REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 489 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1720 of 2003 of the

Chief Magistrate's Court at Nairobi (J. O. Oseko (Mrs.)– PM)

BENARD GICHUHI KANUHI..…..……...……..APPELLANT

VERSUS

REPUBLIC……..……...…….…….…....RESPONDENT

J U D G M E N T

BERNARD GICHUHI KANUHI was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death as prescribed in the law. He was aggrieved by the conviction and by implication the sentence and therefore lodged this appeal.

Miss Gateru, learned State Counsel, conceded to the appeal on a technicality. The learned State Counsel submitted that the learned trial magistrate contravened **Section 77 (2) (b)** and **(f)** of the **Constitution** and **Section 198** of the **Criminal Procedure Code** when she failed to indicate the language used by the witnesses in their evidence in court. We have perused the record of the proceedings and have confirmed the learned State Counsel's submissions that indeed the language used by the Prosecution witnesses was nowhere indicated in the record. Consequently, the Appellant's Constitutional and Statutory Rights to have the trial conducted in the language he understood seem to have been contravened. The trial was a nullity and consequently we declare a mistrial and set aside both the conviction and sentence.

The next issue we have to decide is whether or not to order a retrial. **Miss Gateru** has urged us to order a retrial on the basis of the strong evidence of identification by PW1 and PW2. Counsel submitted that the two witnesses would be availed if a retrial were ordered.

Counsel submitted further that since the Appellant had only been in prison just below 3 years since being sentenced to death, he would suffer no prejudice.

Mr. Kangahi appeared for the Appellant during this appeal and urged us to consider the fact that the Appellant had been in custody for 3 years and that if a retrial were ordered he may go through a similar incarceration.

We have perused the record of the proceedings and analyzed the evidence adduced before the trial court in order to form an opinion whether a conviction may result if a retrial were ordered. See **MWANGI vs. REPUBLIC [1983] KLR 522**

There were four eyewitnesses of the incident and three of them were called as witnesses, PW1, PW2

and PW3. PW1 and PW2 were inside the shop area where the robbers entered. PW1 said two men entered first, one after another, and bent over displayed clothing. He identified the Appellant as the second one to enter. Then, according to PW1, two others entered. The third one had a gun and he whipped it out and ordered them into an inner office where they were robbed. PW2, on the other hand saw only two men enter and that one had a gun and the other had none. She then said she identified the Appellant as one of them, when, after the robbery members of public chased apprehended him and took him back to the shop. PW1 said he hit one of the robbers on the head and that he was apprehended but escaped when the Appellant was brought back to the shop five minutes later.

PW3's evidence was hazy while she was found in the inner office relaxing on the table. She could not distinctively tell the basis upon which she identified him as one of the robbers.

It is clear to us that there were material inconsistencies in the evidence of identification which were unresolved at the trial. The incident took place suddenly and in a short time, and the witnesses had a fleeting glance at the robbers. We have a distinct impression that PW1 was confident about the identification of person whom he hit on the head causing his apprehension but that he was not as confident of the Appellant's involvement. It is also clear that those who had witnessed the incident were not involved in the chase and subsequent arrest of the Appellant. We have not been informed whether those who chased and apprehended the Appellant would be recalled as witnesses. It is also clear that these persons were never interviewed and so we cannot be sure that they would in evidence be able to identify the Appellant or connect him to the offence.

Having considered all these factors we find that both the evidence adduced in court and the potentially admissible evidence is unlikely to result in a conviction if we ordered a retrial. We are also satisfied that such an order will not serve the interests of justice and that it will cause the Appellant to suffer prejudice. We decline to order a retrial. We order that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Kang'ahi for the Appellant

Miss Gateru for the Respondent

CC: Tabitha/Eric

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE