



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 61 OF 2006

COSMAS MUGAMBI1ST APPELLANT
GILBERT KIRAITHE ASHFORD.....2ND APPELLANT
DENNIS KIMATHI NJIRU.....3RD APPELLANT
SILAS MUTEMBEI RIUNGU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From: Original Criminal Case No.220 of 2002 Chuka; A.N. KIMANI SRM)

JUDGMENT

The appellants were charged with another before the Chuka SRM court with 3 counts of offences. The first count the appellant and the others were charged with entering a dwelling house with intent to commit a felony contrary to section 305 (2) of the Penal Code. In the second count they were all charged with rape contrary to section 140 of the Penal Code. In the third count they were all charged with grievous harm contrary to section 234 of the Penal Code. The appellants were convicted. The 1st, 2nd and the 4th appellants were convicted in all three counts while the 3rd appellants was convicted in the 1st and 3rd count. The appellants were sentenced to 3 years imprisonment in the first count, and five years imprisonment in the 2nd and 3rd count. The sentences were to run concurrently. They were aggrieved by the conviction and sentences and therefore filed this appeal.

Mr. B. Gitonga represented the first and second appellant. The third and fourth appellants are at large having been granted bond pending appeal from which they subsequently absconded.

Mr. Kimathi conceded the appeal. It was the submission by Mr. Gitonga that at the beginning of the trial a police sergeant took the evidence of the complainant and PW 1 and that he was unqualified to do so and that the proceedings were rendered a nullity. Mr. Kimathi conceded the appeal on that ground and urged the court to order a retrial of the case on the basis that the interest of justice required a retrial of the case. Mr. Kimathi urged that the appellants had not served any substantial part of their sentence, that the evidence against them was overwhelming and that the offence committed was heinous.

The question that the court has to decide is whether a retrial should be ordered in this case. The principles that apply to such a case are now well settled.

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”.

I am guided by the principles set out in the above stated case. This offence was committed on the 13th January 2002. That is over nine years ago. The trial lasted four and half years having been concluded on the 28th April 2006. The prosecution has not indicated whether the witnesses will be available for the retrial. The charges were serious and the circumstances of the offences heinous. However the incident having taken place in the night and there being no evidence as to the form of lighting at the scene of crime, both in the house, and also near the river where the complainant claims she was dragged and raped it is not very clear that the circumstances of identification were conducive for correct identification. The eye witnesses all claim to have seen different appellants. None of them disclosed the light which aided them to identify the appellants.

The learned trial magistrate in his judgment made sweeping observations that the appellants were known to the complainant and the witnesses before this incident. He also stated in passing that torches were being used without being specific as to who used them, what was flushed with the torches and from which distance and also how bright the torch lights were.

Having considered all the circumstances and the evidence before the court I do find that an order for retrial will not serve the interest of justice because if the self same evidence is presented before the court it is unlikely to result in a conviction. Further an order for retrial will only serve to cause hardship to the appellants and will also cause further delay in disposing off this matter which has been in court in the last nine years. In the circumstances I decline to order a retrial. I will allow the appellants appeal, including for the appellants who are not before this court. I quash the convictions and set aside the sentences. For the appellants who absconded they should forfeit their bonds and be dwelt with in that regard by the Deputy Registrar of this court.

Dated, Signed and Delivered at Meru this 5th day of May, 2011.

**LESIT, J.
JUDGE**

