



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 759 of 2003

(From original conviction and sentence in Criminal Case No.683 of 2003 of the Principal Magistrate's Court at Thika –Betty Rashid - PM)

MARTIN THIONG'O HUNYU.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was tried and convicted by the Principal Magistrate's Court, Thika on one count of store breaking and committing a felony contrary to Section 306 (a) of the Penal Code as well as one count of house breaking and stealing contrary to Section 279 (b) of the Penal Code. He was sentenced to 2 years imprisonment on each count plus 4 strokes of the cane on each count as well. The sentences were ordered to run concurrently.

Following his conviction and sentence, the Appellant appealed to this Court on various grounds set out in the Petition of Appeal drawn and filed by Messrs Mbiyu Kamau & Company Advocates on behalf of the Appellant. It is not necessary for purposes of determining this Appeal to revert to those grounds of Appeal.

When the Appeal came up for hearing, Mr. Ikol, Learned State Counsel conceded to the same on a point of law. The point of law taken up by Mr. Ikol was that the language of the Court and in which the witnesses and the Appellant testified was not indicated in the record of the trial Court and accordingly the trial was a nullity. Basing his submissions on the recent Court of Appeal decision in the case of **SWAHIBU SIMBAUNI SIMIYU & ANOTEHR VS REPUBLIC, C. A. 243 OF 2005 (Kisumu)** (*unreported*), Counsel invited me to hold and declare that the proceedings were a nullity and accordingly allow the Appeal and set aside both the conviction and sentence.

Counsel then urged me to consider ordering a retrial on the grounds that the evidence adduced against the Appellant was overwhelming and consistent. That the Appellant had all along been on bail pending Appeal and accordingly would suffer no injustice or prejudice in the event of a retrial.

Mr. Kamau, Learned Counsel opposed the request for a retrial on the grounds that the Appellant will suffer prejudice. That the evidence adduced in support of the charges was scanty, contradictory and inconsistent and that the case was not proved beyond reasonable doubt.

I have carefully perused the record of the trial Magistrate and its true that nowhere in that record is the language of the Court or in which the witnesses testified indicated. The omission by the Learned Magistrate flies in the face of the provisions of Section 77 (2) (b) and (f) of the Constitution as well as Section 198 of the Criminal Procedure Code. Breach of the said provisions of the law would result in automatic nullification of the trial. In essence that was the holding in the case of **SWAHIBU SIMIYU SIMBAUNI (SUPRA)** referred to by the Learned State Counsel.

The Court of Appeal decisions are binding on this Court. As I am satisfied that there was a breach of Section 77 (2) (b) and (f) of the Constitution and Section 198 of the Criminal Procedure Code during the trial in the subordinate Court, I will accordingly hold that the proceedings were defective. In the premises I allow the Appeal and set aside both the conviction and sentence.

On retrial, I am aware that the principles applicable in determining whether to order a retrial are now well settled. An order for retrial should not be made if it will not be in the interest of justice, will cause the Appellant injustice or to suffer prejudice, see **MANJI VS REPUBLIC (1966) EA 313**. Whether or not an order a retrial ultimately depends on the circumstances of each case. See **AHMED JUMA VS REPUBLIC (1964) EA 481**. However, the most important consideration is that before making an order for retrial the Appellate Court must be satisfied on consideration of the admissible and potentially admissible evidence that a conviction would most likely result – see **MANJI VS REPUBLIC (1983) KLR 522**.

Having considered the evidence on record, I am satisfied that if the self same evidence was to be tendered at the retrial, it is unlikely that a conviction may result. The Complainants did not establish the ownership of the premises that were allegedly broken into by the Appellant. Whereas PW1 testified that the premises belonged to their late mother, PW2 also a Complainant on other hand testified that the premises belonged to their father. Further PW1 stated that the coffee allegedly stolen belonged to their mother who was by then dead. If that be the case could PW1 and PW2 rightly claim to be the Complainants? It is clear to me that there is a family discord between the Appellant and his two siblings. It all has to do with a succession case pitting the Appellant as against the Complainants, and the Criminal case was merely brought against the Appellant to settle scores and so that perhaps the Complainants can gain some mileage.

I also note that the Appellant was first brought to Court over the charges on 5th February, 2003. It was not until 5th August, 2003 that the case was concluded. The case has therefore been hanging around the Appellant's neck for the last 3 1/2 years or so. If a retrial is ordered, it may take another 2 or so years to be concluded. This is not a short time for someone to wait for justice. The Constitution provides for a trial to be conducted and concluded within a reasonable time. If a retrial was to be ordered in the circumstances of this case, it will obviously offend the provision of Section 77 of the Constitution of Kenya in so far as it relates to cases being heard within reasonable time. It matters not that the Appellant has been on bail pending Appeal.

For all the foregoing reasons, I decline to make an order for retrial. Instead I order that the Appellant be set free forthwith unless otherwise lawfully held.

Dated at Nairobi this 28th day of February, 2007.

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MAKHANDIA

JUDGE

Judgment read, dated and delivered in the presence of:-

Appellant

Mr. Ikol for State

Mr. Kamau for Appellant

Erick Court clerk

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MAKHANDIA

JUDGE