



REPUBLIC OF KENYA

E HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 569 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 9897 of 2004 of the

Chief Magistrate's Court at Thika (Mr. B. Oloo- CM)

JOSEPH MBURU MUHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant JOSEPH MBURU MUHIA was convicted on his own plea of guilty to one count of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. The facts of the prosecution case as led by the prosecutor were as follows: -

“The accused herein violently robbed the Complainant of Kshs.4000/- on the 17/10/04. Police were informed and investigation commenced and accused later arrested and charged.”

The Appellant was then sentenced to death. It is against the conviction and sentence he now appeals to this court.

The State through learned State Counsel **Mrs. Gakobo**, has conceded to the appeal. It was **Mrs. Gakobo's** submission that the facts led by the prosecution were threadbare and did not disclose the offence charged. Learned Counsel however urged us to order a retrial as the witnesses will be available and that the Appellant had been in custody for only two years.

The Appellant opposed the request for a retrial. In his submission the Appellant stated that he was very sick on the date of plea and that he did not follow the proceedings and that he was innocent of the charge.

We have considered the appeal and the facts of the prosecution case together with the manner in which the plea was taken. There are many fundamental errors on the manner in which the plea was taken. The offence charged was a capital offence with a mandatory death sentence. Before recording a conviction for such an offence, the learned trial magistrate should have warned the Appellant of the consequences of pleading guilty to the charge and should have recorded clearly in the very words used to give the warning. There is no indication on record that the Appellant was warned that the offence carried a mandatory death sentence. That omission alone is sufficient to vitiate a conviction recorded in such a case.

The other fundamental error arises out of the facts led by the prosecution. They are so vague as not to establish the offence charged. In fact the facts do not clearly show that it is the Appellant was alleged to have done which constituted the offence charged. No wonder the Appellant says that he did not follow the proceedings. It is not clear where and when the offence was committed, the manner in which it was committed which distinctly brought it within a capital charge and the circumstances under which the Appellant was implicated with the offence. The date of arrest and why he was arrested is also omitted. The facts did not disclose the offence preferred. The learned trial magistrate therefore fell into error in law and facts to enter a conviction on the basis of an admission to the facts. The conviction was clearly unsafe and should not be allowed to stand. We set aside both the conviction and sentence.

On the issue of a retrial we decline to order one for one fundamental reason, there was no clear indication that the Complainant was available for the case if a retrial was ordered. It is two years and six months since the Appellant was convicted. It is not clear what offence that the Appellant should face in light of the vagueness of the prosecution case. In the circumstances of the case it may be that the only charge which may stand against him may be simple theft contrary to Section 279 of the Penal Code or some other theft charge. In that case 2½ years in jail is sufficient punishment for such an offence. We find that an order for a retrial will only cause the Appellant to suffer prejudice.

We order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 19th day of April 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Gakobo for the Respondent (State)

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE