REPUBLIC OF KENYA

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

Criminal Appeal 110 of 2002

(From original conviction and sentence in criminal case No.21340 of 2000 of the Chief Magistrate's court at Makadara (Mrs. R. Kimingi-PM)

JOHN GITAU WAMBUI……..……. APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

J U D G M E N T

JOHN GITAU WAMBUI was convicted of four (4) counts of **ROBBERY** contrary to **Section 296(2)** of the **Penal Code**. Having been certified as below 18 years of age, the learned trial magistrate sentenced the Appellant to detention under the President's pleasure. The Appellant was dissatisfied with the conviction and therefore lodged this appeal.

The prosecution case was that there were several robberies committed against residents of a plot at Kayole Estate and that the Appellant was among the robbers. The robbery in the instant case took place at 11.00 p.m. One of the Complainants, P.W.1 apprehended the Appellant inside his house and used him as a human shield against panga blows aimed at him by one of the Appellant's accomplices. The Appellant was cut on the forehead while P.W.1 sustained a cut on his right hand. P.W.1 held on to the Appellant and shouted that he had with him one of the robbers. That is when neighbours ran to his house and helped restrain the Appellant. The Appellant after being beaten by P.W.1's neigbhours named his co-accused in the lower court as one of the accomplices. The co-accused was P.W.1's neigbhour and had been locked inside his house as were several other neighbours to P.W.1. The co-accused was nevertheless charged with these offences but later acquitted by the court.

When the appeal came up for hearing before us on 11th July, 2006 the learned Counsel for the State, **Miss Gateru**, stated that she had instructions to concede to the appeal. Counsel submitted that at page 4 of the proceedings one police constable **Radak** was reflected as having led the first three prosecution witnesses in giving their evidence. Counsel submitted that this was in contravention of **section 85(2)** as read with **section 88** of the **Criminal Procedure Code**. We have perused the record of the proceedings. At the page indicated by **Miss Gateru** for the State, proceedings for two different dates are indicated. These are proceedings for 17th January 2001 and 18th January 2001. On 17th January the court Coram was indicated as follows:

"***17.1.2001***

Before Mrs Kimingi –PM

PC. Radak for prosecution

Court Clerk: - Esther

Accused in custody

Hearing on 18.1.2004

MRS R. KIMINGI

PM"

On the 18th the court Coram was indicated as follows:-

"***18.1.2001***

Coram as before

Accused in custody – both present

Prosecutor

I have the instructions ……"

MRS. R. KIMINGI

P.M."

The court Coram of 18th January 2001 was not indicated and that was the day that the first three prosecution witnesses, all complainants in the case, gave their evidence. Whether we follow the Court of Appeal ruling in **NASSORO MOHAMED MWABUJA vs. REPUBLIC C.A 155 OF 2004** or **EKIMAT vs. REPUBLIC C.A. No.151 of 2004,** the effect will be the same which is that the proceedings of 18th January 2001 were a nullity. The person, who prosecuted the case, remains unknown and his competence to lead the prosecution case unknown. Even if we are to assume the same Police Constable **Radak** who appeared in court on 17th January led the prosecution of the case on 18th as the Coram indicates the proceedings would still be found defective since the police constable was not authorized to conduct the prosecution of the case not being qualified as required under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**. Accordingly we declare that the proceedings in this case were rendered defective by the act of Police Constable **Radak** conducting the prosecution. We quash the convictions and set aside the sentence.

Miss Gateru has urged us to order a retrial in order for the ends of justice to be met. Counsel submitted that there was sufficient evidence to sustain a conviction since the Appellant was positively identified by P.W.1 and P.W.2 and that witnesses in the case would be availed to testify.

The Appellant who was unrepresented did not oppose a retrial of the case.

It is trite law that an order for a retrial may be made where the original trial like in this case was defective See **MERALI vs. REPUBLIC 1971 E.A. 221.** It is also trite law that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each case and that a retrial should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person. See **MANJI vs. REPUBLIC 1966 EA. 343 and MWAURA vs. REPUBLIC C.A. No. 58 of 1989** (unreported).

In this case the Appellant was apprehended by P.W.1, the Complainant in count 1, as one of the

persons who had robbed him as others made their escape from his house. Prior to the attack, P.W.1's electricity lights were on in his house. It was during the robbery that one of the accomplices hit the bulb breaking it and pitching the house in darkness. By the time the lights went off, PW.1 was already holding onto the Appellant and never let go until others went to his rescue.

The Appellant's defence was that he had helped his uncle at a hotel nearby and that as he went home somebody held him and ordered him to sit down. The Appellant said that he was then led to another plot where he was cut on the head and hand. That people from the plot later came and said he was one of the robbers. He denied being one of them.

We have considered the Appellant's defence against the evidence of P.W.1 that indeed after he was robbed he held on to the Appellant to avoid being hit with a panga. It was the evidence of P.W.1 that in the full glare of the electricity lights in his house, the armed robber cut the Appellant and also cut him. Considering that the Appellant was cut by one of the alleged co-accomplices and bearing in mind P.W.1's evidence that the Appellant was asked to hand over money he got from the Complainant's pocket to the armed thug and also that the Appellant was directed to hand over all things he collected from the Complainant's house; considering also that from the Complainant P.W.1's evidence, the Appellant never resisted when he held him, all these circumstances do in our view create a doubt as to the Appellant's involvement. It is very likely as the Appellant stated in his defence that he fell into the hands of the robbers and was forced to do what he did without having formed the *mensrea* to commit these offences. The Appellant's defence raises serious doubts as to whether he formed the necessary common intention with the robbers as to justify a conviction for the offences. We find that the evidence which was placed before the Court may not result in conviction if we ordered a retrial.

We therefore apply two principles in determining whether or not to order a retrial in the instant case. The first principle we apply is the one that was applied in the case of **MANJI vs. REPUBLIC 1966 E.A. 343** which is that an order for retrial should not be made where it is found that it is likely to cause an injustice to an accused person. We find that if we make an order for retrial the Appellant is likely to suffer injustice for three reasons. One that he ought to have been given a benefit of doubt in the trial court had the learned trial magistrate given due consideration to all the facts and circumstances of this case. Secondly that having been 16 years old at the time of his arrest, and having been in prison custody for the last six years the Appellant has suffered enough injustice by spending the most formative years of his life in confinement. Thirdly, if we order a retrial the Appellant will be facing a death sentence if found guilty and such a likelihood is bound to cause the Appellant great prejudice. The second principle we have applied was the one considered in the case of **MWANGI –V- REPUBLIC 1983 KLR 522** which is a retrial should not be ordered unless the Appellate court is of the opinion that on a proper consideration of the admissible evidence and or potentially admissible evidence, a conviction might result. We have considered the evidence adduced before the lower court and have formed the opinion that from the evidence in this case a conviction is not likely to result. We decline to order a retrial and order that the Appellant be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 26th day of September, 2006.

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for State

Tabitha/Erick CC

…….

LESIIT, J.

JUDGE

…….**….**

MAKHANDIA

JUDGE