



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO.70 OF 2007

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 75 OF 2007

(Appeal from the judgement of Hon. A.K. Kaniaru – Principal Magistrate in Nkubu Principal Magistrate’s

Criminal Case No. 738 of 2005 dated 3rd May 2007)

MORRIS MUREGA.....1ST APPELLANT

TIMOTHY KIRIMI KIRUJA.....2ND
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – Irregularity – failure to explain to accused – his trial rights – S. 211 of the Criminal Procedure Code.

Criminal Practice and Procedure – Retrial – Trial a nullity not by fault of prosecution – Retrial ordered

JUDGEMENT

The Appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, and were convicted and sentenced to the penalty of death so prescribed by that Section. They both appealed to this court against both the conviction and sentence. These appeals were consolidated by order of court made on 29th July 2008.

At the hearing hereof both Appellants submitted ten (10) Supplementary Grounds of Appeal respectively which were admitted in terms of **Section 350 (v)** of the **Criminal Procedures Code, (Cap.75, Laws of Kenya)**. One ground common to both appeal was that the trial magistrate erred in law by failing to comply with the provisions of Section 211 of the Code, to the prejudice of the Appellants.

Section 211 of the Code requires the trial court to explain to the accused person the substance of the charge, where the Court finds that the prosecution has established adequate to call upon the Accused to his defence.

The provision also requires the trial court to remind the Accused Person of his rights to given sworn testimony and be subjected to cross-examination, or give an unsworn stamen and escape cross-examination, and also the right to call witnesses to testify on his behalf.

The trial court's record does not show any compliance with the said mandatory requirements of Section 211 of the Code. That omission in law constitutes a serious irregularity and renders the trial a nullity. This was realized by Mr. Kimathi, learned State Counsel who readily conceded to the appeal on this ground but asked for a retrial.

According to the case of M'KANAKE vs. REPUBLIC (1973) E.A 67, a retrial will not be asked for to fill gaps in the evidence, nor to rectify faults of the prosecution.

In this case, there is enough evidence to support a conviction. The Appellants were clearly identified by PW1 with the aid of her torch which she testified had brand new batteries, and the Appellants were 3 to 4 metres close to her, she could see them clearly. In addition the 1st Appellant had been drinking in her earlier in the day. It was easy to recognize him. The Appellants were also known to PW1, the question of mistaken identity would not arise.

PW3, who responded to the screams of PW1, was informed by PW1 that the Appellants had robbed her (PW1). PW2 also confirms in his testimony that PW1 mentioned the names of the Appellants when PW1 accompanied by PW3 went to inform him of the robbery. PW6, the investigating officer also confirms in his evidence that PW1 mentioned the Appellants names as the primary suspects, and it was 2nd Accused/ Appellant who had led him to recover another stole item, a radio. All that information was thus fresh in the minds of these witnesses and there is no likelihood of any explanation to fill gaps by the prosecution.

We consequently allow the appeal, quash the conviction, set aside the sentences herein. We however direct that the Appellants be retried before another magistrate and in the meantime they be remanded in custody.

We so order.

Dated, delivered and signed at Meru this 18th day of June, 2010

MARY KASANGO
JUDGE

M.J ANYARA EMUKULE
JUDGE