



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.178 of 2003

BENSON MWITI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellant herein, Benson Mwititi was charged on six counts of robbery with violence contrary to section 296(2) of the Penal Code. He was tried by the principal Magistrate Isiolo who found the appellant guilty on all the counts except count four on which the prosecution did not adduce evidence as the complainant never testified. The facts of this case may be briefly stated. The six complainants in this case, Abdihakim Salim (PW1), Grace Gatitu (PW2), Magdaline Gatwiri (PW3), Mary Mugure (PW4), Lucy Kangoro (PW5) and Esther Nyambura (PW6) who were all residents of Bulapesa area of Isiolo were woken up at about 3.00am on divers dates between 27.9.2002 and 27.10.2002 when the doors to their houses were either broken down with stones or they were forced to open them and the appellant entered. There were other robbers with the appellant but those other robbers remained outside every house from which they robbed. From the evidence of PW1, the appellant was armed with something that looked like a gun. The appellant stole from PW1's house a torch, two batteries, two chickens, a masai sword, a mattress and two stools. The appellant also carried away some cooked food.

In the house of PW2, the appellant demanded money. He hit PW2 with the flat side of a panga which he was carrying and also took away from the house of PW2 two blankets, three sheets, a kikoi, jacket, shoes, lamp, pullover, two sufurias and a sack in which the appellant stuffed all the stolen items. The appellant also promised to return to PW2's house for more money on 7.10.2002. Appellant also took away underwear and petticoat belonging to PW2. When the appellant entered the house of PW3, he took Kshs. 600/= and household goods and cereals namely maize, beans, sufuria, brief case, bag, pullover, shoes, two wallets one of which contained Kshs. 1,500/=, cups, thermos and pangas. As the appellant and the other robbers who had remained outside all the while were leaving, they promised to make a return visit in three days. The appellant returned after three days as promised and this time round, he and the other robbers took a blanket, sufuria and Kshs. 50/=.

From the house of PW4 which was attacked on 3.10.2002, the appellant and the other robbers stole a thermos, glasses, sheet, bag, and Kshs. 150/= in cash. According to PW4, the appellant was armed with a panga. From the house of PW5, the appellant stole a blanket, mattress, lamp, sufuria and shoes. PW5 said that apart from the panga, the appellant was also armed with something else that looked like a gun, but which the appellant was concealing under his long jacket. After the appellant broke into the house of PW6, he stole from there Kshs. 30/= in cash, four trousers and two T-shirts from the box. The appellant also stole a radio and a watch. According to PW6, the appellant was armed with a panga. PW7, Angelica Mukiri said she was in the house of PW2, Grace Gatitu when the robbery took place. She also stated that after the appellant and gathered together all the goods he stole, and gathered them in a sack, he forced

PW7 to carry those goods up to a place called Pepo La Tumaini. PW7 stated further that the appellant hit her.

In his unsworn statement, the appellant stated that on 9.10.2002 at about 9.00am, while at Isiolo Market where he had gone to visit a friend, he was arrested by Administration Police after being identified by a certain young man. The appellant stated further that he and the young man did not see eye to eye for the reason that the appellant had snatched the young man's wife. The appellant denied knowledge of the allegations made against him and told the court that it was a son of PW2 who took both the police and the appellant to a house from which the complainant's stolen property was found. The appellant has appealed to this court against both conviction and sentence on the following seven (7) homemade grounds:-

1. That the trial magistrate erred in law and fact on upholding that the identification made by the prosecution witnesses was positive without considering that in the circumstances prevailing the positive identification wasn't ideal.
2. That the trial magistrate misdirected himself by upholding the evidence adduced by the prosecution witnesses without caution that the same was contradictory, hence lacked merit to justify a conviction.
3. That the trial magistrate misdirected himself on his final findings in that the charge under section 296(2) of the Penal Code wasn't proved beyond doubts for it was not supported by any medical evidence.
4. That the trial magistrate erred both in law and fact by basing my conviction on the evidence of exhibit items without considering that the same was not supported by inventory form to fulfill the prosecution's allegations.
5. That the prosecution case was not proved beyond doubts by failing to avail the essential witnesses.
6. That the trial magistrate failed to consider my defence hence giving no reasons for rejection of the same.
7. That the learned trial magistrate misdirected himself not only on the burden of proof but also on the evidence on record.

