REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal 397, 398 & 399 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in Criminal Case No. 416 of 2003 – P. Okile)

MAGORIKI OLE RORIKI……..…1ST APPELLANT

LIALO OLE MAINE……..…….2ND APPELLANT

LEMOIS OLE MOLO……..…3RD APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellants, Magoriki ole Roriki, Lialo ole Maine and Lemois ole Molo were jointly charged with committing the offence of robbery contrary to **Section 296(1) of the Penal Code**. The particulars of the charge were that on the 18th of June 2003 at Olopopong Estate, Narok Township, the appellants jointly with other not before the court, robbed Paul Njuguna of a brief case, personal clothing items and a bicycle all valued at Kshs 14,000/= and at or immediately before or after the time of such robbery threatened to use actual violence to the said Paul Njuguna. The appellants pleaded not guilty to the charge and after a full trial, the appellants were convicted as charged. They were sentenced to serve seven years imprisonment. Being aggrieved by the said conviction and sentences imposed, each of the appellants filed a separate appeal against his conviction and sentence to this court.

At the hearing of the appeal, the three separate appeals filed by the appellants were ordered consolidated. The appeals were therefore heard as one. Mr Koech, Learned State Counsel conceded to the appeal. He submitted that the criminal case facing the appellants was prosecuted at the trial magistrate's court by Police Constable Ihaji who was a police officer of a rank not authorized to conduct prosecutions before a magistrate's court. He however submitted that the appellants ought to be retried in view of the serious nature of the offence that they faced. He further submitted that there was overwhelming evidence connecting the appellants to the offence. For instance, he submitted that the 2nd appellant was recognized by the complainant as one of the persons who robbed him *(i.e. the complainant)*. He argued that some of the items which were stolen from the complainant were recovered from the appellants so soon after the robbery hence the applicability of the doctrine of recent possession. He urged this court to order that the appellants be retried. On his part, the 1st appellant was opposed to being retried in view of the length of time that he had served in prison. Likewise the 3rd appellant was opposed to being retried. He asked the court to order that he be discharged. The 2nd appellant was not however opposed to be retried although he asked the court to consider the period that he had served in prison.

Having considered the submissions made by the State, there is no doubt that the proceedings of the trial

magistrate from which these appeals arose were a nullity. The criminal case was prosecuted by a police constable who is not authorized in law to prosecute criminal cases as provided by **Sections 85(2) and 88 of the Criminal Procedure Code.** The court of appeal held in the case of **Eliremah & Anor –vs- Republic [2003] KLR 537** that where such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto will be a nullity. In the circumstances therefore I have no option but to allow the appeal, quash the convictions of the appellants and set aside the sentences that were imposed on them.

Mr Koech has made powerful argument on behalf of the State in support of the submission that the appellants ought to be retried. He had made persuasive argument that there is overwhelming evidence which would support a conviction should this court be minded to order the appellants to be retried. On that part, the appellants have urged this court to consider the period that they have served in prison before making an order that they be subjected to a retrial. Some of the principles which this court is required to consider before making an order for retrial were set out by the Court of Appeal in the case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal held at page 6 that;

> ***"In the case of Ahmed Sumar v Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:***
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> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".***
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> ***The court continued at the same page paragraph H and stated:***
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> ***"We are also referred to the judgment in Pascal Clement Braganza v R [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***
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> ***There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice required it."***

In the present case, while it is true that the vitiated proceedings reveal that there is sufficient evidence to enable this court order a retrial, this court will not lose sight of the fact that the appellants have served two years and nearly two months of the sentence that was imposed by the trial magistrate in the vitiated trial. Justice of this case demands that the appellants should not be retried especially considering the fact that they have served nearly a third of the sentence imposed in the vitiated trial.

In the circumstances therefore, the order that commends itself to me is to order that the appellants be discharged. They are hereby set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE