenty feet each loaded in a motor vehicle Reg. No.KAU 570H Trailer ZC 2673 make Renault Prime Mover containing assorted goods, all valued at KShs.11 million, the property of GEORGE OCHIENG OKELLO. Each of the Appellants pleaded not guilty to the charge and they were both tried, convicted and each sentenced to serve three years imprisonment. Being aggrieved by the conviction and sentence, the Appellants appealed to this court against the said conviction and sentence.

(2) At the hearing of the appeal, however, the State, represented by Mrs. Christine Gakobo, conceded to the appeal on the ground that the Appellants’ respective rights to a fair trial had been violated when the learned Magistrate who took over the proceedings from the learned Magistrate who commenced the trial failed to comply with the mandatory provisions of **Section 200 of the Criminal Procedure Code, sub-section (3)** of which requires the succeeding Magistrate to inform the accused person of his right to demand that any witness who had testified before his (the Magistrate’s) predecessor be re-summoned and re-heard. From the record, it is clear that on the 25th June, 2008 when S. M. Mungai, PM, took over the conduct of the trial from M. N. Gicheru, SPM, as required by section 200(3) aforesaid, the learned Magistrate did not at all inform the Appellants of their said respective rights and proceeded in hearing and recording the evidence of Michael Nzesya Kithome [P.W.2].

(3) The State, properly in my view, conceded to the appeal on this ground. This is because the subsequent proceedings and judgment occasioned procedural injustice to the Appellants. The succeeding learned Magistrate who subsequently convicted and sentenced the Appellants was denied the opportunity

of seeing and assessing Kandu David [P.W.1] who had testified before M. N. Gicheru, SPM, the first trial Magistrate. He could not therefore make a proper assessment on the demeanor of the said witness to determine whether or not he was truthful.

In these circumstances, I will allow the appeal and set aside the conviction and sentence.

(4) The only other issue for determination is whether the court should make and order that the Appellants be tried. In her submissions, Mrs. Gakobo stated that as the first Appellant has nearly completed serving his term, she would not be urging the court to order his retrial. As regards the second Appellant, however, Mrs. Gakobo submitted that having been heard granted bail and released on the 28th June, 2009 after having served only a month of his term, the court should order for his retrial particularly and there is strong evidence that would result in the second Appellant's conviction. Such evidence would establish that it was the second Appellant who took charge of the subject motor vehicle and two containers containing an assortment of goods all of which subsequently disappear without trace at the hands of the second Appellant who was unable to account for the same.

(5) Naturally, the second Appellant does not wish to be retried and in submissions through his learned counsel, Mr. B. N. Mung'ata, the second Appellant noted that the only reason the first Appellant has remained in custody is because he was unable to raise a surety but that fact should not be used so as to discriminate the second Appellant. Further, the other grounds of appeal include that there was insufficient evidence before the trial Magistrate for a finding on conviction to be made.

(6) The principles to be considered by the court in determining whether or not to order a retrial are now well settled (See Fatahali Manji - vs- Republic [1966] EA 353, M'Kanake - vs- Republic [1973] EA.67 and Mwangi -vs- Republic [1983] KLR 522)

In essence, a retrial will be ordered only where the interests of justice will be served. From the record, it is clear that this court granted bail to both the Appellants on the 22nd June, 2009 but despite the terms thereof being reviewed by the court in respect of the first Appellant on the 22nd July, 2010, he was unable to meet the conditions imposed by the court. The first Appellant has therefore remained in custody for that reason alone. In these circumstances, I am not persuaded that it will serve the ends of justice for the second Appellant to be discriminated against and be retried merely because he was able to secure his release by fulfilling the terms of bail imposed by the court. I therefore decline to allow the request by the State for the second Appellant to be tried.

(7) For these reasons, each of the Appellants be and is hereby ordered discharged and each of them is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and Delivered at Machakos this 7th day of April 2011.

P. Kihara Kariuki
Judge