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

Criminal Appeal 210 of 2002

(From original conviction and sentence in Criminal Case No. 15199 of 2000 of the Chief Magistrate's Court at Makadara – Mrs. Kimingi, PM)

SAITOTI MOLEIL ………….................................……………………………….……… APPLICANT

VERSUS

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

JUDGMENT

SAITOTI MOLELL, hereinafter referred to as "***the Appellant***" was charged and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Upon conviction he was sentenced to death as required by Law. The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal.

In his Petition of Appeal, the Appellant cited the following grounds:-

1. **THAT** the Learned trial Magistrate erred in law and facts in failing to note that PW1's alleged recognition was never built on prompt and implicating first report to the Police.

2. **THAT** the Learned trial Magistrate erred in Law and fact in not appreciating that a victim may believe most genuinely that the had recognized an assailant and yet be mistaken.

3. **THAT** the Learned Magistrate erred in Law and facts to conclude that the Prosecution case was proved beyond reasonable doubts yet:-

(i). The Prosecutor in this case was unknown throughout the hearing thereby breaching Section 85 (2) of the Criminal Procedure Code.

(ii). The cause of the Appellant's arrest had nothing to with the robbery upon the Complainant.

The Prosecution case was that on 13th July, 2001 at about 11 p. m., the Complainant (PW1) who was a watchman went to the back of the bar where he was guarding at Makadara Shopping Centre. He was suddenly accosted by eight (8) people who attacked and cut him. Thereafter they took his Kshs.500/= PW1 was able to recognize one of them being the Appellant herein. He was a fellow watchman in the neighbouring premises. PW1 was able to recognize the Appellant with the assistance of the City Council Security lights that were on. Indeed he even called out the name of the Appellant. PW1 was then rescued by passersby who took him to Jericho dispensary for treatment. Thereafter he reported the incident at Jogoo Police Station. He was thereafter issued with a P3 Form. The Appellant was subsequently arrested and the Complainant was informed of the fact on 29th July, 2001. The Appellant was then charged with

the instant offence.

Put on his defence, the Appellant stated that he was arrested on 29th July, 2001 and taken to Jogoo Police Station over another incident. He was however later charged with the instant offence he knew nothing about.

At the hearing of the Appeal, the Appellant tendered written submissions that we have carefully considered. The State was unrepresented in the proceedings though she had been served with the hearing Notice. There being no explaination for the absence of the State representative, we opted to hear the Appeal, the absence notwithstanding.

Our perusal of the record reveals that throughout the trial the Coram of the Court was always recorded as "***Coram as before.***" The last proper Coram to be recorded was on 13th September, 2001 when the matter came up for mention. The case was heard on three different occasions to wit 11th October, 2001, 7th November 2001 and 20th November, 2001 respectively. On each of those occasions the Coram of the Court was merely reflected as "***Coram as before.***" That being the case, it is difficult to tell whether there was a Prosecutor on those occasions and if so whether he met the requirements set out in Section 85 (2) as read together with Section 88 of the Criminal Procedure Code.

Recently the Court of Appeal has had to grabble with a similar case in the celebrated case of ***BENARD LOLIMO EKIMAT VS REPUBLIC, CRIMINAL APPEAL NUMBER 151 OF 2004 (ELDORET) (UNREPORTED)*** in which it rendered itself thus:-

"……***It is difficult to appreciate what the phrase "Coram as before" means. Court cannot assume that the Inspector of Police who was there before was the one present. There must be specific entry as to the Prosecutor present and rank as per Section 85 (2) of the Criminal Procedure Code…."***

For that reason the Court of Appeal proceeded to allow the Appeal, quash the conviction and set aside the sentence. The same scenario obtains here. As the Court of Appeal decisions are binding on us, we accordingly annul the proceedings, set aside both the conviction and sentence. In our view the Appellant was right in raising the issue in his "***supplementary grounds of Appeal.***"

The next issue which we have to determine in the light of the decision we have come to is whether we should order a retrial.

