



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 65 of 2006

PATRICK MATHENGE MUCHEMI:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

(From the original conviction and sentence in Criminal case No 2584 of 2004

in the Chief Magistrate's court at Eldoret by F.M MUCHEMI (CM)

J U D G E M E N T

PATRICK MATHENGE MUCHEMI the appellant in Eld. **HC.CRA.NO.65 OF 2006**, **JOSEPH EWI ETANAI** appellant in **Eldoret HC.CRA.NO.66 OF 2006** and **JAMES GICHURU NJOROGE** appellant in **Eld. HC.CRA.NO. 68 OF 2006** were charged with four counts of Robbery with violence contrary to S. 296(2) of the penal code before the Eldoret Chief magistrate (**F. M. Muchemi**) who found the three of them guilty on two counts and sentenced them to death. She also convicted the 3rd appellant to serve 5 years imprisonment for the reduced charge of stealing by person under S.279 (a) of the penal Code. The three being dissatisfied with both the convictions and sentences preferred the said three appeals. At the start of the hearing the three appeals were consolidated and ordered to be heard simultaneously. Mr. Magare who was representing the second appellant also held brief for Mr. Misoi for the 1st appellant and Mr. Omboto for the second. Mr. Omutelema the learned state counsel appeared for the state. He at the onset of the hearing told the court that he was conceding to the appeal as the provisions of S.200 C.P.C were not complied with by the 2nd magistrate who took over the trial. He however asked court to order for a retrial and said witnesses will be available.

Mr. Magare opposed the request for a retrial. He said trial before the lower court was fatally defective. He said during plea taking the appellant pleaded only to one count but there were four counts. All count should have been read to the appellants. It was not clear which court they pleaded to. This was a serious defect as they were acquitted in counts 3 and 4.

Further he submitted that the only evidence against the appellant was that of identification which was full of contradictions.

We have considered the submissions. A look at the record show that hearing started on 7th January,2005 before Principal Magistrate, a Mr. Macharia, Senior Resident Magistrate. He heard one witness on that day. On 8th February 2005 another witness was called to testify before him but he was stood down. On subsequent dates he heard three other witnesses. Apparently Mr. Macharia left the station thereafter and on 14th February 2006 F.M. Muchemi the Chief Magistrate ordered that the case do

proceed before another magistrate under S.200 C.P.C. The hearing proceeded before her on 11th July 2006 and it is clear from the record she did not comply with S.200 C.P.C. She did not explain the appellant he had a right to choose to recall witnesses or proceed from where the case had reached. This failure was prejudicial to the appellant and we concur with the state counsel that that failure was fatal and appeal should succeed on that score.

On the issue of retrial court has been told that witnesses are available. An Appellant court has the powers to order a retrial in an appropriate case. In the case of **BERNARD LOLIMO EKIMAT VS R. CR. A. NO.151 OF 2004**, the court of appeal stated:

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particulars facts and circumstances of that case but an order of retrial should only be made where interest of Justice require it.”

We have considered the facts and circumstances of this case. In the first place the appellant were arrested in early 2004. They have been in custody for four years now. Coupled with that we find the issue which was central to the case was that of identification. The offence took place at night. There were contradictions as to mode of light used to identify the appellant. Also there were contradictions between the witnesses over the identification parade. Infact, that is what led to the acquittal of the appellants in counts 3 and 4. There is therefore much doubt if the evidence of identification can stand the way it is.

It is because of the above reasons we feel that it would not be in the interest of justice to order for a retrial. In the circumstances we allow the appeal, quash the conviction and set aside the sentences imposed. The appellants be set at liberty forthwith unless otherwise legally held.

Dated and delivered at Eldoret this 21st day of February, 2008.

MOHAMMED IBRAHIM

JUDGE

KABURU BAUNI

JUDGE