



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HC.CRA NO. 28 OF 2010

LESIT & KASANGO, J.J.

(From: Original Criminal Case No. 961 of 2008 Maua ; P. W Macharia SRM)

**MAURICE MUTEMBEI
KAMBATHUKI.....APPELLANT**

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was arraigned before SPM's court at Maua charged with one count of Robbery with Violence contrary to section 296(2) of the Penal Code. He was found guilty and convicted for the offence and was sentenced to death.

We have perused the record of the proceedings in this case. The learned trial magistrate recorded the entire evidence of witnesses in the form of reported speech. The magistrate recorded the testimony of witnesses in third person stating what the witnesses said in examination in chief, in cross examination and in re-examination.

Part V of the Criminal Procedure Code provides for Mode of Taking and Recording Evidence in Trials. Section 197 makes provisions for the manner of recording evidence before a magistrate s. 197(1) thereof provides:-

“197. (1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner -

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;

(b) such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative:

Provided that the magistrate may take down or cause to be taken down any particular question and answer”.

The provisions of S.197(1)(b) are couched in mandatory terms. The magistrate is required under that section to take the evidence down in the form of a narrative. There is a reason the law requires the evidence to be recorded in form of a narrative. It is of supreme importance that the court records the testimony of the witnesses in the exact words used by them and as accurately as possible. It is only when the evidence is so recorded that it can be said that the record is accurate and that it reflects what the witnesses said in their evidence.

The records of the proceedings in this case do not qualify to be regarded as an accurate record of what the witnesses said in court. The words recorded can hardly be associated with the persons reflected as the ones who spoke them.

We find that the learned trial magistrate failed to comply with the procedural and mandatory provisions of the law. That failure to comply with mandatory procedural laws rendered the proceedings defective and therefore a nullity. Accordingly we set aside both the conviction entered against the appellant and also the sentence.

The question to decide is whether to order a retrial. The Court of Appeal has had occasion to consider when a retrial should be ordered and the principles which apply. Faced with a similar question, the Court of Appeal in the case of **David Kiplagat Bunei Vs. Republic Criminal Appeal Case No. 370 of 2006** observed:-

“We have considered the past decisions of this Court which includes the decision in the case of Richard Omolo Ajuoga V. Republic, Criminal Appeal Case No. 223 of 2003, in which several past cases were considered and fully analyzed as to what circumstances need to be considered before a re-trial is ordered. We have considered the decisions in the case of Pascal Ouma Ogolo V. Republic Criminal Appeal No. 114 of 2006 (unreported), Henry Odhiambo Otieno V. Republic Criminal Appeal No. 83 of 2005 (unreported) and the case of Bernard Lolimo Ekimat V. R., Criminal appeal No. 151 of 2004 (unreported). In the Ekimat Case, it was stated:-

‘There are many decisions on the question of when appropriate case could 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.

I have stated that this trial was defective for reason this court discharged assessors before the case was concluded therefore denying the accused a statutory right he was enjoying.’

The above case has set out the principle that should inform the court when deciding whether a retrial should be ordered. The interest of justice is the cardinal principle that should inform that decision. The other principle include a determination whether an order for retrial will occasion in justice or prejudice to the appellant; whether it will accord the prosecution an opportunity to fill up gaps in his evidence as the first trial; and whether upon consideration of the admissible or potentially admissible evidence a conviction may result.”

We are guided by the above authority. We have considered the circumstances of this case. The appellant was taken before the Maua SPM’s court for plea in this matter on the 8th April 2008. The offence was alleged to have been committed on the 16th April 2007. This matter was finalized on the 26th January 2010. From the foregoing the appellant has been in custody since being arraigned in court for only 2 years. It cannot be said that the appellant has been in custody for long and therefore we are satisfied that the accused will not suffer prejudice or hardship if the case is ordered to go for a retrial. Since there has also not been a long lapse between the times the offence was committed and the time that the case was finalized it is highly likely that the witnesses will be available for a retrial.

We are satisfied that the interest of justice requires that a retrial be ordered in this case. The offence is a serious one. The error which occurred in this case was by the court. The prosecution should not be made to suffer prejudice for a mistake it never committed.

We direct that there be a retrial of this case. We order that the accused should remain in custody until the 25th of May, 2011 when he should be presented before the SPM’S Court Maua for plea taking for the self same charges. The case should proceed to be heard by a magistrate other than P.W. Macharia.

Those are our orders.

Dated, Signed and Delivered this 19th May 2011

Lesiit, J

Judge

Kasango, M

Judge