REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 384 of 2001

DABASO WAKO JALDESA ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

Criminal Appeal 385 of 2001

MOHAMED HAPI BAGAJA …… APPELLANT

VERSUS

REPUBLIC ……...…...…… RESPONDENT

J U D G M E N T

(consolidated) The two appellants Dabaso Wako Jaldesa and Mohamed Hapi Bagaja (hereinafter referred to as the 1st and 2nd appellants) respectively were jointly tried together with one Jarso Kuno Sora before the Senior Resident Magistrate's Court Nyeri for the offences of Robbery with violence contrary to section 296 (2) of the Penal Code and Rape contrary to section 140 of the Penal Code. The 1st and 2nd appellant were convicted of the offence of Robbery with violence but acquitted of the offence of Rape, whilst their Co-Accused was acquitted of both counts. The appellants have now each separately appealed against conviction and sentence which appeals have been consolidated for purposes of hearing.

We have carefully perused the proceedings of the lower court and do find that the trial magistrate committed two serious blunders. First we note that the record does not reflect any of the five prosecution witnesses who testified as having been duly sworn before giving their evidence. Section 151 of the Criminal Procedure Code provides that: "Every witness in a Criminal Cause or matter shall be examined upon oath and the court before which any witness shall appear, shall have full power and authority to administer the usual oath."

As we recently observed in High Court Criminal Appeal No. 338 of 2002 & 109 of 2003, David Muriithi Ndungu & Peter Nderitu Kiondo v/s Republic this is a mandatory provision which any court handling a criminal cause or matter must comply with. Such compliance must be clearly apparent on the face of the record, with the witnesses faith (i.e. whether Christian, Hindu, Muslim, aethist etc) being ascertained before the oath is administer accordingly. In this case the failure by the trial magistrate to have the witnesses properly sworn vitiated the entire proceedings.

Secondly at the close of the prosecution's case each of the appellants when put to their defence is recorded as stating as follows:

“My defence is as in criminal case No. 4117/2000.” That is all each of the appellants is recorded as stating in their defence.

The judgment of the lower court however shows each appellant as having given a detailed statement which is extensively referred to.

In their submissions before this court the appellant complained that at the time of their trial before the lower court they had a total of 8 criminal trials, 5 of which were heard before the same magistrate who handled this particular case. The appellants claim that they were advised by the trial magistrate that in this case he would use their defence which they had made in the other cases. There is some substance in this allegation because the trial magistrate appears to have imported the defence of each appellant from another file.

Section 34 (1) of the Evidence Act which is the only provision dealing with admissibility of evidence given in previous proceedings states as follows:

34 (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances.

(a) Where the witness is dead, or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable; and where, in the case of a subsequent proceeding–

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section–

(a) the expression “judicial proceeding” shall be deemed to include any proceedings in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

In the first instance it is debatable as to whether the evidence of an Accused person in his defence in a Criminal trial qualifies to be evidence given by a witness in a judicial proceeding as described in section 34 (1) of the Evidence Act. But even Assuming that it so qualifies the lower court could not in the instance case admit such evidence as no application was made before it for admission of such evidence and the circumstances laid down in section 34 (1) (a) for the admission of such evidence had not arisen. Moreover the appellants who were all available and ready to give evidence in their defence were apparently denied the opportunity to do so in this particular case and this resulted in failure of justice.

The fact that the appellants were tried by the same magistrates in 5 cases also exposed the appellants to serious prejudice as the trial magistrate could not disabuse his mind of the evidence he had become privy to in all the other cases.

All in all, in our view the trial of the appellants was fatally defective as the evidence of the prosecution witnesses was not properly taken and the appellants were not given an opportunity to defend themselves. Learned Principal State Counsel Mr. Orinda conceding these flaws has nevertheless urged the court to consider ordering a retrial. The case of Fatehali Manji v/s Republic [1966] EA 343 is one of the leading authorities on the issue of retrials. In that case the court of appeal stated as follows:

“In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a trial is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

Further guidance on the issue of retrial is available from the case of Mwangi v/s Republic [1983] KLR 522 where the court of appeal held:

“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 occur.”

In this case the appellants were charged with very serious offences i.e. Robbery with violence and Rape. Although the offences are alleged to have been committed about 5 years ago, tracing witnesses should not be very difficult. Apart from the complainant 3 witnesses were police officers and the other a Doctor. We have reviewed the evidence and are satisfied that as concerns the offence of Robbery with violence this was not a case where there was insufficiency of evidence or gaps in the prosecution case. There was evidence that an offence had been committed and there was prima facie evidence pointing to the appellants as the culprits.

Although the appellants have been in custody for a long time, we believe that it is in the interest of justice that the case be properly tried.

We do therefore allow the appeal to the extent of quashing the conviction and setting aside the sentence imposed on each of the appellants.

We order that each of the appellants shall be retried before a court of competent jurisdiction for the offence of Robbery with violence. The appellants shall be remanded in custody at Nyeri Police Station and be produced before the chief magistrate Nyeri without further delay.

Dated this 15th day of November 2005

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE