



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 393, 394 & 395 of 2003

(From original conviction and sentence of the Principal magistrate's court at Nyahururu in criminal case No. 572 of 2002 - Kathoka Ngomo [P.M.]

STEPHEN RUTTO BUSIENEI.....1ST APPELLANT

JOSEPH TARKOK CHELIMO.....2ND APPELLANT

JOSEPH KIMNOO TOROREY.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Stephen Rutto Busienei, Joseph Tarkok Chelimo and Joseph Kimnoo Tororey were charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on the 13th and the 14th of February 2002 at Laikipia District jointly with others not before court and while armed with dangerous weapons, the appellants robbed J W K and F M K of their properties which were listed in the charge sheet and in the course of the said robberies wounded the said J W K and F M K. The appellants faced two other counts of rape contrary to **Section 140** of the **Penal Code**. The particulars of the offence were that on the 13th and the 14th of February 2002, the appellants had carnal knowledge of J W K and N N K without their consent. The appellants pleaded not guilty to the charge and after a full trial the appellants were convicted of all the charges. They were sentenced to death as is mandatorily provided by the law on the counts with robbery with violence. On the counts of rape they were sentenced to serve ten years imprisonment on each count. The said sentences were ordered to run concurrently. Being aggrieved by their conviction and sentence each appellant filed a separate appeal against conviction and sentence.

The said appeals were consolidated and heard as one during the hearing of the appeal. Mr. Koech learned State counsel conceded to the appeals filed by the appellants on the sole ground that part of the proceedings in the subordinate court were conducted by a police officer who was not qualified to conduct such criminal cases. He however urged this court to order that the appellants be retried in view of the overwhelming evidence that was adduced against them in the vitiated trial. The appellants, while welcoming the conceding of the appeal, naturally were opposed to being retried. They submitted that they had been in lawful custody for a period of 4¹/₂ years since they were arrested on the 21st of February 2002. They urged this court to discharge them.

We have perused the proceedings in respect of which this appeal arose. We have noted that part of the criminal proceedings facing the appellants was prosecuted by Sergeant Migwi. He is a police officer of rank lower than that of an Assistant Inspector of police. He was thus not authorized to prosecute criminal cases before a magistrate's court in accordance with the provisions of **Section 85(2) and 88** of the **Criminal Procedure Code**. As was held by the Court of Appeal in the case of **Eliremah & Another – vs- Republic [2003] KLR 537**, where such a police officer prosecutes a case before a magistrate's court, the proceedings thereto will be declared a nullity. In the present case we declare criminal proceedings of the subordinate court from which this appeal arose to be a nullity and as a consequence of which the convictions of the appellants is quashed and the sentences imposed set aside.

The issue that is left for the determination by this court is whether to order a retrial. Mr. Koech learned state counsel has submitted that there was overwhelming evidence which was adduced in the vitiated trial that would lead to the conviction of the appellants if they are retried. The appellants on their part are not willing to be subjected to a retrial. The principles to be considered by this court in determining whether or not to order a retrial were restated in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004** (unreported) (Eldoret) when the Court of Appeal held 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 present case, the State has submitted that there was overwhelming evidence which was adduced by the prosecution witnesses in the vitiated trial that would enable a court hearing the evidence in a retrial to convict the appellants. Mr Koech did not however tell us if the witnesses would be available to attend court if a retrial is ordered. We have considered the totality of the circumstances of this case and we are of the view that the ends of justice would not be served if a retrial is ordered. The appellants have been in lawful custody for a period of over 4¹/₂ years. If a retrial is ordered there is a possibility that by the time the trial is concluded they would have spent an inordinate time in remand custody. Further there is no guarantee that the witnesses would be available to testify if a retrial is ordered. The memory of the witnesses would have faded taking into consideration that the alleged robbery incident took place more than four years ago.

Although we agree with the submission made by Mr. Koech that there was overwhelming evidence in the vitiated trial that would have enabled a competent court of law to convict the appellants, we are not satisfied that the State would be in a position to avail the same witnesses if a retrial is ordered. Further, considering that the evidence that was relied on was that of basically identification made in difficult circumstances, we are not persuaded that the prosecution would muster sufficient evidence to secure the conviction of the appellants if a retrial is ordered.

In the circumstances of this case the order that commends itself to us is to discharge the appellants. The appellants are therefore ordered released from prison and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 20th day of July, 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE