



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 59 of 2008

JULIUS MWAI KAROKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 60 OF 2008

FRANCIS MWARA KACHOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The two Appellants were jointly charged with one count of Arson contrary to Section 332(a) of the Penal Code and 3 counts of attempted murder contrary to Section 220(a) of the Penal Code before the Senior Resident Magistrate Court in Kerugoya. They pleaded not guilty on all the charges and the matter went to trial with the prosecution calling a total of 5 witnesses in support of its case.

After the close of the prosecution case, the learned trial Magistrate delivered the following ruling;

“ After going through the evidence on record, I am satisfied that a prima facie case has been established against the 2 accused. Alternative put them on their defence.” (sic)

This very brief ruling fails to indicate whether the accused persons had been placed onto their defence on all the 4 counts or whether they had been acquitted on any of the charges and if so why. The assumption one could make however is that they were placed onto their defence on all 4 counts because if this was not so, then the ruling would clearly indicate if there were any acquittals at that stage which should have been proceeded by a detailed informed ruling giving reasons for such acquittals.

When one goes to the Judgment however the opening words are as follows;

“ The accused persons are charged with the offence of Arson contrary to Section 332(3) of the Penal Code. They have also been charged with the offence of attempted murder, where they were not put on their defence.”

One wonders then, what happened to the 3 counts of attempted murder? At what point were they dropped and for what reasons? That was a serious flaw in the proceedings and Judgment and the Judgment failed to comply with the mandatory provisions of Section 169 of the Criminal Procedure Code. That notwithstanding however, the accused persons were convicted and sentenced to serve 10 years imprisonment each on count 1. Being dissatisfied with the said conviction and sentence, they filed this appeal. They have nonetheless been on bail pending appeal.

The learned state counsel conceded the appeal for the reason that the language used in the proceeding was not indicated. He nonetheless requested for a retrial.

On her part, counsel for the appellants resisted the request for a retrial saying that other than the issue of the language, they had proved other grounds that were sufficient to have the appeal allowed. I have considered these submissions along with the grounds of appeal relied upon.

The issue of the language on its own is sufficient to have this appeal allowed. The concession by the state is therefore in order. What therefore remains is for me to decide on whether a retrial would be tenable in the circumstances. A retrial would usually be allowed if the rest of the evidence is strong or overwhelming to support the conviction. The court would also consider whether the witnesses who testified before the trial court would be available to testify afresh. The court would not order a retrial where the evidence of the prosecution was weak and where they would just be looking for an opportunity to fill in the gaps in their case. The court would also consider whether the retrial would be prejudicial to the appellants.

I have considered the entire evidence adduced before the trial court. I have earlier on pointed out the flaws in the proceedings and Judgment that would call for its quashing. On the evidence itself the only eye witness is PW2. She said that the incident happened at about 4.00 a.m. She heard noises and took a torch. She said she saw both appellants outside. One was carrying a jerrican and the other struck a match stick. She did not say how far they were when she saw them, how intense the torch light was, or what were the circumstances prevailing at the time to make a flawless identification possible.

PW3 said he just saw the 2 at the gate as they left. He did not say how far he was from the gate or explain the circumstances prevailing at the scene that made the identification possible.

I am inclined to agree with counsel for the appellants that identification of the appellants was not foolproof. There are therefore other grounds other than the language issue which render the conviction of the appellants unsustainable.

I find their conviction unsafe. Accordingly, I allow this appeal in its entirety and quash the conviction and set aside the sentence imposed by the trial magistrate. There shall be no retrial as requested by the state. The appellants shall therefore be set at liberty unless they are otherwise lawfully held.

Delivered, signed and dated at Embu this 20th day of May 2010.

**W. KARANJA
JUDGE**

In presence:-

Appellants- Ms Wangeci for them and Mr. Wohoro for the state.