



ALEX MWANGE KILONZO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2112 of 2005 of the Chief Magistrate's Court at Machakos by V. W. Wandera – Principal Magistrate)

JUDGEMENT

The appellant has come before us challenging his conviction and sentence for robbery with violence contrary to section 296(2) of the Penal Code. The appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal code and after full trial he was convicted and sentenced to suffer death hence this appeal.

The appeal was argued before us by Mr. Ondieki learned counsel for the appellant. He raised one fundamental issue that on 28th July 2005 when the appellant appeared before the trial court for his plea, the language was not indicated in the proceedings of that day. Mr. Ondieki advocate contended that the trial court never complied with the law at the time the plea was taken by failing to indicate in the proceedings the language the appellant opted to be used for the proceedings on the day the plea was taken. He stated that at the time of plea it is not enough to state the substance of the charge is read in a language the appellant is conversant with. In essence the failure to indicate the language in the proceedings is fatal to the proceedings and the plea that was taken on 28th July

2005. He therefore urged us to allow the appellant's appeal on that ground alone and set him free.

The State through Mr. Wangonde learned state counsel conceded to the appeal on the ground that the language that was used or that the appellant was conversant with was not indicated by the trial court on the date when the appellant first appeared before court for his plea. However, the State urged us to remit back the matter for retrial since the appellant was convicted for a very serious offence which carries mandatory death penalty. It is also the position of the State that there is enough and sufficient evidence to connect the appellant to the charges preferred against him. The State Counsel further argued that the complainant, PW1, PW2 and PW3 would be available for them to give evidence and that the mistake that was committed by the lower court should not be visited upon the State.

Mr. Ondieki learned counsel for the appellant objected to a retrial on the grounds that a retrial would cost injustice to the appellant and would prejudice the rights and interests of his client who has been in custody for the last five years. He also submitted that evidence on record is not sound as the prosecution alleges and that a retrial would give the State an opportunity to fill the gaps that are currently existing in the prosecution case.

As is our mandate we have considered the rival positions taken by the appellant and the respondent. First and foremost we agree that the trial or proceedings of 28th July 2005 was not validly conducted since the trial court did not indicate the language in the proceedings. We think that was a fundamental error which goes to the root of the proceedings and as a result we agree with the learned counsels who appeared before us that the trial court committed a fundamental mistake resulting in an incompetent proceedings. For that reason we allow the appeal, quash the conviction and set aside the

death sentence imposed by the trial court.

The question for us now is whether we should order for a retrial. The position taken by the State is that the prosecution witnesses are easily available and that there is sufficient evidence to sustain the conviction of the appellant upon a valid retrial. On the other hand the appellant contends that a retrial would result in an injustice since he has been in custody for a period of 5 years and that the evidence on record would not return a proper conviction on his retrial.

In deciding whether we should order for a retrial, we have a duty to weigh the scale of justice and ensure that both sides deserve what they are entitled to. The starting point is that the trial court upon evaluating the evidence tendered, convicted the appellant and sentenced him to suffer death. The appellant is urging us to overturn that conviction and set him free on the basis that the trial court committed a mistake in not indicating the language in the proceedings of 28th July 2005. In deciding whether we should order for a retrial we are guided by the principle that we have a limited powers to consider and evaluate the evidence tendered by the prosecution. At this stage we cannot make definite conclusion which would give a magistrate who would retry the matter a hint of our position and the direction which we would have adopted if we had the opportunity to reevaluate the evidence afresh. The principles that guide a retrial, whether we should order a retrial is whether the evidence recorded by the lower court is of such a nature as to lead to a probable conviction in the event a matter is remitted back for a retrial. Secondly, another guiding factor is whether the witnesses and exhibits if any will be easily found and available for a retrial to go on smoothly and without delay. Thirdly, it is whether or not the State may take advantage of the retrial to fill the gaps that may have existed in the first trial and would eventually prejudice the rights of the appellant. Fourthly, is whether a

retrial would end up prejudicing appellant who has spent 5 years in custody awaiting the determination of the allegations that were preferred against him.

Being guided by the above factors and being mindful of the fact that we have limited powers to analyze and reevaluate the evidence, we have considered the arguments that were presented before us by the parties in this case. Without giving conclusive and definite hints, we think the evidence on record is of such a nature as to lead to a probable conviction. The evidence of PW1, PW2 and PW3 makes a clear indication that if the three witnesses are found and the evidence presented before court is likely to return a verdict of guilty. We have been assured by the State Counsel that the witnesses and exhibits would be easily available. We have also been assured that the State has no intention of filling any gaps in order to sustain a proper case against appellant. We therefore think that it is in the interest of justice that we order for retrial since the evidence tendered by the prosecution is likely to lead to a proper and sustainable conviction. In our humble view it would be unfair to set free the appellant who committed very serious offence against PW1 and PW2. We also think that the time the appellant spent in custody awaiting his trial cannot be a basis to set him free before his matter is determined on merit. Public interest demands that all complaints, allegations and charges must be heard and determined on merit. For that reason we think the best option is to order for a retrial before another magistrate who would proceed with the trial on priority basis. And taking into consideration the amount of time the appellant spent in custody, we order that the retrial be heard and determined on an urgent and priority basis.

In the premises, we order that the appellant be taken before the Chief Magistrate or any other magistrate who is in charge of Machakos Law Courts for plea and for purposes of fixing an early hearing date within the shortest time possible. We direct the appellant

to appear before the Chief Magistrate Machakos Law Courts for plea on 18th December 2009.

Dated, signed and delivered at Machakos this 17th day of December, 2009.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE