



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Appeal 187 of 2007

ALOISIO NJERU KAIMETI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

AND

CRIMINAL APPEAL NO. 188 OF 2007

ALED NJUE KAIMETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 189 OF 2007

MOSES NYAGA KAIMETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO.190 OF 2007

IRERI KAIMETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(CONSOLIDATED)

JUDGMENT

The four appellants are brothers. They were all jointly charged with Burglary and Stealing contrary to Section 304 (2) and 279 (b) of the Penal Code. They denied the charge and the matter went to full hearing with the prosecution calling a total of four witnesses. They were found guilty and convicted and each sentenced to four years imprisonment.

Before the prosecution case was closed the matter was handled by four magistrates. In the course of the taking

over by one magistrate from the other, some forgot to explain the provisions of Section 200 C.P.C. This amounted to a miscarriage of justice and on that ground, the learned counsel for the state conceded this appeal. I do not therefore need to go into the details of the evidence adduced. He nonetheless requested for a retrial. I have since gone through the proceedings of the trial court. I have noted that on 8/1/2007 when the matter was supposed to start denovo, the prosecutor informed the court that the complainant was not available to be recalled. The prosecutor is actually on record as having said that it was not possible for the other witnesses to be recalled. This being the case, the futility of ordering a retrial is evident. The witnesses will not be available to testify. The availability of witnesses is one of the key considerations before the court can order a retrial in a case. If the witnesses cannot be available, then a retrial would not be tenable.

Secondly, I have noticed that the appellants remained in custody for a period of about 2 years as the matter dragged in court (though in most instances the appellants were to blame for the delay).

Thirdly, they were sentenced to serve four years imprisonment on 13/12/2007. They have therefore served almost 1-½ years of that sentence. Ordering a retrial would in my view be prejudicial to them, as they have been incarcerated for over 3 ½ years.

In the interests of justice therefore, I find an order for retrial should not be made. In the circumstances, I allow the appeal in its entirety and order that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 11th day of June 2009.

In presence of: -All appellants and Mr. Omwega for State.