REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 354 Of 2001

GEORGE GITAU GIKARU………...........................…...…………APPELLANT

VERSUS

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

JUDGMENT OF THE COURT

The appellant, George Gitau Gikaru was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the 30th of October 2000 at Midland Hotel Nakuru, the appellant jointly with others not before court while armed with dangerous weapons namely a pistol, robbed Mary Kinangoi cash of Kshs 317,495/=, 580 US Dollars, 13,200 Sterling Pounds in travelers cheques, all valued at Kshs 1.8 million and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Mary Kinangoi. The appellant was further charged with violently robbing Sammy Muiruri Mwaniki of his motor vehicle registration number KAG 170Q Nissan Sunny contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on the same day at Section 58 Nakuru, while armed with dangerous weapons namely a pistol, the appellant jointly with others not before court robbed Sammy Muiruri Mwaniki of his said motor vehicle and cash Kshs 1,600/= and at or immediately before or immediately after the said robbery threatened to use actual violence to the said Sammy Muiruri Mwaniki. The appellant denied committing the said offences. After a full trial he was found guilty as charged and was duly convicted. He was sentenced to death as mandatorily required by the law. Being aggrieved by his conviction and sentence the appellant appealed to this court.

At the hearing of the appeal Mr Gumo, Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the police officer who had prosecuted the case was incompetent and not authorized to conduct prosecutions before a magistrate's court. He however urged the court to order the appellant to be retried in view of the overwhelming evidence that was adduced against him in the vitiated trial. The appellant on his part welcomed the conceding of the appeal but submitted that he should be discharged instead of being retried. He submitted that he had been in lawful custody and in prison for a period of over six years. He also stated that while in prison his health had deteriorated. He urged the court to give him the benefit of doubt and order that he be discharged.

We have perused the proceedings of the trial magistrate's court in respect of which this appeal arose. We have noted that the proceedings thereto were prosecuted by Sergeant Winnie. She is a police officer of a rank lower that of an Assistant Inspector of Police. She was thus not authorized to prosecute criminal cases before a magistrate's court as provided for by **Section 85(2) and 88** of the **Criminal Procedure Code**. As was held by the Court of Appeal in the case of **Eliremah & Anor –vs- Republic [2003] KLR 537** where such a prosecutor prosecutes a case before a magistrate's court the proceedings thereto will be a nullity. We therefore declare the proceedings of the trial magistrate from which this appeal arose to be a nullity and as a consequence of which the appeal herein is allowed, the conviction quashed and the sentence imposed set aside.

The issue that remains for determination of this court is whether this court should order the appellant to be retried. Mr Gumo has submitted that there was overwhelming evidence which was adduced by the prosecution in the vitiated trial which would enable any court hearing the case against the appellant during retrial to convict the appellant. On the other hand, the appellant has submitted that he has been in lawful custody for a period of over six years, first during the pendency of the trial before the trial magistrate's court and secondly after his conviction and pending the hearing and determination of this appeal. He also submitted that while in prison his health had deteriorated. He urged this court to give the benefit of doubt and discharge him.

The law as regard whether a retrial should be ordered or not is now well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004** (Eldoret) (unreported) that:

"***In the case of** Ahmed Sumar v Republic **[1964] EA 481, at page 483, the predecessor to this court stated as follows:***

"***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 continued at the same page paragraph H and stated:

"***We are also referred to the judgment in** Pascal Clement Braganza v. R [1957] EA 152**. In this judgment the Court accepted the principle that a retrial should not be ordered unless 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 the 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".***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In the instant appeal we have re-evaluated the evidence which was adduced against the appellant. Two pieces of evidence were adduced by the prosecution to secure the conviction of the appellant. The first evidence was that of identification. Two witnesses, the receptionist at Midlands Hotel and the driver of the motor vehicle which was carjacked by the robbers were able to positively identify the appellant as being among the robbers who robbed them on the material day. The second piece of evidence is that of the recovery of the cash and some of the travelers cheques from the possession of the appellant. This evidence is overwhelming. The prosecution would not thus be filling gaps in its case against the appellant if this court were to order the appellant be retried.

However the appellant has submitted that he has been in custody for a period of over six years since his arrest. He has told the court that his health had deteriorated while he was in prison. This court saw the health condition of the appellant during the hearing of the appeal. He appeared to be of poor health. Weighing the facts of this case, we are of the view that it would not serve the ends of justice if the appellant is retried. We are not certain that the prosecution would be able to procure the witnesses to testify if the appellant is retried. Further there is a possibility that memories could have faded and therefore defeating the necessity of ordering a retrial. We therefore agree with the appellant that in the circumstances of this case he should not be retried.

We therefore order that the appellant be discharged. He is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 1st day of March 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE