



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1123 OF 2002

(From original conviction and sentence in Criminal Case No. 5031 of 2001 of the Senior Principal Magistrate's Court at Thika: H.A. Omondi (Mrs.))

EUTICUS KABUGU NDONGA.....1ST APPELLANT

SIMON MWANGI NGUGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants herein, **EUTICUS KABOGO NDONGA** Cr. A. 1123 of 2002, and **SIMON MWANGI NGUGI**, Cr. A. No. 1124 of 2004 were charged with **ROBBERY WITH VIOLENCE CONTRARY** to Section 296(2) of the Penal Code, in Criminal Case No. 5031 of 2001, in the S.R.M.'s Court, at Thika.

The particulars of the charge were that on 6/11/01 at Gathugu Village, Thika District, Central Province, jointly with another not before court while armed with dangerous or offensive weapons namely a pistol and rungus robbed RONALD KANGUHA MUSIMBI of Cash kshs.60,850/- and immediately before or immediately after the time of such robbery threatened to use actual violence on the said RONALD KANGUHA MUSIMBI.

The two appellants were convicted of the offence as charged and sentenced to death, as by law prescribed, and being dissatisfied with both the conviction and sentence, they have appealed in this court against both the conviction and the sentence.

Their grounds of appeal, which are essentially similar, revolve around identification and discrepancies in the evidence adduced and the charge sheet. The Charge Sheet states that they robbed P.W. 1 of 65,850/- while the evidence by P.W.1 states that the sum stolen was Kshs.55,000/-. The prosecution case is that on the material date P.W. 1, the salesman of Kenblest, was selling bread in various places in Thika with a driver – P.W. 2 – in vehicle KZT 798. While at Riverside, they were stopped by a person holding a paper bag. The person, not in court, wanted five loaves of bread and as P.W. 1 alighted from the vehicle, a pistol was put at his side – P.W. 1 – and the 2nd Appellant threatened that his intestine will be shot till they spill/fall down and told P.W. 1 not to move. The one with the pistol robbed him of 55,000/- and coins from the dashboard.

P.W. 1 identified 2nd Appellant as the person who threatened him. After the robbery the three robbers ran off. Appellant 1 had confronted the driver and ran and hid in a culvert. Appellant 2 ran and

entered a toilet in another man's home but he was removed.

P.W. 1 and P.W. 2 (the driver) shouted for help and members of the public assisted them to arrest both appellants who were taken to the police station and finally charged with the offence herein.

After their arrest, P.W. 1 testified that the two appellants said the 3rd robber who had the gun had escaped with the money robbed.

Ms. Gakobo, for the state conceded the appeal, but on a technical ground that part of the prosecution was conducted by an unqualified person. This offends Section 85(2) of the Criminal Procedure Code, and rendered the trial at the lower court a nullity and the conviction and the sentence cannot stand. She however, stated that the state seeks a retrial on the basis of the evidence adduced at the lower court, which but for the technical problem was sufficient to sustain both the conviction and the sentence.

We have carefully perused the entire record from the lower court, and it is true that, at Pages 10 and 11 of the proceedings one Police Constable Omulepu conducted the prosecution on 19/4/02. This clearly is against the provisions of Section 85(2) of the Criminal Procedure Code and renders the entire trial a nullity and as such the conviction and the subsequent sentence therefrom cannot stand.

On the retrial of the two appellants as applied by the learned State Counsel, we wish to firmly state that justice is for both the appellants (accused at the lower court) and the victims of their thuggery.

Our perusal of the evidence on record from the lower court indicates a strong case by the prosecution, and we accordingly order for a retrial of the two appellants, on the following conditions: The trial will be conducted by a competent prosecutor, before a competent court, presided over by a competent magistrate other than the one before whom the case was initially heard. Further, for speed – given that the appellants have been in custody for four years – only those witnesses who testified in the original trial will be called upon to testify.

It is so ordered.

DATED and delivered in Nairobi this 3rd Day of May, 2005.

O.K. MUTUNGI

JUDGE

F.A. OCHIENG

JUDGE