



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 137 OF 2009

ZABLON GITONGA KITOLE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeals against conviction and sentence against the judgment of Mr. Gitonga SPM in Criminal Case No. 27 of 2009 delivered on 1st July 2009)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The offence was said to have taken place between 24th and 25th August 2008. The trial of the appellant after he pleaded not guilty was commenced on 19th March 2009. The trial was before SPM M.R. Gitonga. As we have stated in previous judgments where the trials have been conducted by the honourable magistrate that the magistrate did not comply with the requirement of provision of an interpreter for the accused. We say so because throughout the trial, the learned magistrate did not indicate the language used by the witnesses for the prosecution who testified before the court. Article 50 of the Constitution provides that every accused person has the right to a fair trial which includes the right;-

“50 (M) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

Similarly, under section 198 (1) of the Criminal Procedure Code, the requirement of provision of an interpreter is stated. That section provides:-

“198 (1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language he understands.”

Bearing those two provisions in mind, the Court of Appeal in the case **Degow Dagane Nunow Vs. Republic NYR**, Criminal Appeal No. 223 of 2005 (unreported) had this to say:-

“.....It is the responsibility of trial courts to ensure compliance with these provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.....”

The learned state counsel in the hearing of the appeal by the appellant conceded to the appellant's appeal. The concession was due to the trial court's failure to indicate the language used by the witnesses. The learned state counsel however sought a retrial of the appellant. It was submitted that there was cogent evidence identifying the appellant as the robber. The learned state counsel submitted that the retrial of the appellant would be in the interest of justice. In considering whether to order a retrial, we place reliance on the case **Bernard Kariuki & 4 others Vs. Republic** Criminal Appeal No. 433 of 2007. The Court of Appeal in considering whether to order a retrial had this to say:-

“In Muiruri Vs. Republic [2003] KLR 552, this court held that as a general rule, whether a retrial should be ordered or not must

depend on the circumstances of the case and will only be ordered where the interests of justice require it, and if it is not likely to cause injustice to the appellant. The court also held that the nature of the defects in the original trial, the length of time which has lapsed since the arrest and arraignment of the appellant, who was responsible for the mistake leading to the order setting aside the conviction and sentence, and the nature of the evidence the prosecution is likely to rely on in support of the charge are also important factors to consider. These factors are not necessarily exhaustive. Each case has to be considered on the basis of its peculiar factors and circumstances.

It is only through a trial that it will be demonstrated that justice has been done both to the deceased's family and the appellants. In the circumstances of this case whether or not the evidence on record will be sufficient to sustain conviction is outweighed by the public interest to demonstrate that justice has not only been done but has been seen to be done."

We have examined the prosecution's evidence in the lower court and we are satisfied that if the same evidence is tendered, a conviction will more than likely follow. In our view, the prosecution will not use the opportunity of retrial to fill any gaps in the evidence. For that reason, and in the best interest of justice, we shall order the appellant to be retried. The appellant's appeal does succeed and the conviction of the appellant is hereby quashed and the sentence is hereby set aside. We order the appellant to be retried before Isiolo Magistrate Court by any other magistrate other than M.R. Gitonga SPM. For that purpose, this case shall be mentioned before Isiolo Magistrate's Court on 16th November 2010 with a view to the court giving date for the retrial of the appellant. In the meanwhile, we order the appellant to be detained in custody.

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

LESIT, J.

JUDGE

KASANGO, M.

JUDGE

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

In The Presence Of:

Kirimi/Mwonjaru Court Clerks

Appellant Present

Mr. Kimathi For the State

LESIT, J.

JUDGE

KASANGO, M.

JUDGE