



REPUBLIC OF KENYA

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

CRIMINAL APPEAL NO. 776 OF 2003

MOHAMMED ABDI BASHIR APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

MOHAMED ABDI BASHIR, hereinafter referred to as the Appellant was arraigned before the Senior Resident Magistrate's Court, Garissa on one count of robbery with violence contrary to Section 296 (2) of the Penal Code. The facts being that on 16th day of September, 2002 at Dagahaley Location of Garissa District within North Eastern Province armed with a dangerous weapon namely a knife, robbed ZAINABU ADEN ALI of her 10 kg of sugar, tea leaves, medicine and Kshs.300/= all valued at Kshs,900/= and at or immediately before or immediately after such robbery used personal violence against the said Zainabu Aden Ali. The Prosecution called seven (7) witnesses. At the end of it all the Court found that on the evidence available, the offence disclosed and proved was simple and not capital robbery. The Court therefore proceeded to convict the Appellant on the lesser charge of simple robbery contrary to Section 296 (1) of the Penal Code. He was then sentenced to 8 years imprisonment with 4 strokes of the cane.

The Appellant was aggrieved by the conviction and sentence and consequently lodged this Appeal. When the Appeal came up for hearing, Miss Gateru, Learned State Counsel informed the Court that the State was conceding to the Appeal on the ground that part of the proceedings in the subordinate Court were conducted by an unqualified Prosecutor, to wit one Police Constable Adalo. Infact P. C. Adalo led the evidence of PW2, PW3 and PW4. The proceedings were thereby rendered a nullity. The Learned State Counsel invited me to annul the proceedings and set aside the conviction and sentence. The Appellant for obvious reasons welcomed the decision by the State.

The Court of Appeal in the case of ELIREMA & ANOTHER VS REPUBLIC (2003) KLR 537 held that any proceedings in the Lower Court apart from mentions conducted by a Prosecutor below the rank of an Assistant Inspector of Police were a nullity. P. C. Adalo was clearly not qualified to act as public Prosecutor. I have perused the record of the subordinate Court and noted that indeed P. C. Adalo led the evidence of PW2, PW3 and PW4. His participation in the proceedings in which he purported to act as a Public Prosecutor rendered the proceedings a nullity in line with the ELIREMA CASE (supra). Accordingly, the proceedings being a nullity. I will set aside both the conviction and sentence.

The Learned State Counsel urged me to order a retrial on the basis that there was strong evidence on record to secure a conviction if retrial is ordered. That no prejudice will be occasioned to the Appellant in the event of a retrial as he had only served 2 1/2 years of the prison term imposed. Finally Counsel submitted that witnesses were readily available to testify again in the event that a retrial is ordered. The

Appellant would hear none of the above. He claimed that he was framed in the case and that he had served 2 years of the prison term and had thereby been sufficiently punished.

The purpose of a retrial is to call to the attention of the trial Court some error which was committed during the trial. Whether or not to order a retrial is discretionary. The discretion of the Court to order a retrial is one that ought to be exercised with a great care. This exercise is not done randomly but is grounded on well formulated principles as developed by our Courts. There are several facts to be considered when the Court is deciding whether or not to order a retrial. The earliest Court of Appeal decision that laid down some of the considerations was **FATEHALI MANJI VS REPUBLIC (1960) EA 343**, in which it was held that:-

- (i). In general a retrial will be ordered when the original trial was illegal or defective.
- (ii). That each case must depend on its own facts and circumstances.
- (iii). That an order of retrial should only be made where the interest of justice require it.
- (iv). A retrial will not be ordered if by so doing an injustice will be caused or occasioned.

The case of **ALOYS AWORI VS UGANDA (1972) EA 469** introduced another consideration which is:-

- (v). A retrial will not be granted for purposes of enabling the Prosecution to fill up the gaps in its evidence at the first trial and

finally in the case of **RATILAL SHAH VS REPUBLIC (1958) EA 3** it was further held that:-

- (vi). A retrial should not be ordered unless the Court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result.

Applying these principles to the present case, it is clear that the original trial was illegal and or defective for want of a qualified public Prosecutor. However considering the facts and circumstances of this case, it is my view that that is so long after the events giving rise to the charges against the Appellant as to render a retrial impracticable. Much as the Learned State Counsel stated that the witnesses are readily available, this Court is not persuaded by that submission considering the in which the offence was committed. The witnesses could as well have moved on and thereby render their availability to testify again during the retrial practicably impossible. I also note that the Appellant has been in custody since 13th September, 2003, I do not think that it will be in the interest of justice to order a retrial. Everything considered I do not think that an order of retrial in the circumstances would be in the interest of justice.

In the premises, I decline to order a retrial and instead order that the Appellant be forthwith set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 15th day of March, 2006.

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MAKHANDIA

JUDGE