When the appeal came before us for hearing on 20.4.2005, Mr. Muteti, the learned state counsel informed us that he was conceding to the appeal on the ground that the prosecution case was partly conducted by a police constable contrary to section 85 of the Criminal Procedure Code which provides as follows:-

“85 (1) the Attorney General, by notice in the gazette may appoint public prosecutors of Kenya or for any specific area thereof and either generally or for any specific case or class of cases.

(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or a person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police to be a public prosecutor for the purposes of any case.” While conceding the appeal on the ground as above stated the learned state counsel urged us to order a retrial on the grounds that:-

- (a) The appellant was tried and convicted of five counts of robbery with violence on the basis of watertight evidence which evidence can sustain a fresh conviction.
- (b) All the state witnesses are and will be available.
- (c) There were no loopholes in the prosecution's case and that an order for retrial would not therefore be giving the prosecution to fill up any gaps as the evidence on record was sufficient.
- (d) The appellant's trial ended on 17.7.2003, which is not a long time since.
- (e) It would be in the interests of justice to order a retrial.

The appellant opposed the prayer for a retrial, contending that he had been in prison for long and that there was not sufficient evidence on which a fresh conviction could be based even if a retrial was ordered. The appellant left the determination of the rest of the issues to the court. From numerous decisions by the Court of Appeal, our duty as the appellate court of first instance is to evaluate and reconsider the evidence adduced before the trial court and to make our own independent findings as to whether indeed the conclusions reached by the learned trial magistrate were soundly made. In this regard, we rely on the Court of Appeal decisions in RANDYA V. R. (1957) E.A. 336 and OKENO V. R (1972)EA 32. As the learned state counsel has already conceded the appeal on the grounds we have set out elsewhere in this judgment, our task at this stage is to consider the law as set out under the provisions of section 85 of the Criminal procedure Code and also to consider whether the appellant's case is a proper case to be remitted to the lower court for retrial. First of all, we shall dispose of the fact of the prosecution's case in the lower court having been partially conducted by a police constable. Our view is that the provisions of section 85 of the C.P.C. are clear in their wording and this was made explicit by the Court of appeal decision in ELIREMA & OTHERS V.R. Criminal Appeal No. 67 of 2002.

The learned judges of appeal expressed themselves as follows on the issue of who a competent prosecutor is:- "Going by the provisions of the codeit is clear that the Attorney General has no power to appoint a police officer below the rank of Assistant Inspector to be a public prosecutor.....(the two corporals) were clearly acting as public prosecutors. They did not They were clearly not qualified to act as public prosecutors. We are not told that the Attorney General had appointed them as public prosecutors but even if the Attorney General had purported to do so, such appointment would not be legally admissible or tenable so that for all practical purposes the two officers were not entitled to act as public prosecutors." That is the seriousness with which the Court of Appeal has viewed non-compliance by the prosecution of the provisions of section 85 of the C.P.C. That indeed is trite law and we say nothing more about it except perhaps to express our agreement with the learned state counsel in his decision to concede to the appeal on that ground. Should this case be referred back to the lower court for retrial? The learned state counsel has contended that a retrial would not be prejudicial to the appellant for the reasons that all the prosecution witnesses are readily available and that the prosecution's case is based on watertight such that it would certainly support a conviction against the appellant on retrial.

That because the evidence is so overwhelming an order for retrial would therefore not be an opportunity for the prosecution to fill in any gaps in its case. In MERALI AND OTHERS V. R. (1971) EA. 221, a decision that was followed by SK Sachdeva and JS Patel JJ (as they then were) in SHAZAD AND 2 OTHERS V. REPUBLIC (1988)KLR 282, the Court of Appeal for East African (Sir William Duffus, P, Law and Mustafa JJA) held that a retrial may be ordered if the interests of justice require and if no prejudice is caused to the accused. Secondly, that a retrial may be ordered only when the original trial was illegal or defective. We shall examine the evidence before us in order to see whether the same is so overwhelming against the appellant that the only logical conclusion we can reach is to order a retrial and whether or not such a retrial would not be prejudicial to the appellant. Does the evidence before us show that the appellant was positively identified as one of the robbers who visited the mayhem upon the complainants in this case? PW1 stated that when the appellant entered the house, the lamp was on and that he saw the appellant well. When PW1 was cross-examined by the appellant, he said in part:- "You entered inside and I saw your face with the aid of light from the lamp. I saw you very well. I know your face. You were wearing a "Kabuti""

