



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 48, 46, 47 & 53 of 2008**

JAMES GICHURU MBERIA APPELLANT

CRIMINAL APPEAL NO. 46 OF 2008

GEOFFREY NKUNJA MBORI APPELLANT

CRIMINAL APPEAL NO. 47 OF 2008

MARTIN MWENDA KIMATHI APPELLANT

CRIMINAL APPEAL NO. 53 OF 2008

ANDREW KIMATHI MWENDA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of A.K. Kaniaru P.M. Nkubu in Criminal case No. 32 of 2004 delivered on 15th day of April 2008)

JUDGEMENT

All the four appellants above were tried together in the lower court. All were charged with two counts. On the first count, they were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. On the second count they were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The learned trial magistrate convicted the appellants on the two counts. We have examined the learned magistrate said judgment and we have noted that the same did not comply with section 169 (1) of the Criminal Procedure Code. That section provides

as follows:-

“169. (1) Every such judgment shall, except as otherwise expressly proved by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”

The learned trial magistrate failed to put a date to his judgment as required by that section. That being so, that judgment is not valid for that failure. Having made that finding, we find that the appeal against conviction and sentence will be allowed. This is because the conviction by the lower court is vitiated by that failure by the trial court. The learned state counsel in his submissions at the hearing of the appeal of the appellants did seek for retrial. On retrial, the Court of Appeal has considered the principles that are to be applied. A retrial will normally be ordered as has been decided in previous cases in the following circumstances:-

- (1) If original trial was illegal or defective,*
- (2) If it is in the interest of justice,*
- (3) If it will not occasion injustice or prejudice to the appellant,*
- (4) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial,*
- (5) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally,*
- (6) Each case must depend on its particular fact and circumstances.”*

We are aware that in considering to order for a retrial, each case has to be decided on its own circumstances. We have considered the evidence adduced at the lower court and we are of the view that if the same was tendered a conviction might result. We are of the view that the prosecution will not have an opportunity to fill gaps in the evidence to secure conviction. Our judgment is that the appeal due to the mistake of the trial court does succeed.

1. We therefore hereby quash the conviction of the lower court against all the appellants and we set aside their sentence.

2. We order that all the appellants be retried before another magistrate at PM Court Nkubu other than A.K. Kaniaru PM.

3. For that purpose, we order that the appellant's case be mentioned in the said court on 14th December 2009 with a view to the retrial commencing. In the meanwhile, we order that the appellants be detained in custody.

Dated and delivered at Meru this 16th day of October 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE