



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CR. A. NO.18 OF 2010

DENIS EGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of E.H. Keago R.M in Busia Criminal Case No.324 of 2008)

J U D G M E N T

The appellant Denis Ogesa, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was after a full trial, convicted and sentenced to death. He appealed against the conviction and sentence.

When the appeal came for a hearing, the State Counsel, Mr. Okeyo, conceded the appeal. He stated that the Appellant is shown in evidence before the court, to have been arrested as he committed the offence, at the scene of crime. The charge alleged that the appellant had robbed the complainant a sum of ksh4,200 together with shoes. A search had been conducted at the scene of crime immediately the appellant was arrested. However, the evidence from the complainant and his witness who were the people who arrested him as he committed the crime, revealed that the appellant was not in possession of any item. The evidence also indicated that the appellant had no weapon and that he was alone.

Although the same evidence also indicated that PWI, the complainant, had some injuries on his left knee, right leg and right knee, also had a fractured small finger, nevertheless, the evidence never indicated that the appellant had caused them or committed a robbery.

We have carefully perused and considered the evidence on the record. We are of the view independently, that the appellant never committed the offence he was charged with. We agree with Mr. Okeyo, on his decision not to oppose the appeal.

Mr. Okeyo suggested that this court should order a retrial because the evidence suggested that the appellant had committed a possible penal code offence. The appellant expressly indicated that he had no objection to a retrial.

We have considered Mr. Okeyo submission. We however, find it difficult to allow the request. We find, as Mr. Okeyo rightly pointed out, that there is no evidence on record to support a charge of robbery. Indeed Mr. Okeyo conceded to that claim. Since the appellant had not alternatively been charged with any other offence, this appellate court cannot order for a retrial of an offence which the lower court trial did not deal with. Otherwise the court could be usurping the role of the prosecutor who alone should have decided at the lower level what possible offence the investigated evidence supported. Put differently, a retrial can only be justified on the same tried offence which was mistried.

In the above circumstances this court quashes the conviction on the offence of robbery with violence, and sets aside the sentence of death against the appellant. That sets free the appellant forthwith unless he is otherwise lawfully held in prison.

We cannot also avoid noticing that the State will find it very difficult to freshly charge the appellant with any other offence on the same facts since that might find conflict with the principle of Autrefois Acquit included in section 279 of the Criminal Procedure Code.

We hereby make the necessary orders.

Dated and delivered at Busia this 28th day of June 2011

D.A. ONYANCHA

F. MUCHEMI

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