REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 91 & 91B of 2006

STEPHEN MUSYOKA MUTUA……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

AND

CRIMINAL CASE 91 'B' OF 2006

JOHN KINYUA MURIITHI……....…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original Judgment and sentence in Criminal Case No.1148 of 2005 of Senior Resident Magistrate's Court at Siakago by F.M OMENTA SRM.)

(CONSOLIDATED)

JUDGMENT

The two appeals were consolidated for purpose of hearing the same having arisen out of the same Trial. There was an issue as to whether the first appellant Stephen Musyoka Mutua, was over 18 years when the offence was committed. After inquiry and the medical report on the assessment of age the first appellant confirmed that he is now 20 years and therefore at the time the offence was committed he was over 18 years. When the hearing of appeal commenced Mr. Omwega for the Republic informed the court that he was conceding the appeal on grounds that the language used in the proceedings was not indicated and the 2nd appellant was convicted on evidence of an accomplice and further more the evidence which led to discovery of items fell under Section 31 Evidence Act which was repealed under Act 5 of 2003 became admissible. However the state counsel requested for a retrial order in respect of first Appellant on the ground that the evidence on record was sufficient to sustain a conviction. He was identified by the complainant, he knew him and it was evidence of recognition. The complainant also gave the name of this appellant.

The offence was robbery contrary to section 296 (2) Penal Code and the particulars was that both appellant being armed with offensive weapon, namely a stone, jointly robbed J M Mcash 100/= and ¼Kg of sugar, paraffin and some fruits all valued at Shs.187.50 and at or immediately before or after the time of such robbery used actual violence to the said J M M. There was an alternative charge of indecent

assault contrary to section 144 (1) Penal code. At the trial PW1 the complainant did not mention the identity of second appellant and none of the other witnesses knew the 2nd Appellant. But he was arrested because PW5 informed members of public that he was involved. However the evidence in connection with his arrest and recovery of items stolen was inadmissible under evidence Act as amended. It is evident also that Appellant No. 1 is the one who led to his house. In the circumstances we agree with state counsel that such evidence cannot sustain a conviction. The state counsel urges the court to order a retrial in suspect to first appellant on the ground that although on 28/12/2005 when the trial commenced the Trial Magistrate did not record the language used, there was overwhelming evidence against the first Appellant sufficient to sustain a conviction. The issue of the language is a constitutional right. Section 198 Criminal Procedure Code requires that criminal proceedings be conducted in a language an accused is able to understand. Therefore the Trial Court must indicate the language used to remove any doubt. Section 77 of the constitution Subsection (b) requires that an accused shall be informed as soon as practicable in a language that he understands in details, of the nature of the offence with which he is charged. Subsection (f) thereof an accused person shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge. Therefore it is a violation of the rights of an accused person to fail to comply with these provisions. In these proceedings it is not shown what language was used when the proceedings commenced on 28/12/2005. The evidence against the first Appellant was given by the complainant who said that on 15/6/2005 at 5.45 p.m. she was walking homewards carrying some items she had purchased and her handbag. At about 6 p.m. she met Musyoka, first appellant. Before she could talk to appellant Number one, she was hit from the other side by another person. She did not identify this other person. She fell down unconscious. When she came to the following day she found herself lying down in a ditch by the road side. She managed to get to her home and with the assistance of her relatives she was taken to hospital. She talked to her brother and told him that one of her attackers was Musyoka first Appellant. She said she was hit by the other man she could not identify. She further said it was first appellant who raped her. She gave his name as Musyoka Beth.

PW5 gave evidence, he was a P.C attached to Langata Police Station on Traffic duties. After being given the name of first Appellant he sent for the arrest of the Appellant by the chief. On the arrest of the first Appellant he (the first appellant) said he had assaulted complainant with Robert Kinyua and he could take them to his home. Now the confession of the first Appellant was inadmissible. The disclosure that the second Appellant was involved was evidence of an accomplice and could not have been used to convict the 2nd Appellant. In his sworn statement the first Appellant admitted that he knew the complainant although he had not seen her on 15/6/2005 and he denied the charge.

On the issue of retrial the appellate court should not order a retrial unless it is of opinion that conviction might result. That was stated in the case of ***Braganza Vs Republic 1957 EA 152***. In the case of ***Kinyato vs Republic Civil Appeal 100/85 CA and Njoroge Vs Republic C.A 35/83*** the question of Section 77 (2) (f) of the constitution was considered. The court was of the opinion that the trial was unsatisfactory and ordered a Retrial. It was held that the fairest and proper order to make where an accused has not had satisfactory trial is to order a retrial. See the case of ***Republic vs Dossant 1946 EA CA B 150.*** The instances where the retrial has been ordered is where circumstantial evidence has not been considered, sworn statement not considered. Section 354 (3) the court has discretion to be exercised judicially as was stated in the case of Muhsiri & others vs Republic 1950 17 EA CA 128. However, it is not proper to order retrial where there is insufficiency of evidence or to allow the prosecution to fill up the gaps even where the mistake is not the fault of prosecution. Each case has to be decided on its own facts and the interest of justice without any injustice being caused to the accused. In this case the complainant said that it was the second appellant who hit her on the side of her head. She was about to talk to the first appellant who was known to her. After she was hit she fell down and became unconscious for a long time. She did not come to know what happened thereafter. The goods which were stolen were recovered in the house of second appellant. In the circumstances the interest of justice demands that the first Appellant be set free. The trial was not defective or a nullity or irregular except in the omission to indicate the language used and the appellants did not raise the issue showing they were not prejudice by the conduct of the proceedings. It is just that both appellant should be treated equally.

The state having conceded this appeal we order that the both appellants be set at liberty forthwith

unless otherwise lawfully held. We do not order retrial for the first appellant.

Dated this 7th day of March 2008.

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J. N. KHAMINWA

JUDGE

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M.S.A MAKHANDIA

JUDGE