REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 496 of 2004

EVANS GATHURI NDUNGU …….. APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1666 of 2004 of the Chief Magistrate's

Court at Kibera – Ms Mwangi SPM)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 497 OF 2004

JOHN MUREITHI MBURU ……..APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

EVANS GATHURI NDUNGU (*1st appellant*) and **JOHN MUREITHI MBURU** *(2nd appellant*) were jointly charged before the subordinate court with robbery with violence contrary to Section 296(2) of the Penal Code.

After a full trial they were convicted of the offence and sentenced to suffer death as provided for by law.

Being dissatisfied with the decision of the learned trial magistrate, they filed their appeals challenging both conviction and sentence. At the hearing, the two appeals were consolidated and heard together, as the appeal arose from the same trial.

The learned State Counsel, Mrs. Obuo, conceded to the appeals. It was her contention that the proceedings before the learned trial magistrate were a nullity, as part of the proceedings were conducted with a prosecutor whose rank was not indicated by the learned trial magistrate. Consequently, it could not be said that the prosecutor was a qualified prosecutor in terms of section 85(2) as read with Section 88 of the Criminal Procedure Code (Cap. 75).

We have perused the record of proceedings. Indeed, on the 8.6.2004, when (PW3) Teresia Njogu Kimani testified, the prosecutor is recorded as Kanyai. Again, on 6.8.2004, when (PW4) Chief Inspector

Samson Muthoka testified, the prosecutor is recorded as Oyoo. On both dates, the designation and rank of the prosecutor was not indicated by the trial magistrate.

The failure by the learned trial magistrate to indicate the rank of the prosecutor means that we do not know whether the prosecutor was a qualified prosecutor under the provisions of Section 85(2) as read with Section 88 of the Criminal Procedure Code (Cap 75).

In the case of **ROY RICHARD ELIREMA& ANOTHER – vs – REPUBLIC Criminal Appeal No. 67 of 2002 (Eldoret),** the Court of Appeal stated –

"In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provisions of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution……. For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a person employed in the public service not being a police officer below the rank of an Assistant Inspector. We suspect the rank of Assistant Inspector must have been replaced by that of Acting

Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity".

In the present case, we cannot say that Kanyai and Oyoo are qualified prosecutors and, therefore, the entire proceedings are a nullity. Learned State Counsel correctly conceded to the appeal. Consequently, we set aside the convictions recorded by the learned trial magistrate against the two appellants, and set aside the sentences.

Learned State Counsel, Mrs. Obuo, asked us to order a retrial. It was her contention that the appellants were positively identified, as there was adequate light in the house. Also that the robbers were not masked and the robbery incident lasted 15 minutes. She further submitted that the evidence of PW2 and PW3 showed that the witnesses and the appellants were in close proximity, and therefore there was no possibility of mistaken identity. In her view, the positive identity of the appellants was strengthened by the fact that on 26th February 2004, PW1 and PW2 recognized the appellants on a road and called the police to arrest them. She also submitted that witnesses were readily available and that the offence was a serious offence.

In response, the 1st appellant opposed a retrial. He stated that his defence was that he was arrested when he had visited his relative, the 2nd appellant. In his view, PW1 could not have identified the people who robbed him as he had been told by the robbers to lie down.

The 2nd appellant also opposed a retrial. He submitted that both PW1 and PW2 were lying down during the robbery incident. Therefore, they could not identify the robbers. He also contended that there were contradictions in the evidence of PW1 and PW2 as to whether or not both were in the vehicle at the time of robbery. He also submitted that PW3 said that the robbers were masked.

The principles to be considered by the court in deciding whether to order a retrial are well settled. In the often cited case of **AHMED SUMAR – vs – REPUBLIC [1964] EA 481,** at page 483, the Court of Appeal for Eastern Africa stated –

"**It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".**

The court went further to state on the same page –

"**We were also referred to the judgment in PASCAL CLEMENT BRAGANZA – vs – REPUBLIC [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".**

We have carefully considered the evidence on record. The case of the prosecution was that the two appellants were identified by PW1, PW2 and PW3 at the scene. We observe that the incident occurred at night at about 10.30 p.m. PW1, the owner of the house, and PW2 his wife had come from church in their vehicle. PW3, their housemaid, was in their house at Ngong. The gate to their house was opened for them by the watchman and they parked the car, only to discover that some people had got hold of the watchman at the gate and then entered into the compound with him. These people, numbering four, robbed them of money and other items from the house. PW1 described in his evidence in court what each of the two appellants did in the robbery. The robbers were said to be four in number. The electricity light was said to be on outside and inside the house. The watchman did not testify.

The appellants were arrested on 26.2.2006 at about 5.30 p.m., when PW1 and PW2 saw four people on the road, who were said to be wearing the same clothes worn by the robbers during the time of the robbery. The police were called and managed to arrest the two appellants, while the other two escaped.

There is no evidence tendered in court that the eyewitnesses, or any of them, described the appearance of any of the robbers to the police after the incident. The description given in court by PW2, that the 2nd appellant was dark does not help matters. The appellants were in any case arrested because the clothes they wore resembled the clothes worn by the robbers during the robbery, not because of their appearance. The police officer who testified as PW4, Inspector Samson Muthoka, was merely the arresting officer who was called by PW1 to go and arrest the suspects. The identification of the appellants is therefore far from positive

In our view, if the same evidence tendered before the learned trial magistrate was tendered, a conviction is not likely to result. We respectfully disagree with the contention of the learned State Counsel that the identification of the appellant was positive.

We appreciate that the offence was a serious one being robbery with violence. We note also that the appellants have been in custody from February 2004. Though we agree with learned State Counsel that witnesses might be readily available, the circumstances and facts of this case do not justify an order for a retrial. An order for a retrial, in our view, will not be in the interests of justice. We think that a retrial, if ordered, is likely to cause an injustice to the appellants. We decline to order a retrial. Instead, we order that the appellants be set at liberty forthwith, unless otherwise lawfully held.

Dated at Nairobi this 3rd day of May 2007.

LESIIT

JUDGE

DULU

JUDGE

Read and Delivered in the presence of –

Appellant

Ms Nyamosi for State

Tabitha/Eric – Court Clerks

LESIIT

JUDGE

DULU

JUDGE