REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 61A of 2003
(From Original conviction (s) and Sentence (s) in Criminal Case No. 1087 of 2000 of the Principal Magistrate's Court at Kitui (M.N. Gicheru P. M)

SAMUEL MURIITHI MBUI ……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 107 of 2003

NZAU MULI ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellants in these appeals **SAMUEL MURIITHI MBUI** and **NZAU MULI** were with others jointly charged in three counts of Robbery with violence Contrary to Section 296 (2) of the Penal Code. They were tried, and found guilty and convicted in all three counts. Their appeals have been consolidated having arisen out of the same trial.

When this appeal came up for hearing, Mr O'Mirera conceded to it on grounds that the case for the prosecution was conducted by an unqualified public prosecutor. Mr O'Mirera submitted that one Police Constable Mutua led PW12 and PW13 in giving them evidence and that although the rest of the prosecuted was led by a qualified prosecutor, the same rendered the entire prosecution a nullity.

We have perused the record of the proceedings of the lower court and are satisfied that as the learned counsel for the state submitted part of the prosecution was conducted by one Police Constable Mutua who was unqualified to conduct the prosecution case. As held in the Court of Appeal case of ***ROY ELIREMA & ANOTHER versus REPUBLIC (2003) KLR,*** such prosecution renders the entire proceedings a nullity since it is impossible to separate the part of the proceedings that was not, since the trial was one. We find the proceedings were a nullity and set aside both the convictions and the sentences. The issue remaining to be decided is whether or not we should order a retrial of this case. We have carefully analyzed and evaluated the evidence adduced before the trial court. Mr O'Mirera, has urged this court to order a retrial. The first ground cited by the learned counsel was that the offences were grave and that dictates of justice required that the appellants be tried properly. The second ground cited was that the appellants were charged in court on 17th July 2000 and the case concluded on 14th March 2003.That therefore the appellants had not been in custody for long and will suffer no prejudice.

The third ground cited was that the evidence was strong and could sustain a conviction and that the prosecution witnesses would be availed for the retrial. He submitted that the prosecution would not fill any gaps in its case since the case was fully investigated.

Each of the appellants opposed an order for retrial. The 1st appellant submitted that he had been in custody since his arrest in July 2000 and therefore will suffer prejudice if a retrial were ordered. That the evidence was inconsistent and insufficient to sustain a conviction. The 1st appellant pointed out to various alleged shortcomings in the evidence adduced especially by PW1 and the Doctor's evidence.

The 2nd appellant on his part adopted the submission by his co-appellant. The 2nd appellant then added that he has suffered prejudice because of his age and the fact he was a school boy when he was arrested and charged with this offence. The 2nd appellant also submitted that despite the witnesses claiming that they had recognized him at the scene of the crime, none had given out his name in their first reports.

The principles applicable in determining whether or not to order a retrial is now well settled. In the case of ***MERALI & OTHERS*** versus ***REPUBLIC 1971 EA 221*** it was held that:

"A retrial may be ordered only when the original trial was illegal or defective."

We have already found that the original trial in this case was defective and therefore meets the first test. In the same ***Merali Case*** the Court of Appeal went on to hold:

"A retrial may be ordered if the interest of justice require and if no prejudice is caused to the accused."

In the case of ***Ahmed Suman Versus Republic 1964 E.A 481*** it was held that:

> ***"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where court is not likely to cause an injustice to an accused person."***

From the holdings in the above cited case, it is clear that each case should be decided on its comments. That the unique facts and circumstances of each case should be considered. However, the overriding consideration is that an order for retrial should only be made if the appellate court is of the opinion that the interests of justice require it and if no prejudice is caused to the accused person.

The gravity of the offence and the sentence that could be passed are some of the factors that should be considered. In the instant case, someone lost his life and his property. In addition to this, the family of the deceased that is the wife also suffered injuries in the cause of the attack and was physically traumatized. We believe that alongside the interests of the appellants in this case, those of the complainants should equally be weighed and considered. Having weighted this interests we are satisfied that the interests of justice would require that an order for retrial be made. We are also satisfied that no prejudice will be suffered by the appellants if the order for a retrial were made.

In the case of **MWANGI** versus **REPUBLIC 1983 KLR 522, HANCOX JA, CHESON**I and **NYARANGI Ag. JJA held:**

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

We have considered the evidence adduced in this case and are of the opinion that if an order for retrial were made and the same evidence is adduced that a conviction will result against both appellants. We are of the view that the evidence of identification and the circumstances leading to the arrest of both appellants are strong and could possibly sustain a conviction in a retrial. We do not wish to go into any further details in order not to pre-empt the retrial. Accordingly, we order that a retrial be held in this case. In that regard we order that the two appellants be held in custody until the 30th day of November 2005

when they should be produced before the Kitui Senior Principal Magistrate's Court for a plea to the self same charges. These are orders of the court.

Dated at Machakos this 25th day of November 2005.

D.A. ONYANCHA

JUDGE

J. LESIIT

JUDGE