REPUBLIC OF KENYA

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

Criminal Appeal 271 of 2005

DAVID GITHINJI WANJIKU ……..……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

***(From original conviction and sentence in Criminal Case No. 13 of 2004 of the Senior Principal Magistrte's Court at Kikuyu, M. W. Murage, PM*)**

JUDGMENT

DAVID GITHINJI WANJIKU was convicted for the lesser offence of robbery with violence contrary to Section 296 (1) of the Penal Code. Initially he had been charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. In reducing the charge to simple robbery, the Learned Magistrate observed:-

"…..I note that the Complainants did not suffer any injury….."

This was a gross misdirection in law on the part of the Learned Magistrate.

It has been stressed on many occasions by this Court that the key requirements for the Application of Section 296 (2) are disjunctive so that if any of the requirement exist - i.e. being armed with an offensive weapon, or being in the company with one or more person, or, at or immediately after the time of robbery, the robber wounds, beats, or strikes or uses any other personal violence to any person, then sub-section (2) applies. In the present case the facts established on the evidence show that the Application of sub-section (2) did not depend only upon the issue of violence. Even if there was no violence visited on the Complainants there was ample evidence that the Appellant was is in the company of two others one of whom was armed with a knife, a dangerous and offensive weapon. The Appellant therefore ought to have been convicted as initially charged. For the restatement of the Law on the subject I would respectively draw the attention of the trial Magistrate to the Court of Appeal decision in the case of ***JOHANA NDUNGU VS REPUBLIC, CRIMINAL APPEAL NUMBER 116 OF 1995 (UNREPORTED).*** As already stated, the Learned Magistrate fell into error therefore in reducing the charge to simple robbery for the aforesaid reasons. Violence is just but one of the three ingredients of robbery with violence. If one of the other two ingredients are proved to the satisfaction of the Court, a conviction should result.

Be that as it may, upon conviction on the simple robbery charge, the Appellant was sentenced to 5 years imprisonment on each of the two counts and the sentences were ordered to run concurrently. It is against this conviction that the Appellant has now appealed to this Court.

Mrs. Gakobo, Learned State Counsel conceded to the Appeal on a technicality on the basis that the trial

was defective in that on the day of the ruling on no case to answer and thereafter the defence, the coram of the Court was not indicted. Accordingly it is not known whether the Court was properly constituted. Counsel therefore urged me to annul the proceedings as it was possible that the provisions of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code were violated.

If I were to accede to the Counsel's request, she pleaded with me to order a retrial on the grounds that the evidence on record against the Appellant was overwhelming as he was recognised by PW1 and PW2, that no prejudice would be occassioned to the Appellant since he had only been in custody for $2_{1/2}$ years which period is not comparable to the seriousness of the offence charged, that the witnesses were readily available to testify again in the event of a retrial and finally that the interest of justice demand that a retrial be ordered.

On his part, the Appellant opposed the request for retrial. He submitted that the sins of the trial Magistrate should not be visited upon him, that the case was a frame-up and finally that he had suffered sufficiently whilst in prison.

I have on my part carefully scrutinized and perused the record of the Lower Court proceedings and I am in agreement with the Learned State Counsel that on 23rd February, 2005 when the case came up for ruling on no case to answer and defence hearing, the coram was not indicated. Apart from the name of the presiding Magistrate, there is no indication as to whether there was a Prosecutor and if he was, whether he met the mandatory qualifications set out in Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. The issue of who is a qualified Prosecutor was revisited and expounded in the celebrated case of ***ELIREMA & ANOTHER VS REPUBLIC (2003) KLR 537.*** It is also not possible to tell whether there was a Court clerk who interpreted the proceedings to the Appellant as well as to the Court. See ***SWAHIBU SIMIYU & ANOTHER VS REPUBLIC, CRIMINAL APPEAL NUMBER 243 OF 2005 (KISUMU) (UNRPORTED).*** The Appellant's trial before the Lower Court was in those circumstances defective. I therefore accept the invitation by the state and accordingly annul the proceedings. I therefore declare the trial a nullity and set aside both the conviction and sentences imposed.

The principles applicable to the issue of when to order a retrial are now well settled.

An order for retrial should not be made if it will cause the accused person to suffer prejudice. See MANJI VS REPUBLIC (1966) EA 313. In any event whether or not an order of retrial should be made depends with the peculiar circumstances of each case. See AHMED JUMA VS REPUBLIC (1964) EA 481. An Appellate Court should not order a retrial unless it is of the opinion after a consideration of the admissible and potentially admissible evidence that a conviction may result. See MWANGI VS REPUBLIC (1983) KLR 522

I have evaluated the evidence on record. I do not wish to comment much on the same in order not to pre-empt the possible outcome of the retrial. Suffice to say that and as correctly urged by the Learned State Counsel, the evidence on record in the nullified proceedings was overwhelming against the Appellant and if the self-same evidence was to be re-enacted at the retrial, I am certain that a conviction may result. I therefore find this a suitable case for an order of retrial. I therefore order that a retrial be held in this case. In that regard the Appellant shall be produced before the Principal Magistrate's Court, Kikuyu on 12th February, 2007 for retrial to commence on the self same charges before any other Magistrate of competent jurisdiction other than Mrs. M. N. Murage, P. M. who presided over the initial trial. In the interim period, the Appellant shall remain in prison custody.

Dated at Nairobi this 5th day of February, 2006.

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MAKHANDIA

JUDGE

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

Appellant

Mrs. Gakobo for State

Erick Court Clerk

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MAKHANDIA

JUDGE