



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 280 of 2007

JOSEPH MWANGI WANJIKU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Principal Magistrate's Court at

Murang'a in Criminal Case No. 3230 of 2006 dated 25th September 2005 by J. Gathuku – R.M.)

J U D G M E N T

Joseph Mwangi Wanjiru was found guilty of the alternative count of Handling stolen goods contrary to section 322(2) of the Penal Code and the second count of being in possession of an offensive weapon contrary to section 89(1) (3) of the Penal Code. He was convicted and sentenced to 3 and 7 years respectively on the two counts.

It is against the conviction and sentence aforesaid that he now appeals to this court.

When the appeal came up for hearing Ms Ngalyuka learned counsel for the state conceded this appeal and did not seek a retrial. Learned counsel conceded the appeal for the reason that section 200 of the criminal procedure code was not complied with by Mr. J. Gathuku, the incoming trial magistrate.

I have perused the record of the lower court and have confirmed that the original trial magistrate seems to have ceased exercising jurisdiction in this case after 17th May 2007 when she wrote a ruling on no case to answer and had it delivered on her behalf by J. G. Gathuku Esq. Mr. J. G. Gathuku Esq. R.M. then took over the case. However, he failed to comply with the provisions of section 200(3) of Criminal Procedure Code. Section 200(3) of the Criminal Procedure Code is in these terms:-

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

See also the case of Kariuki v/s Republic [1985] KLR 504.

This is a mandatory requirement and failure to comply with it renders the trial defective and a nullity. Accordingly I declare the proceedings a nullity and quash the conviction and set aside the sentence.

Ms Ngalyuka submitted that the state was not seeking a retrial on the basis that the evidence on record was scanty. The Appellant on his part relied on his supplementary grounds of appeal which in actual fact were written submissions to oppose a retrial. In those submissions he stated that there was no evidence to support the charge and further that the evidence tendered was doubtful and contradictory. There was no evidence that the house in which the stolen items were recovered was solely occupied by him or that the toy pistol allegedly recovered was indeed a toy pistol.

I have carefully perused the record of the trial court's proceedings and re-evaluated the evidence.

The issue of a retrial is quite simple. No order for retrial should be made unless the appellate court is of the opinion that on proper consideration of the admissible evidence a conviction might result. See *Mwangi v/s Republic* 1983 KLR 522. Having re-evaluated the evidence on record, I find that there was no iota of evidence connecting the Appellant with the two charges. The complainant in the charge, PW1 testified that she never saw the appellant rob her. The reason of the appellant's arrest is clearly explained by the entire police team who were informed of the presence of suspicious characters in the neighbourhood by informers. Acting on the information they proceeded to a house and forced it open. They found the appellant therein. A search was then conducted and items allegedly stolen from PW1, two months earlier recovered. However the appellant was not the only tenant of the house. To say the least, the reason for the appellant's arrest had nothing to do with the robbery on PW1. It was motivated by suspicion. To order a retrial would in my view be compounding travesty of justice.

Even without going into any further details, it is sufficient for me to state that for reasons I have stated herein above I find that the interests of justice will not require an order for a retrial and that making such an order

will cause the appellant injustice. I decline to order a retrial and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of September 2008

M. S. A. MAKHANDIA

JUDGE