REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 191 OF 2006

JOSEPH KAMAU NJERI……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant was charged with two counts of the offence of **robbery with violence** contrary to **section 296 (2)** of the penal code. The particulars of the first count state that on the night of 15th/16th December 2005 at Ndunyu-Njeru trading centre in Nyandarua District within Central Province, jointly with others not before court while armed with dangerous weapons namely an AK 47 rifle and pistols robbed James Njoroge Ngata of one pair of shoes, mobile phone make Samsung X460, 40 CD discs and cash Kshs 10,000/- all valued at Kshs 27,500/= and at or immediately before, or immediately after, such time of robbery threatened to use actual violence on the said James Njoroge Ngata.

The particulars of the second count state that on the night of 15th/16th December 2005 at Ndunyu-Njeru trading centre in Nyandarua district within Central Province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 and pistols robbed Naomi Wambui Ngata of mobile phone Nokia 2650 and cash Kshs 33,000/= all valued at Kshs 42,000/= and at immediately before or immediately after such time of robbery threatened to use actual violence to the said Naomi Wambui.

The appellant faced an alternative charge of **handling stolen goods** contrary to **section 322(2)** of the penal code. The particulars of the offence state that on the 16th day of January 2006 at Naivasha township in Nakuru District within Rift Valley Province, otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 2650 knowing or having reason to believe it to be stolen goods or unlawfully obtained.

The appellant was tried before the Senior Resident Magistrate Nyahururu, was convicted and sentenced to death for both counts. Being dissatisfied with the conviction and sentence, he appealed and in his petition of appea,l he has challenged the trial before the learned trial magistrate which he contends was not conducted according to the rules of natural justice and therefore was a breach of his fundamental rights. The appellant filed further grounds of appeal and written submissions which further fault the judgment of the trial court which the appellant contends was based on insufficient evidence especially the evidence of identification. The evidence adduced before the trial court was contradictory and inconsistent.

This appeal was opposed by the State. The learned State Counsel **Mr. Njogu** submitted that there was overwhelming evidence before the trial court by PW1 and PW2 who were the victims of robbery. When the robbery took place there was electricity light. The ordeal took about 45 minutes and the witnesses had ample time to identify the appellant as one of the assailants. Moreover PW2 was robbed of a mobile telephone, a nokia by make which was recovered from the appellant three weeks after the robbery. The appellant did not explain how he came to be in possession of this stolen item which was identified by PW2 who had the receipt. Counsel urged the court to uphold the conviction and sentence of the appellant.

This being a first appeal, we have re-evaluated the evidence before the trial court bearing in mind the principles set out in the case of **Okeno vs. Republic [1972] KLR 32**. Briefly stated, on 16th December 2005 **James Njoroge Ngatia (PW1)** and his sister **Naomi Wambui Ngatia (PW2)** were asleep when at around 1.30 a. m. they were awoken by people calling from outside and banging the window. PW2 screamed and put on the lights. The assailants started shooting in the air and also shot on the door and the windows of the house. The assailants forced their way into the house. They were armed with pistols.

PW1 testified that he was able to identify the appellant who was armed with a pistol. It was the appellant who hit him on the right side of the head demanding to be given Kshs 200,000/- or else they would kill PW1. The appellant placed the pistol on PW1 and threatened to shoot him. The robbers ransacked the house and took away the items stipulated in the charge sheet. They also demanded money from PW2 who gave them Kshs 33,000/=, a mobile telephone. The robbers also carried away a bicycle belonging to PW1.

PW1 reported the matter to the Police, and on 25th February 2006, he was summoned at the Engineer Police Station and informed that a suspect had been arrested with a mobile phone which he and PW2 had descried to the Police. An identification parade was held by **Chief Inspector Walter Kamau (PW6)** on 26th January 2006. Both PW1 and PW2 were able to identify the appellant. This matter was investigated by **PC Elphas Marete (PW3)**. Following information he arrested the appellant with mobile telephone make Nokia 2650 which matched the description of the telephone that was robbed from the complainant's herein. **Sgt. Erastus Maina (PW4)** is the one who booked the report. He testified that when the complainants made a report of the robbery they also gave the description of the assailants.

The police collected spent cartridges which were examined by **Alex Mwandawiro (PW5)** a firearm examiner based at the CID forensic laboratory Nairobi. He formed the opinion that the seven spent cartridges which he received for examination were expended from an AK 47 rifle or from a pistol or submachine gun.

Put on his defence, the appellant testified that on 9th January 2006, Police searched his house but did not recover anything except a mobile telephone make Nokia 1100 which he claimed was his own. The Police arrested the appellant and detained him in the Police Cells for two days but released him on Police bond until the 16th January 2006 when they raided his house took his TV and Kshs 71,000/= claiming they were stolen properties. He was taken to Kinangop Police Station where an identification parade was conducted and he was charged with the present offence.

Upon evaluation of the above evidence, the trial court was satisfied that the appellant was positively identified by PW1 and PW2. There was electricity light during the robbery. The robbery took about 45 minutes which gave the complainants sufficient time to identify the appellant. The appellant was also armed with a dangerous weapon which was confirmed because the cartridges that were emitted from the firearms were confirmed by a firearm examiner. There was proof that the robbery with violence took place. The appellant was accordingly convicted and sentenced to death.

We entirely agree with the findings by the trial court. However going through the proceedings before the trial court especially the proceedings of 27th June 2006, the court recorded that "***provisions of section 211 CPC complied with – accused replies unsworn statement***". After the appellant gave his unsworn statement the record shows that he was cross-examined by the prosecutor which is a procedural error and

is against the provisions of **Section 211 (1)** of the **Criminal Procedure Code** where it is provided as follows:

"***(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

In view of this oversight the appellant was prejudiced because he was not supposed to be cross-examined and therefore was not accorded a fair trial. In the premises the trial of the appellant was not in accordance with the provisions of the law and the entire proceedings and judgment of the trial court were vitiated.

The issue for determination is whether this matter should be referred for retrial. The Court of Appeal considered the principles to bring to bear when considering whether a matter should be ordered for a retrial. In the case of **Ekimat vs. Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** the Court of Appeal reiterated the principles that guide the court on whether or not to refer the matter for retrial as follows:

"***In the case of*** *Ahmed Sumar v Republic [1964] E.A. 481*, ***at page 483, the predecessor to this court stated as follows:***

'***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.'***

The court continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] E.A. 152.* ***In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.'***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

Bearing in mind the above principles and the evidence before the trial court the interest of justice in this matter requires the matter be referred for retrial for the following reasons that there is overwhelming evidence against the accused person which is likely to result to a conviction. It is about three years since the offence occurred. We accordingly allow the appeal, quash the conviction, set aside the death sentence and order a retrial. The appellant is to be charged before the Principal Magistrate, Nyahururu; this file should be returned to the Principal Magistrates court Nyahururu.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE