REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 267 & 268 of 2003

FRANCIS MUCHIRI NDONGA ……..…… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Appeal from original Judgment and Conviction in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 528 of 2003 dated 21st May 2003 by Mr. G. K. Mwaura – S.R.M. – Murang'a)

HIGH COURT CRIMINAL APPEAL NO. 268 OF 2003

JOSEPH KAMANDE MWAURA ……..…… APPELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(Appeal from original Judgment and Conviction in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 528 of 2003 dated 21st May 2003 by Mr. G. K. Mwaura – S.R.M. – Murang'a)

J U D G M E N T

Francis Muchiri Ndonga hereinafter referred to as the 1st appellant is the appellant in High Court Criminal Appeal No. 267 of 2003, Joseph Kamande Mwaura hereinafter referred to as the 2nd appellant is the appellant in High Court Criminal Appeal No. 268 of 2003.

The two appellants were jointly tried before the Senior Resident Magistrate in Murang'a for 4 counts of the offence of Robbery with

violence contrary to section 296(2) of the Penal Code with two alternative counts against each appellant for the offence of Handling stolen property contrary to section 322 (2) of the Penal Code.

The 1st appellant also faced another charge of House breaking and stealing contrary to section 304 (1) and 279 (b) of the Penal Code and another alternative charge of Handling stolen property contrary to section 322(2) of the Penal Code.

During the trial in the lower court a total of 11 witnesses testified for the prosecution, whilst each of the Accused gave unsworn evidence and called no witnesses. Having heard and considered the evidence the trial magistrate convicted the two appellants of all the main charges against them, but made no finding on

the alternative counts. The appellants were sentenced to the mandatory death sentence in respect of the capital robbery charge and a further 7 years imprisonment for the 1st appellant in respect of each limb of the charge of House Breaking and stealing. Being dissatisfied with the judgment each appellant has now brought an appeal against conviction and sentence, which appeals have been consolidated for purposes of hearing.

Learned State Counsel Ms Ngalyuka has intimated to this court that she does not support the appellants' conviction as the trial was a nullity the prosecution in the lower court having been conducted by an incompetent person. Ms Ngalyuka however contends that there was sufficient evidence to sustain the case against the appellants.

She therefore urges us to order for a retrial. To this each of the appellant protests that they cannot be held responsible for the mistake done by the prosecution. They complain that they have already been in prison for a period of 3 years. They therefore urge the court to order their release.

It is apparent from the record of proceedings that the prosecution in the lower court was carried out substantially by one Sgt. Gitau. This was contrary to section 85 (2) of the Criminal Procedure Code which empowers the Attorney General to appoint any person employed in the public service not being a police officer below the rank of assistant inspector of police to be a public prosecutor. The trial of the appellants was therefore a nullity as the prosecution was conducted by a police sergeant. The appellant's conviction cannot therefore stand.

In considering whether to make an order for a retrial, we find the case of **Fatehali Manji v/s Republic [1966] EA 343** to be relevant. Therein the court of appeal stated as follows:

"In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a trial is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

In the case of **Mwangi v/s Republic [1983] KLR 522** the court of appeal explained further as follows:

"A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might occur."

In this case the trial was vitiated by the prosecution being done by an incompetent prosecutor. Looking however at the evidence which was adduced before the trial magistrate we have not noted any gaps in the prosecution case. To the contrary, there was evidence of identification of the appellants as well as evidence of recent possession of stolen items. We have formed the impression that, this evidence was strong and on a proper consideration could easily have resulted in a conviction.

We have noted the fact that the appellants have already been in prison for about 3 years ago. However, given the seriousness of the charges and the fact that most of the offences carry a mandatory death penalty, we find that the period is not so long as would interfere with the availability of witnesses or evidence. We are satisfied that it is in the interest of justice that a retrial be ordered so that the case can be properly tried.

We therefore allow the appeals to the extent of quashing all the convictions and setting aside the sentences imposed.

We order that the appellants shall be remanded at Maragua police station and be produced before the Principal Magistrate Murang'a as soon as possible for a retrial.

Dated signed and delivered this 3rd day of May 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE