



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 223 of 2003

PAUL NJAGI NYAGA.....
APPELLANT

V E R S U S

REPUBLIC.....
.....RESPONDENT

(Being an appeal against the original conviction and sentence in
Chuka Senior Resident Magistrate’s Court Criminal Case No 33 Of 2003

By Hon. A.N. Kimani – S.R.M.)

J U D G M E N T

1. One of the grounds of appeal in this matter is that the prosecution was conducted by an unqualified person as one Sgt. Musila conducted part of the case for the Prosecution contrary to s.85 (2) and s.88(1) of the Criminal Procedure Code (see ground 3 in the petition of Appeal filed on 6.11.2002). I have seen the record and I note that on 23.1.2003 the Prosecutor was one Police Constable Kiambi. On 11.3.2003 the Prosecutor was one Sgt. Musila. On 13.3.2003, the record reads;

“Coram as before” and presumably Sgt. Musila was the Prosecutor. Although Inspector Michuki thereafter conducted the prosecution on 15.5.2003 and the record keeps reading, “Coram as before”, Sgt Musila reappeared on 6.8.2003 and thereafter conducted the case including cross-examining the accused persons and represented the Republic at the Judgment and sentencing.

2. The above being true of the prosecution before the lower court, the trial was rendered a nullity and as was said in Elirema and another vs. R. [2003], EA 50.

“If a police Corporal does not, in law have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. the parts conducted by corporals Kamotho and Gitau) are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.” This holding is also true of this case.

3. Once I have so declared I must now hold that the trial was materially defective for reasons stated

above, and I should now declare it a nullity and ask myself whether there are serious grounds for ordering a retrial. The issue was not addressed in submissions but nonetheless I am aware that the learned Senior State Counsel, Mr. Oluoch did say that there was overwhelming evidence against the Appellant and that he was very lucky to have been charged with robbery contrary to s.296 (1) of the Penal Code. The reason for this submission was that there was overwhelming evidence in Mr. Oluoch's view tendered by the prosecution against the Appellant.

4. I wholly agree and had it not been for the material defect above, I would have dismissed the Appeal and sustained the conviction and sentence. The reason for so saying is that P.W.1 Godfrey Nyaga Muchiri and P.W.2 Aurelia Gatakaa Nyaga were consistent in their evidence that the Appellant although not in the robbery committed on 27.12.2002 was sighted by neighbours when the second robbery was committed on 4.1.2003 and his name was given to the sub-chief and his home visited at night but he was only arrested at 6.30 a.m. To corroborate this evidence P.W.3, Kennedy Miriti when woken up by the screams of P.W.1 and P.W.2 at 2.30 a.m. on 4.1.2003 ran out to help, shone his torch and recognized the Appellant as one of the robbers and they chased P.W.2 back to his home but he later that night told the sub-chief that he had seen the Appellant and was present when the Appellant was arrested early that morning.

5. P.W.4 Kithuci Mugira saw the Appellant at the scene on the material night using moonlight and light from P.W.1's house.

6. P.W.5 APC Charles Mungira raced to P.W.1's home on the material night and was one of those who arrested the Appellant as he was identified as having been at the scene by some of the witnesses.

7. To my mind all circumstances were favourable and clearly the Appellant was identified at the scene and he cannot now be heard to fault that identification by witnesses who recognized him, since they knew him before and proceeded to arrest him at his home the same night.

8. I see nothing in the Appellant's defence before the trial court to change this evaluation and conclusion.

9. The Appellant was sentenced to serve 7 years in prison with hard labour on 30.9.2003. The circumstances of the case were such that he deserved a harsh sentence. He was part of a terror gang that also became part of a hit squad, if their statements to P.W.1 that they were hired killers, can be believed. No matter P.W. 1 was attacked twice and the Appellant and his accomplices ought to have been taught a lesson with stiff sentences. They escaped and now by a technicality of law, the Appellant will not serve that lenient sentence.

10. However, there is overwhelming evidence that a retrial would be the best route in this matter for reasons that there is evidence that the conviction against the Appellant was sound.

11. Accordingly, the Appeal is allowed, conviction quashed and sentence set aside.

12. The Appellant shall be retried and pending such retrial shall be held at Chuka Police Station.

13. Orders accordingly.

Dated, signed and delivered in open court at Meru this 2nd day of August 2006

ISAAC LENAOLA

JUDGE

In the Presence of:

Appellant in person

Mr. Muteti State Counsel for the state.

ISAAC LENAOLA

JUDGE

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