REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 88 & 89 of 2003

NJIRU BENSON ZABLON ……………………………1ST APPELLANT

ELIAS NKONGE ……………..……………………….. 2ND APPELLANT

VERSUS

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

(*Appeal from a judgment of Mr. A. N. Kimani, SRM in Chuka Criminal Case No.898 of 2002 dated 14th February, 2002).*

JUDGMENT

The two appellants, Benson Njiru Zablon and Elias Nkonge were tried together in the court below for the offence of robbery with violence contrary to Section 296(2) of the Penal Code but they were found guilty of robbery contrary to Section 296(1) of the Penal Code, convicted and sentenced to seven year's imprisonment.

The appellants filed separate appeals, which were duly consolidated before the hearing of their appeal. According to the particulars of the offence as outlined in the charge sheet, the appellants while armed with offensive weapons, namely pangas, axes and rungus robbed Lisbeth Gateria Mbae of Kshs.71,000(cash), 50 packets of sportsman and 20 packets of supermatch cigarettes, and 2 dozen Eveready batteries all valued at Kshs.75,400/=. This was on 25th May, 2002 at Ndunguri Market in Meru South District

Evidence led for the prosecution was to the effect that the complainant, PW1, Lisbeth Gateria Mbaya left her father Obed Ndubi (Ndubi) in her shop on the night in question.

While sleeping in the shop at 1.00 am Ndubi heard movements outside the shop and shortly after he also heard a bang. When he realized that he was under attack, he screamed for help as the attackers broke the window to the shop. The attackers got into the shop but Ndubi hid in another room. The gang left the shop after emptying the drawers of cash. Ndubi's screams attracted several people, among them, PW2, Royford Nkonge (Nkonge), PW3, Anderson Miriti Njeru (Njeru) and PW4, Japhet Kinyua Nkonge (Kinyua).

All of them, except the complainant testified that they were able to identify the appellants by their voices. They also confirmed that they recognized them as the appellants were known to them prior to the incident in question.

The matter was reported to the police who arrived at the scene after the gang had escaped. Investigations were commenced and PW6, PC Nathan Kibara arrested both the appellants.

In his unsworn defence the 1st appellant told the court that he had his own shop and that he used to buy his stock from the complainant's store.

That the complainant's employees would insist on him buying extra stock and later seek commission from him. He would refuse to do this. Then one day the police arrested him, took him to the police station, demanded a bribe of Kshs.2,000/= and he was charged with this offence when he failed to pay the bribe.

The second appellant similarly gave an unsworn statement in which he denied participating in the commission of the crime in question. He was arrested along with his brother who was later released after executing a bond. He attributed his arrest and trial to a land dispute between him and the complainant.

The trial court considered the foregoing evidence and found that the prosecution case was proved beyond reasonable doubt, convicted and sentenced the appellants to seven years imprisonment. The appellants have now preferred this appeal, being aggrieved by the decision of the trial court.

The fist appellant has listed seven grounds of appeal while the 2nd appellant has eight grounds. However, during the hearing of this appeal both tendered what were headed "Amended Grounds of Appeal" in which the first appellant listed four grounds and the second appellant 9 grounds. Basically their arguments are that there was no evidence or sufficient evidence of identification; that the prosecution evidence was contradictory; that the trial court failed to take into consideration their respective defences; and that the trial court's record was irregular as it failed to reflect the coram of the court.

Learned Counsel for the respondent conceded the appeal on the ground that part of the proceeding before the court below was conducted by a Police Corporal contrary to Section 85 of the Criminal Procedure Code.

He, however, applied that the case be remitted to the lower court for retrial. He argued that a retrial will meet the ends of justice and that the appellants will not be prejudiced. He further submitted that there is sufficient evidence to sustain a conviction.

The appellants opposed the application for a retrial arguing that they have been in custody for 4 years and 3 months and further that the evidence available cannot sustain a conviction.

We have anxiously considered these arguments and hold the following view; the trial before the lower court was a nullity as, from the record, it is clear that on 2nd December, 2002, Cpl.Mbogori conducted the prosecution when he led the evidence of two prosecution witnesses. So, although the rest of the proceedings were conducted by an Inspector of Police, the part conducted by Cpl. Mbogori cannot be isolated from the rest of the proceedings. This is contrary to Section 85 of the Criminal Procedure Code as interpreted in numerous judicial decisions. See particularly Elirema and Another, V R(2003) KLR 537.

Thus the trial before the learned trial Magistrate was vitiated by this single factor. What then is the consequence of such transgression of the procedure? We have been asked to order for a retrial.

Generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. In Muiruri V R(2003) KLR 552, the Court of Appeal stated the following;

"It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zedekiah Ojuondo Manyala V R(Criminal Appeal No.57 of 1980). The length of time

which has elapsed since the arrest and arraignment of the appellant; whether the mistake leading to the quashing of the conviction were entirely of the prosecution's making or court's"

The Court of Appeal has also stated in the case of Mwangi V R(1983) KLR 522 that a retrial should not be ordered unless the court is of the opinion that, on a proper consideration of the admissible or potentially admissible evidence, a conviction might result.

The appellants strongly opposed an order for retrial on the ground that they have been incarcerated for more than 4 years. That there is no evidence upon which a conviction may be based should a retrial be ordered.

The Plea before the court below was taken on 7th June, 2002. Trial was concluded in less than one year when the judgment was delivered on 13th January, 2003. This appeal was promptly lodged on 24th April, 2003-but was not admitted until 11th November, 2004.

The appeal was first placed before Sitati, J on 18th May, 2006. There is no explanation on the record for the lull between the date of admission and when the appeal was placed before Sitati, J.

It is therefore correct that the appellants have been incarcerated since June, 2002- a period of 5 years, part of which was taken up in the trial in the court below.

We have anxiously considered these matters and taking into account the evidence on record brought against the appellants, which in our view was not frivolous and might well result in a conviction, we are inclined to order a retrial. The witnesses are all neighbours from one area and availing them will not pose a problem.

That being our view of the matter, we allow this appeal, quash the conviction and set aside the sentence of seven years recorded against the appellants and order that they will be retried before a Magistrate with competent jurisdiction at Chuka Law Courts. Pending this the appellants shall remain in custody.

Those shall be our orders.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF JULY, 2007

ISAAC LENAOLA

JUDGE

WILLIAM OUKO

JUDGE