



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 692 OF 2011

LESIIT J.

KENETH KIMATHI NCOORO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING IN REVISION

This case was brought to this courts attention by the Magistrate in charge, Maua SPM's Court Mr. J. G. Kingori. In the covering letter the learned magistrate indicated that the trial court which tried the accused had failed to comply with section 162 and section 163 of the Criminal Procedure Code.

I have perused the record of proceedings of the lower court. The accused was arraigned before count on 3rd May 2010 with one count of Malicious Damage contrary to section 339(1) of the Penal Code. He faced a second count of escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code.

When the charges were read to the accused, he admitted both counts. He then admitted the facts as led by the prosecution. The accused then informed the court that he had mental problems. He was referred for psychiatric examinations and the results came out positive. The accused was confirmed to be mentally unstable.

The learned trial magistrate asked for a probation officers report which was swiftly provided. The learned trial magistrate then committed the accused to Mathare Hospital for rehabilitation for one year.

The accused was sent to the mental hospital. After expiry of one year the accused was returned to prison.

The prison authorities wrote to the court asking for directions on what to do with the accused. That is why the matter was referred to this court.

Mr. Mungai learned counsel for the state urged that after the accused was sentenced by the lower court the file should have been brought to this court for confirmation of sentence.

I have carefully considered this matter. Section 162 and 163 set out in full the various precedents the court should adopt once it realizes that an accused before it is a of unsound mind.

In the instant case the learned trial magistrate ought to have set aside the conviction entered against the accused the moment the Psychiatric Report confirmed him to be of unsound mind. This is for the simple reason that if the accused was of unsound mind at the time of plea, he could not have understood the

proceedings.

After setting aside the conviction, the learned trial magistrate should then have sought admission for the accused in a mental institution and or ordered for his treatment.

Thereafter once the accused recovered from his illness or in the opinion of a doctor he is found capable of standing trial, then the learned trial magistrate should have required the Attorney General to make an election as set out under S.163(2) of the Criminal Procedure Code. That sub section provides:

“163. (2) The Attorney-General shall thereupon inform the court which recorded the finding concerning that person under section 162 whether Inquiry by court as to soundness of mind of accused.”

In the instant case the learned trial magistrate failed overlooked the provisions of ss. 162 & 163 of the CPC. More importantly however, is the fact the learned trial magistrate, after entering a conviction against the accused ought to have passed sentence against him. The order he made committing the accused to Mathare Mental Hospital was irregular. The learned trial magistrate had no power to commit the accused to the mental institution after conviction was entered.

In the circumstances the entire proceedings before the court were defective. Accordingly I set aside the conviction and order committing the accused to the Mental Institution under S.364(a) and (b) and S.354(3) (a) (1) of the Criminal Procedure Code.

I have considered whether to order a retrial in this case.

There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic** H.C. Criminal Appeal No. 223 of 2003. They are as follows:-

“In the case of Ahmed Sumar Vs. Republic (1964) E. A. 481, at page 483, the predecessor to this court stated as follows:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

“There are many decisions on the question of what appropriate case would 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.”

The accused served sentence in this case, a whole 12 months. He has been in custody since completely the sentence for a period of six months. The charge the accused faced, if he were found guilty would have

been liable for imprisonment for five years in the first court and the two years in the second court.

It is my view that an order for retrial would cause the accused unnecessary hardship and would only serve injustice in the case. I therefore decline to the case. I therefore, decline to order a retrial. I order that the accused be released from prison forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2011

J. LESIIT
JUDGE