REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 299 of 2002

(From the Original Conviction and Sentence in Criminal Case No. 19756 of 2001 of the Chief Magistrate's court at Makadara)

DAVID OTIENO JUMA …….....…….……..……..
APPELLANT

VERSUS

REPUBLIC …….....……..
…….RESPONDENT

JUDGEMENT

MR. DAVID OTIENO JUMA, hereinafter referred to as the "***Appellant",*** was charged with one count

of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that the Appellant on4th October, 2001 along Ladhies Road in Nairobi within Nairobi Area in Nairobi Province jointly with others not before Court while armed with dangerous weapons namely knives robbed ***GEORGE OUMA OKWERO*** cash Kshs.6,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ***GEORGE OUMA OKWERO.*** He pleaded not guilty to the charge.

Following a full trial in which the prosecution called only 3 witnesses, the Appellant was found guilty convicted and sentenced to death as by law provided. Being aggrieved by the conviction and sentence the Appellant lodged the instant Appeal.

The Prosecution case was that 4th October, 2001 at around 7.30 p. m., ***GEORGE OUMA OKWERO***, the Complainant had come to the City Centre to board a bus to Busia. He went to stage coach terminus and found all the buses full. He then went to country bus station for alternative means. As he was walking towards the country bus station near the retail market and at the traffic lights he heard people running from behind. He looked back and saw two young men. They stopped him and enquired where he was going. When he told them that he was going to Busia, they told him in Luo which was the Complainant's mother tongue that all except one bus to Busia were full. That they were agents of the only bus that was not full. They together walked to country bus station but found no bus. The two young men then proposed to the Complainant that it was better if he went back home and came back very early next day to take the bus. The Complainant fell for the trap and the three left country bus station crossed Jogoo Road and went to a bus stage so that the Complainant could take a matatu to town. They proceeded to the traffic lights just opposite the retail market. The Complainant had a brief case. On reaching the traffic lights, the two young men suddenly produced knives and told the Complainant to produce all the money he had. He gave them 500/= but they insisted on more money. A third person appeared on the scene also armed with a knife and frisked the Complainants pocket and removed his wallet that contained 5,500/= and took the same. Suddenly, the Complainant heard a car brake hard at the traffic lights. The three young men started saying "***Police" "Police" "Police"*** and ran away. A Police officer came out of the motor vehicle and ran after them. After about three to five minutes a group of people came from the direction the three young men had ran towards with a suspect. A Police officer asked the Complainant if he could identify the people who had robbed him. He identified the Appellant herein among the people. The Appellant was then charged with the instant offence. The Appellant denied robbing the Complainant.

In his petition of Appeal, the Appellant questions his identification by the Complainant, the reliability of the evidence of PW2 and PW3 on which the Magistrate based her conviction and finally the Appellant faults the Learned Magistrate for rejecting his defence in contravention of the provisions of Section 169 (a) of the Criminal Procedure Code.

When the Appeal came up for hearing, Mrs. Gakobo, Learned State Counsel conceded to the Appeal on the sole ground that the proceedings were defective in that on the day that the trial commenced, the coram of the Court was not indicated. This was a fatal error rendering the entire proceeds a nullity. She however intimated to the Court that the state would nonetheless be seeking a retrial.

Mr. Weda, Learned Counsel for the Appellant welcomed the concession by the Sate regarding the Appeal, but was opposed to an order of retrial. He submitted that the Appellant had been in custody since 4th September, 2001. That was such a long period of time that it would be unjust to the Appellant to be subjected to a retrial. Counsel further submitted that looking at the entire evidence tendered, it was insufficient to sustain a conviction. That in any event, the sins of the prosecution should not be visited upon the innocent Appellant. On the overall Counsel submitted that it would not be in the interest of justice to order a retrial. In support of his submission, Counsel referred this Court to its own decision ***IN CR. APPEAL NO. 1232 OF 2002, ABUSIRO HUSSEIN KADIR VS REPUBLIC (UNREPORTED)***

In response Mrs. Gakobo submitted that the Appellant had been in custody for 4 years. However taking into consideration the severity of the offence and the sentence, it causes the interest of justice required that an order for retrial be made. Counsel further submitted that no prejudice will be suffered by

the Appellant. That the evidence on record was sufficient to return a conviction and that there were no gaps in the evidence that the prosecution may seek to fill in the course of the retrial. Finally Counsel submitted that all witnesses were Kenyans and would be readily available to testify again if a retrial was ordered. In his brief reply, Mr. Weda submitted that the mere fact that the Appellant had been in custody for 4 years is such strong prejudice that retrial should not be ordered. Although witnesses were Kenyans, it had not been stated where they were and whether they were willing or interested in testifying again. Counsel further urged us to find that there were huge gaps in prosecution case including the improper identification of the Appellant.

