REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Appeal 187 of 2008

DEDAN KARIUKI KIMATHI ……………………… APPELLANT

VERSUS

REPUBLIC ………………………………………….. RESPONDENT

(An appeal against the judgment of Hon. A.K. Kaniaru PM in Nkubu Criminal Case No. 1994 of 2004 delivered on 2nd October 2008)

JUDGMENT

The appellant was charged in the lower court with the offence of robbery with violence contrary to section 296(2) of the Penal Code in respect of the 1st, 2nd and 3rd counts. He was convicted as charged and sentenced to death. At the conclusion of the prosecution's case, the learned trial magistrate ruled:-

"***I have considered the evidence adduced. A prima facie case is well established against the accused. I rule therefore that the accused have a case to answer."***

The learned magistrate did not explain to the appellant the provisions of section 211 of the Criminal Procedure Code. Section 211(1) and (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 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 the trial a nullity a trial. 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 as stated before renders this trial a nullity. Although the learned state counsel submitted that a retrial should be ordered, we are of the view that a retrial cannot be ordered because it would lead to the appellant's prejudice. We say so because the charge which the appellant faced at the lower court was defective in that the particulars of the offence did not state that the weapons used by the appellant were dangerous. That is a requirement under section 296(2) of the Penal Code. That section is in the following terms:-

"***296. (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The particulars of the offence in the charge that the appellant faced at the lower court were as follows:-

"***1. Dedan Kariuki Kimathi***

2. …………………………

3. …………………………..

On the 13th day of August 2004 at Mitunguu Location in Meru Central District within Eastern Province, jointly with others not before court, while armed with an imitation gun, axes and pangas robbed JUSTUS GIKUNDA MUGAMBI cash Kshs. 12,000/= and one mobile phone make Siemen valued at Kshs. 6,000/= and or immediately before or immediately after the time of such robbery used actual violence to the said JUSTUS GIKUNDA MUGAMBI."

As can be seen from Section 296(2), it is essential that the particulars of the charge do indicate that a person was armed with dangerous or offensive weapon. Failure to state that renders that charge to be defective and the consequence of that finding is that the appellant's appeal would succeed. That was holding by the Court of Appeal in the case of **Juma Vrs. Republic** [2003] 2 E.A. The court held as follows:-

"***The charge referred to the appellant having been armed with knives but the particulars did not clearly state whether the knife was a dangerous weapon. Under section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument. The charge as laid was defective as it did not clearly specify the essential ingredients of the offence under section 296(2) of the Penal Code."***

Having found that, the charge that the appellant faced in the lower court was defective, the appellant's appeal must succeed.

Accordingly, the lower court's conviction is hereby quashed and the sentence is hereby set aside and we order the appellant to be set free unless he is otherwise lawfully held.

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

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE