REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 71 OF 2007

ROMANO MUTUGI KINYUA …….. APPELLANT

CRIMINAL APPEAL NO. 74 OF 2007

JOEL NYERERE KINYUA …….. APPELLANT

(An appeal against the judgment of A.K. Kaniaru PM in Nkubu Criminal Case No. 413 of 2004 delivered on 3rd May 2007)

JUDGEMENT

Both appellants were charged with the offence of robbery with violence contrary to section 296(2) on count 1 and on 2nd count they were charged with rape contrary to section 140 of the Penal Code. The appellants were convicted by the lower court on only on count 1 and they have filed this appeal against their conviction and sentence of death. The learned state counsel Mr. Kimathi conceded to the appeal on the basis that the lower court's trial was a nullity for having failed to abide by the provisions of section 211 of the Criminal Procedure Code. Section 211(1) (2) of the Criminal Procedure Code requires the trial magistrate at the conclusion of the prosecution's case to do as follows:-

"211. (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 a 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).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

The provisions of that section are mandatory and failure to comply with them renders a trial a nullity. Indeed that was the finding in the case of **Simon Muthee Murithi Vrs. Republic** High Court Criminal Appeal No. 162 of 2007 Meru where it was stated:-

"Lastly, the learned trial magistrate failed to explain to the appellant his rights under section 211 of the Criminal Procedure Code. This section is mandatory in its provisions. The court is mandated (shall) to explain to the accused again the substance of the charge and to inform the accused of his right to give evidence on oath from the witness box and to be cross examined and the right to call witnesses or adduce other evidence in their favour, or to make a statement not on oath from the dock."

Failure to explain the provisions of that section renders this trial a nullity. The lower court trial was vitiated by the error of the trial magistrate. The principles to guide us as we consider whether to order a retrial are well set out in various decided cases. A retrial will normally be ordered 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.,

In the case of **Hahindi Vrs. Republic** Criminal Appeal No. 270 of 2006 the Court of Appeal added the circumstances under which the court would consider whether or not to order a retrial. One such circumstance is the period that the appellant was taken into and has spent in custody. Such a period should be considered and in being so considered the court should determines whether witnesses would be traced in good time to mount a successful retrial. The appellant faced the charge of rape and the particulars of that charge were:-

"1. Romano Mutugi Kinyua 2. Joshua Mwebia M'Rintari 3. Joel Nyerere Kinyua. On the 1st day of February 2004 at N Village in Meru Central District within Eastern Province jointly with others not before court had carnal knowledge of PK against her consent."

Those particulars indicate that all the accused persons raped the complainant. The particulars suggest that all those men at the same time raped the complainant which is impracticable. The Court of Appeal so stated in the case of **Paul Mwangi Murunga Vrs. Republic** (2008) eKLR as follows:-

"The particulars of that charge were that on 2nd day of March, 2000 the appellant and one John Ndegwa Waswa who was the 2nd accused before the magistrate "jointly with another not before the court had carnal knowledge of* FWG *without her consent." This court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men cannot the same time "jointly" enter or try to enter her genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape. We accordingly allow the appeal as regards the charge of rape, quash the conviction recorded there on and set aside the sentence which the High Court had correctly ordered to be held in abeyance as the appellant had been sentenced to death on the charges of robbery."

Consequently, in view of that holding in that case, we cannot allow a retrial on the second count. However, on the 1st count of robbery with violence, we have reconsidered the evidence adduced and we are of the view that the evidence on record if re-submitted would lead to conviction. The prosecution in our view will not use this opportunity to fill in the gaps in the evidence because there are none. Having the appellant retried for the robbery charge in our view, would also ensure that justice would be done to the victim who suffered a violent robbery and rape. In our judgment therefore, we find that the appeal will be allowed. Our judgment is:-

1. We order that the conviction against the appellant be quashed and the sentence be set aside.

2. We order the appellant be retried only on the charge of robbery with violence at Nkubu Magistrate Court before another magistrate other than A.K. Kaniaru PM. The appellants shall appear before the said court for mention on 14th December 2009 and in the meanwhile, they shall be detained in custody.

Dated and delivered at Meru this 20th day of November 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE