



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL APPEAL NO. 45 OF 2009

Lesiit & Kasango J. J.

MURIUKI IMUNYA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. Mr. N. E. Gitonga S. P.M. in Isiolo Criminal Case No. 1196 of 2008

delivered on 20th February 2005)

JUDGEMENT

The appellant was charged before Isiolo SPM's court with one count of Robbery with violence c/s 296(2) of the Penal Code. He was found guilty, convicted in the offence and sentenced to death. Being aggrieved by the conviction, he filed this appeal.

In his amended grounds of appeal the appellant challenged the conviction on the basis the evidence of identification by recognition was motivated by a grudge between him and the complainant and secondly that his alibi defence was improperly rejected.

Mr. Kimathi, learned State Counsel conceded to the appeal. The basis of his concession was that the learned trial Magistrate failed to record the language in which the evidence was given during the trial. Mr. Kimathi urged the court to order a retrial as the evidence before court, if presented at the re-trial, could lead to the conviction of the appellant.

We have subjected the evidence adduced before the trial court to a fresh analysis and evaluation, while bearing in mind that we neither saw nor heard any of the witnesses and giving the due allowance see **OKENO VERSUS REPUBLIC [1972] EA 32.**

We have confirmed from the proceedings that indeed the learned trial Magistrate did not indicate the language of the court, and or whether there was any interpretation used at the trial. That mistake and omission deprived the accused of his right to interpretation at the trial as envisaged under s. 77 of the (old) Constitution, and s.198(1) of the CPC s.198(1) of CPC provides it renders the trial defective. The question is whether we should order a retrial. A retrial can only be ordered if the appellate court is

of the considered view that a conviction is likely to result of the evidence available to the prosecution is presented at the retrial, among other considerations.

We have considered the evidence adduced against the appellant. We believe that the evidence is good and could lead to a conviction if it were adduced at a retrial. We say no more in order not to preempt the retrial.

We have also considered that the offence was committed in June 2008, just 2 years and 4 months ago. The appellant will not suffer any prejudice by reason of prolonged stay in custody, if a retrial is ordered.

Having come to the conclusion we have of this case, we set aside the conviction and sentence meted out against the appellant. We order that a retrial should be held in this case.

In further direction we order that the appellant be held in custody until 5th November, 2010 when he should be presented to the Senior Principal Magistrates Court at Isiolo for the taking of a fresh plea in this case and for retrial.

It is so ordered.

Dated, signed and delivered at Meru this 29th day of October, 2010

Lesiit, J
Judge

Kasango, M
Judge.