



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 157 of 2005

STRIVESTER KITHIA NZALA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a judgment of A. N. Kimani P.M. Chuka, dated 24th June, 2006)

JUDGMENT OF THE COURT

The appellant, Sylvester Kithia Nzala was charged jointly with the 1st accused at the trial with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

According to the charge sheet laid before the trial court, the appellant and his co-accused are alleged to have jointly robbed Fredrick Njeru of a motor cycle Reg. No. KXW 072 valued at Kshs. 140,000/= and that being armed with iron bar at or immediately before or immediately after the time of such robbery they wounded the said Fredrick Njeru.

In the second count, the appellant was charged jointly with his co-accused in the lower court with assault causing actual bodily harm contrary to section 251 of the Penal Code. That on 28th May 2003 at Chuka Township, Meru South District they jointly unlawfully assaulted Janice Igoki thereby occasioning her actual bodily harm.

In the 3rd count both were once against charged with assaulting John Mugo on the same day at the same place, thereby causing him actual bodily harm. The 1st accused absconded while the hearing was pending.

After a full trial, the learned trial magistrate, A.N. Kimani Esq, found the appellant guilty of all the three counts, convicted him and sentenced him to death on the 1st count and to one year imprisonment in respect of counts 2 and 3. The court further ordered the latter two sentences to run consecutively. We want to point out here that the last two orders were erroneous. The one year imprisonment in respect of the last two counts ought to have been held in abeyance. See *Abdihussein V. R.* Criminal Appeal No. 47 of 2001. The offences charged in the last two counts were committed in the same transaction and the two

sentences ought to have been concurrent.

Being aggrieved, the appellant has preferred this appeal citing six grounds which we have condensed as follows:-

- a. That there was no proper identification
- b. That no exhibits were produced
- c. That the trial magistrate erred in rejecting the appellant's application to transfer the case to another court.
- d. That the appellant's defence was rejected without sufficient reason.

The appellant raised additional grounds at the trial to the effect that the case was prosecuted by an unqualified person; that the trial court did not avail to him the services of an interpreter; that it was irregular to impose custodial sentence simultaneously with death sentence; that the charge sheet was defective; that the appellant's constitutional rights were violated since he was not brought to court within 14 days.

In his initial argument, learned counsel for the respondent supported both the conviction and sentence. But when the court drew his attention to the fact that the case was prosecuted by an unqualified person, he conceded the appeal and did not press for a retrial arguing that the offence having been committed in 2003 he could not guarantee the availability of witnesses. He also submitted that a retrial may not result in a conviction as the trial court record was jumbled up.

We have considered these submissions and note that Sgt. Musila is shown on record to have acted as prosecutor when the plea was taken and subsequently led evidence of PW1. His participation in the trial was in contravention of section 85(2) of the Criminal procedure Code thereby vitiating the entire trial which we hereby declare a nullity. See *Roy Elivema Richard V R*, (2003) KLR 537. Having so found the only issue falling for our consideration is whether we should order a retrial.

As was stated in *Muiruri V. R.* (2003) KLR 552, generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. The court laid down the following principles:-

*"It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to illegalities or defects in the original trial (See *Zedekiah Ojondo Manyala V. Republic* No.57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts."*

The appellant urged the court to consider the period he has served. The appellant's trial began on 25th August 2003 and he has therefore been incarcerated for over 4 years, a substantial part of his life for no fault of his own. The irregularity concerning the appointment of an unqualified prosecutor was the fault of the prosecution. If the period the appellant has remained in incarceration is anything to go by then a retrial is likely to take another lengthy period.

We have considered the entire circumstances of this matter and we do, with respect, agree with counsel for the respondent that a retrial is not desirable here. Learned counsel categorically confirmed that prosecution witnesses may not be available.

What we are saying in a nutshell is that we are not inclined to order a retrial. In the result this appeal is allowed, the conviction of the appellant quashed and sentence set aside. The appellant is set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Meru this 8th day of February 2008.

I. LENAOLA

JUDGE

W. OUKO

JUDGE