



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 188B OF 2008

**J. LESIIT, J
RAYFORD BUNDI**

NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of principal magistrate's court at Chuka; A.N. Kimani

JUDGEMENT

The appellant **RAYFORD BUNDI NJERU** was the second accused in the trial before the lower court. He faced a charge of stealing contrary to section 2745 of the Penal Code. Both the appellant and his co-accused were convicted of the charge and sentenced to 3 years imprisonment. The appellant's co-accused does not seem to have appealed from the decision of the lower court. The appellant raised four grounds in the Petition of Appeal as follows;

1. That the trial magistrate erred in law for the failure to comply with mandatory provisions of the Constitution and particularly Section 77 where the Appellant was not communicated in a language he understood during the taking of appeal.
2. That the trial magistrate erred in law in convicting the appellant in a charge that was not proved beyond reasonable doubt by the prosecution.
3. That the trial magistrate erred in law and fact in convicting the appellant wherein the essential ingredients of the offence were not proved beyond reasonable doubt.

4. That the trial magistrate did not comply with mandatory provisions of Section 211 of the Criminal Procedure code and therefore the trial was a flawed process in law.

I have carefully analyzed and evaluated the evidence adduced before the lower court and I have drawn my own conclusions. I am guided by the court of Appeal case of in the case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The appeal has been conceded by the state on a technicality that section 211 of the Criminal Penal Code was not complied with.

Mr. Mwanzia for the appellant raised issue of language that the learned trial magistrate did not indicate the language of the court at plea, and the language used by the witnesses.

I agree with that analysis of the proceedings. No where did the learned trial magistrate indicate the language in which the witnesses testified before her. This is a serious as it flouts procedural provisions of the law, i.e. S 198 (1) of the Criminal Procedure Code. It also flouts Section 77 of the former Constitution which gave an accused person the right to a fair trial and to interpretation to a language he understands.

The proceedings are defective on account of that omission. Before I consider the issue of retrial, I must delve into other points.

Mr. Mwanzia urged that there were two magistrates who heard this case. That the succeeding magistrate did not comply with section 200 of the Criminal Penal Code, therefore failing to give the appellant the right to choose whether he wanted the case started denovo, or proceed from where proceeding magistrate had left off.

I looked at the proceedings. The hand written proceedings show very clearly that the entire case was heard by Mrs. C.N. Ndumbi. The typed proceedings give a different picture, as in some pages it reflects that G.N Gesora took the evidence of some witnesses.

My only caution is to the learned magistrate to exercise diligence and observe ‘eye for detail’ as they certify proceedings for purposes of appeal. I am sure we are all aware of unscrupulous practice in some where litigants could steal court proceedings and create new ones complete with hand written and typed copies, all fake, for purposes of appeal.

Mr. Mwanzia and Mr. Kimathi did not have the benefit of seeing the handwritten drafts and so relied on the typed proceedings they had. The proceedings were otherwise heard by one magistrate to conclusion.

The other issue was raised by Mr. Kimathi that Section 211 of the Criminal Procedure Code was not complied with. Again there was apart of it which has to do with incorrect typing. The handwritten draft shows that a ruling was made under section 211 of the Criminal Procedure Code. The typed copy missed that out all together. The record then shows that the appellants made an election of how they wanted to give their defence. They chose to give sworn evidence. The appellant chose in addition to call two witnesses.

Even though the record does not reflect it, it is clear that the learned trial magistrate must have complied with the provisions of section 211 of the Criminal Procedure Code, as the appellants exercised their rights thereto. I find that no prejudice was suffered by the appellant.

Regarding a retrial the courts have considered this issue in several cases. 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 Ajuiga 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.”

Mr. Kimathi urged that the state would not ask for retrial on grounds the matter was civil in nature and not criminal.

I do not agree with the learned state counsel about the case being a civil matter. It is actually a criminal case. The complainant's goods kept in premises rented from the appellant dissevered from the stores. It was a prima facie case of theft.

A retrial will not be ordered unless the court is satisfied that the potentially admissible evidence would result in a conviction if it were presented at the retrial. In the instant case, I do not consider that a conviction would result. The evidence was clear that court was the appellant's co-accused who kept possession of the keys where the complainant's goods were kept, and who opened for the complainant every morning. The evidence at the trial was that the store had been opened with a key and had not been broken into. That being the case, it was the co-accused, not the appellant against whom the charges should have been preferred. That may explain why the co-accused, not the appellant against whom the charges should have been preferred. That may explain why the co-accused did not prefer a appeal.

Having considered all the relevant factors, I am convicted that justice does not require that a retrial be held in this case. Accordingly, I decline to order a retrial.

I will allow the appellant's appeal and quash the conviction and set aside the sentence.

Dated at Meru this 28th day of July 2011.

LESIT, J.

JUDGE