REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.110 OF 2008

CONSOLIDATED WITH

CRIMINAL APPEAL NOS.112 & 113 OF 2008

(From original conviction and sentence in Criminal Case No. 837 of 2005 of the Principal Magistrate's Court

at Nkubu – A.K Kaniaru (P.M) dated 3rd July, 2008)

STEPHEN RIUNGU NJERU.....1ST APPELLANT

ELIAS KAMUNDE KIRIMA.....2ND APPELLANT

CORNEUS MURATHI NJERU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – *when a retrial may be ordered – overwhelming evidence*

JUDGEMENT

The Appellants named above were charged with one count of robbery **with violence** contrary to **section 296(2) of the Penal Code,** and two counts of **attempted robbery** contrary to section 297(1) of the **Penal Code (Cap 63, Laws of Kenya).** The three Appellants were acquitted on Counts II and III of attempted robbery. They were however convicted and sentenced on the 1st count of the offence of robbery with violence. The penalty is death when found guilty. All the three Appellants have appealed to this court

against both their conviction and sentence.
The principal grounds in the Amended Grounds of Appeal by both the 1st and 3rd Appellants is that the trial court did not comply with the mandatory requirements of **Section 211 of the Criminal Procedure Code (Cap.75, Laws of Kenya) (the CPC).** The 2nd Appellant did not have a similar ground either in his original Petition of Appeal or the Amended Grounds of Appeal, but the trial having been conducted together, he has benefit of Section 211 of the CPC.Section 211 lays down that where the trial court at the close of the evidence in support of the charge, finds that the prosecution had made a case against the Accused Person sufficiently to require him to make a defence the court shall again-

(i) explain the substance of the charge to the accused person;
(ii) inform the accused persons of his right to give evidence on oath from the witness box, and that if he does so, he will liable to cross examination, or
(iii) to make a statement not on oath from the dock, and
(iv) Ask the accused whether he has any witness to examine or other evidence to adduce in his defence.

It is only after compliance with those requirements that the court *shall* then hear the accused and his witnesses and other evidence *(if any).*Section 211 (2) provides further that if the accused person states that he has witnesses to call but are not present in court, and the court is satisfied that the absence of those persons is not due to the fault or neglect of the accused persons, and that there is a likelihood that they could if present, give material evidence on behalf of the Accused Person, the court may adjourn the trial and issue process or take other steps, to compel the attendance of the witnesses.

The record (at p.27) sets out the Ruling of the learned trial magistrate. After stating that the prosecution had established a prima facie case, and that the accused had a case to answer p.31 of the record merely says, "Court, Defence hearing now". There is no record stating either compliance with the requirements of section 211 aforesaid, or any responses by or from the Appellants (Accused Persons). This is a breach of the Appellants' statutory rights and renders to trial not merely irregular but a nullity. Mr.Kimathi learned State Counsel was well directed to concede the appeals on this ground alone. His concession was however subject to caveat, that the courts do order a retrial of the Appellants.

The principles for ordering a retrial are now steeled. There must be overwhelming evidence and a strong likelihood of a conviction of the Appellants if they were retried. The retrial must not be used by the prosecution to fill gaps arising from its own fault or negligence. See the case of **NZIOKA vs. REPUBLIC (1973) E.A.91.**

We agree with Mr. Kimathi that the evidence against the Appellants was watertight. It was overwhelming. Both PW1 and PW3 had gone to purchase small quantities of sugar and tea leaves from the kiosk run by PW2. PW3 fell victim first to the attack by the Appellants. They took him to a nearby compound and told him to lie down. The accused went back, and attacked PW1 who had gone to purchases paraffin from the kiosk PW2.

The first appellant is the person who first attacked PW1 and stole Kshs. 340/= from him. The 2nd Appellant had been an employee for 4 months in the house of PW1. PW1 had struggled with 2nd Appellant, who had hit him with a metal bar, and PW1 had in turn cut him with a panga he had wrestled from the 1st Appellant. The Appellant was the brother of the 1st Appellant.

All the witnesses, *(PW1, Leonard Muthaura Gitonga)* the 2nd victim of the attack by the Appellants, PW2 *(Joyce Kathure Mutugi – the kiosk owner),* PW3 *(Julius Mugambi, the first victim of the attack by the Appellants)* were all affirmative that the Appellants had something *like a gun, a metal bar and a panga (all offensive and dangerous weapons).*All testified that there was moonlight and that there was a solar light from the kiosk. They not only recognized the Appellants, but that they also knew them well previously. In other words the circumstances for conclusive and positive identification of the Appellants were conducive and favourable.

We further agree with Mr. Kimathi that evidence of the child was not material, either to the prosecution

or to the Appellants. The child had gone back to asker her mother what the change would be out of Shs 200/= PW3 had given her only to return to the kiosk and find the buyer (PW3) had *"disappeared"* in the hands of the Appellants. We further agree with learned State Counsel that it was not necessary to call the first investigation officer whose portfolio had been taken over by his colleague, PW5. There were no gaps to be filled by his evidence, particularly as the Appellants were arrested by the citizens and frog- matched to the police station. Similarly there were no gaps to be filled by either Mwangangi, Kinyua, Cyrus and Domisiano who were merely the companions of PW4 who had heard noise from a nearby kiosk and went to inquire into the cause of the noise. There was no need to call such people. Their evidence would have been of neither benefit to the prosecution nor the Appellants. No prejudice can be said to have been caused to the Appellants.

In the premises therefore, we hold that there is overwhelming evidence against the Appellants and had it not been for the trial court's failure to comply with the requirements of Section 211 of the Criminal Procedure Code, the Appellants would have been properly convicted and sentenced. On account of that failure, great prejudice was caused to the appellants. The conviction is therefore quashed, the sentence set aside.

We however for reasons given order that there be a retrial of the Appellants before another magistrate, and pending such retrial, the Appellants shall be held in custody.
It is ordered.

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

M.J ANYARA EMUKULE
JUDGE