REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 543 of 2003

(From original conviction and sentence in Criminal Case No.1662 of 2002 of the Chief Magistrate's Court at Nairobi – J. Oseko, SRM)

JOHN GIDEON OKUTOI ……....…….……..….APPELLANT

VERSUS

REPUBLIC ……..…….. RESPDONDENT

JUDGMENT

JOHN GIDEON OKUTOI was charged before the Chief Magistrate's Court, Nairobi with one count of robbery with violence contrary to Section 296 (2) of the Penal Code. He was duly tried for the offence, convicted and sentenced to death being the only sentence authorised by law. He was aggrieved by the conviction and sentence, hence he preferred this Appeal.

When the Appeal came up for hearing Mr. Ikol, Learned State Counsel, conceded to the same on the ground that the proceedings of the subordinate Court were defective in the sense that the Court failed to state in its record the language in which the witnesses testified. This omission breached Section 77 (2) (b) and (f) of the Constitution of Kenya. And in the light of the Court of Appeal decision in ***SWAHIBU SIMBAUNI SIMIYU & ANOR VS REPUBLIC C. A. NO. 243 OF 2005 (unreported)*** Counsel urged us to annul the proceedings. Mr. Mwendwa Learned Counsel for the Appellant was in agreement with the stance taken by the Learned State Counsel.

We have perused the record of the Lower Court's proceedings and have confirmed that indeed the language of the Court was not anywhere indicated. We are therefore in agreement with both Counsel's that the proceedings were a nullity and in line with the Court of Appeal decision in ***SWAHIBU SIMBAUNI SIMIYU (SUPRA)*** we accordingly set aside both the conviction and sentence.

The next issue that we must now tackle is whether we should order a retrial. Mr. Ikol urged us to do so on the basis that:-

i. The evidence on record against the Appellant was overwhelming and consistent.

ii. Prosecution will not seek to fill in gaps in the Prosecution evidence if a retrial is ordered.

iii. The ingredients of the offence of robbery with violence were met.

iv. It would be in the interest of justice.

v. The Appellant would not be prejudiced by such an order and finally,

vi. Witnesses will be easily availed in the event that a retrial was to be ordered.

In response, Mr. Mwendwa opposed the request for an order of retrial citing the fact that the Appellant had been in custody for a considerable period of time given that the Appellant had been in continuous custody since 12th June, 2002. It would be prejudicial and unjust to order a retrial, Counsel for the Appellant claimed. Finally Counsel pointed out that during the trial, the Appellant was a juvenile and ought not to have been sentenced to death.

Ordinarily a retrial would be the appropriate order to make since such fundamental irregularities would result in a miscarriage of justice which is not curable under Section 382 of the Criminal Procedure Code. The Appellant did not have a satisfactory trial. This Court has stated before the various grounds upon which a retrial can be ordered, most important of all being that a retrial should not be ordered if it will

cause an injustice and or prejudice to the Appellant. See ***MANJI VS REPUBLIC, (1966) EA 343.***

The offence was committed some five years ago and the Appellant has been in custody since then. It is unlikely that he will receive a speedy trial as envisaged under Section 77 of the Constitution. Indeed if a retrial was to be ordered it will cause an injustice and or prejudice to the Appellant. In all the circumstances of this case therefore we decline to make an order for retrial. Instead we order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 15th day of February, 2007.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgement read, signed and delivered in the presence of:-

Appellant present

Mr. Ikol for State

Mr. Mwendwa for Appellant

Erick/Tabitha Court clerk

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LESIIT

JUDGE

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MAKHANDIA

JUDGE