PW2, Grace Gatitu who was in the house with PW7, Angelica Mukiri also told the court that when the appellant got into the house, he lit a lamp and that is when PW2 saw the appellant. According to PW7, it was PW2 who lit the lamp before opening the door after the appellant had demanded that the door be opened. The evidence of PW3 was that after the appellant and some five other people entered the house, the appellant lit the lamp, and when cross-examined by the appellant, PW3 said in part:- "I saw you after you put on the lamp on. You had a "kofia". You were the gang leader." The evidence of PW3 tallied with that of PW2 who described the appellant as having a "kofia". PW5, Lucy Kanyoro, also testified that the person who broke into the house lit a lamp. According to PW6, when the appellant entered the house he (appellant) lit the lamp and started ransacking the house. That the appellant was armed with a panga. PW6 made the following statements when she was cross-examined by the appellant:- "You had a long coat. I saw you very well..... I marked you very well. You were walking about with the lamp as if the

house was yours. You were found wearing the clothes you stole which belong to my son.” PW8 Amina Mukami told the court that when she heard the door being banged, she got out of bed and lit the lamp and on opening the door, she saw the appellant who pushed her back as he entered the house. She also stated that while inside the house, the appellant put new batteries in a torch when the lamp went off and the appellant started walking around with the lit torch as he ransacked the house looking for money and other valuables, which included two chickens, one mattress and bed sheet. In his considered judgment, the trial court said:-

“All (prosecution witnesses) testified that they saw the accused very well. Accused appears to have been the leader. He was entering the house and taking out the booty and handing it over to his accomplices. There was light from lamps and this enabled them to see. Some like PW9 knew the accusedand they had stayed together Eventually when the accused was caught he was found wearing clothes which were identified by PW6.” The trial court thus believed and accepted the evidence adduced by the prosecution through PW1, PW2, PW3, PW5, PW6, PW7, PW8 and PW9. The trial magistrate considered and rejected the unsworn evidence by the appellant in which the appellant alleged that he was framed by an unnamed young man because of a disagreement over a woman whom the appellant alleged he had snatched from the unnamed young man. We have ourselves evaluated that evidence and considered all the circumstances of the case and are satisfied that the evidence against the appellant is so overwhelming that it can certainly sustain a conviction on a retrial. The conditions prevailing during the time of the robberies was conducive to positive identification of the appellant as the gang leader.

We have also considered the detail the circumstances of this case among them the period it took from the day the appellant was arrested to the day he was convicted. From the record, the appellant’s case was first mentioned in court on 29.10.2002. Judgment in the case was delivered on 15.7.2003. Although it has taken time before the appeal is finalized, the reason for the delay is that for long interludes, there was no resident judge at Meru to deal with appeals, and as a result, there was a backlog. If it was not for the backlog this appeal would have been heard and determined towards the end of 2003 or early 2004. Our view is that in the interests of justice, this case should be sent back to the lower court for retrial. It is also our view that no injustice will be caused to the appellant. As each case has to depend on its own facts and circumstances, we are satisfied that in view of the facts and circumstances of this case, an order for retrial would be justified (see AHMED ALI DHARMSHI SUMAR V. REPUBLIC (1964) E.A. 481 and also FATEHALI MANJI V REPUBLIC (1966) EA 343. In the result, we find that the appellants appeal has merit. We allow the same, quash the conviction and set aside the sentence of death imposed upon the appellant on each of counts 1, 2, 3, 4 and 5. We however order that the case be sent back to the Principal Magistrate’s Court, Isiolo for retrial before a magistrate other than the one who heard the case in the first instance. As we are desirous that the case against the appellant be determined soonest we order that the hearing of the same be given priority and be heard from day to day until it is concluded. It is so ordered.

Dated and delivered at Meru this 25th day of May 2005.

D.A. ONYANCHA

JUDGE RUTH N. SITATI

JUDGE