The Appellant was opposed to an order for retrial. In his written submissions on the issue, he stated that the evidence on record was scanty and if the self same evidence was tendered at the retrial it is highly unlikely that a conviction may result. For this proposition, the Appellant relied on the case of ***MWANGI VS REPUBLIC (1983) KLR 522.*** The Appellant further submitted that if an order for retrial was to be made, it would occasion him grave injustice and prejudice.

The principles upon which the Appellate Court acts in determining whether or not to order a retrial are now well settled. A retrial should only be ordered.

(i). Where the original trial was illegal or defective.

(ii). If it is in the interest of justice

(iii). If it will not occasion injustice or prejudice to the Appellant

(iv). If it will not accord the Prosecution opportunity to fill up gaps in its evidence at the first trial and finally

(v). Each case must depend on its particular facts and circumstances.

(vi). If upon consideration of the admissible or potentially admissible evidence a conviction may result.

As stated by Justice A. M. Akiwumi, in the case of ***JACKSON MUTHARIA MWAURA ALIAS KAMANDE & ANOTHER VS. REPUBLIC, CRIMINAL APPEAL NUMBER 58 OF 1988 (unreported),*** the above conditions are conjunctive and not disjunctive. However one of them which must be present is that the trial in the subordinate Court must have been defective. In the instant case, this condition has been met.

The Appellant was arrested on 29th July, 2002. In total the Appellant has been behind bars for a period of well over 5 years. That is a long period of time. In the circumstances, an order for a retrial would in our view, occasion injustice to the Appellant. Further without having heard from the Respondent regarding the fate of witnesses, we cannot be definite that the witnesses will be traced without unreasonable delay if a retrial is ordered. The Complainant was a watchman. From his nature of work it may probably be difficult to trace him 5 years after the incident.

On the evidence we note that this was a case of recognition as opposed to visual identification. However as stated by PW1, the intruders who numbered 8 attacked him suddenly in a place that was inadequately illuminated. This condition could have hampered and or hindered the Complainant's observation. PW1 did not indicate nor did the Court inquire as to the period taken by PW1in observing the Appellant as to be able to recognize him. In our view PW1's sudden confrontation with the armed strangers must have taken him by surprise as to render his ability to positively identify the thugs leave alone the Appellant well nigh impossible. The identification of the Appellant was made worse by the fact that the person alleged to be the Appellant was disguised. He had a woolen cap covering his face. In Blackstone Criminal Practice 1997 at Section F – 18, the Learned Author states and rightly so in our view that:-

"…… ***As in the process unconscious transference, a witness may confuse a face he recognized from the scene of crime. It may be of an innocent person confused with that of the offender…"***

This possibility cannot be ruled out in the circumstances of this case. It is also worthy repeating what was stated by the Court of Appeal in the case of ***JOSEPH LEROI OLE TOROKE VS REPUBLIC IN CRIMINAL CASE NUMBER 204 OF 1987 (UNREPORTED***) that:-

"…….***.It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows yet be mistaken so the possibility or error or mistake is still there whether it be a case of recognition and identification are quite different concepts but this alone cannot absolve a trial Court from the need to warn itself of the dangers of basing a conviction on such evidence….…"***

It is evident that although PW1 claimed to have recognized the Appellant he never said so in his first report. This fact alone puts to question PW1's alleged recognition of the Appellant further. All in all we are not satisfied that if this self same evidence was to be tendered at the retrial, a conviction may result.

Taking all these matters into consideration we do not think that it would be in the interest of justice to subject the Appellant to a fresh trial. Accordingly we refuse to order a retrial with the consequence that the Appellant is to be released from prison forthwith unless otherwise lawfully held.

Dated at Nairobi this 2nd day of November, 2006.

……………………………………

LESIIT

JUDGE

…………………………………**..**

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Erick/Tabitha: Court clerks

……………………………

LESIIT

JUDGE

……………………………….

MAKHANDIA

JUDGE