We have re-examined the record of the trial Court in the light of the submissions of the Learned Counsels. From the record, it is quite clear that when the case was first heard on 4th December, 2001, the Court coram at the beginning of that date was not indicated. However later on it was indicated as follows:-

"***At 11.40 a. m.***

Coram as before

Accused reminded the charge and states:- Not true

PW1 adult male sworn and states in English"

Prior to this the matter had been mentioned on 19th/11/2001 when again the coram of the Curt was indicated as follows:-

"***19/11/2001***

Coram as before

Accused in custody – absent

Hearing on 3/ 12/ 2001

Mention on 3/ 12/ 2001

Court: Production order for 20/ 11/ 2001"

The same story was repeated on 3/ 12/ 2001 when the Court coram read as follows:-

"***3/12/2001***

Coram as before

Accused in custody – Present

Hearing 4/ 12/ 2001

We are unable to appreciate the full meaning and purport of the phrase: "***Coram as before"*** that has become all too fashionable among the Magistrates of late. Though it is manifestly clear that the Magistrate and the accused person were present at the commencement of the trial, there is nothing however to show that a Prosecutor was present and if he was, that he met the requirement set out in Sections 85 (2) and 88 of the Criminal Procedure Code and as reinforced by the Court of Appeal in the celebrated case of ***RICHARD ROY ELIREMA & ANOTHER VS REPUBLIC, CRIMINAL APPEAL. NO. 67 OF 2002 (UNREPORTED)***

The Court of Appeal has in the recent case of ***BENARD LOLIMO EKIMAT VS REPUBLIC C.A.***

NO. 151 OF 2004 (ELDORET) had occasion to deal with the issue. It delivered itself in the following terms:-

"***On our own perusal of the record as reflected above, we agree with the Learned Counsel for the Appellant, that there was nothing on the record to show that a Prosecutor was present and prosecuted the case before the trial Court. As there was no coram entered in the record, it is not possible to know whether, if there was a Prosecutor was of the rank specified in the Code and was thus a qualified Prosecutor. We cannot assume, us urged by Mis Oundo that I.P. Irungu must have been the Prosecutor on 12th February, 2002 when the prosecution case was presented…. Having considered it we are unable to conclude that the case was properly prosecuted as required by law.***

The proceedings of 12th February, 2002 were a nullity. The result is that the conviction recorded against the Appellant must be and is hereby quashed and sentence set aside……"

The decisions in Elirema and Ekimat cases (supra) are binding on this Court. Consequently we annul the proceedings with the consequence that the conviction recorded against the Appellant must be and is hereby set aside and the sentence set aside.

We were urged by the State Counsel to order a retrial on various grounds. The Appellant would hear none of it also on various grounds. The principles upon which the Court acts in determining whether or not to order a retrial, we think, are now settled. In the case of ***JOHN KARIUKI KAMAU & ANOR VS REPUBLIC, CR. APP. N. 415 OF 2002 (unreported),*** the Court of Appeal summarised the principles as follows:-

(a). A retrial may be ordered only when the original trial was illegal or defective.

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

(c) A retrial should not be ordered unless the Appellate Court is of the opinion that on proper consideration of the admissible evidence or potentially admissible evidence a conviction may result"

We may also add on our part that whether or not to order a retrial is an exercise in discretion and as in every discretion it must be exercised judiciously and on sound principles. On the basis of our evaluation of the evidence we make the following observations:-

(1) The Appellant was with the Complainant for a considerable period of time. They walked together from the traffic lights near the retail market to country bus station, crossed Jogoo Road and proceeded to a bus stage at the traffic lights again near the Retail Market. All along they were conversing in Luo.

(2). That soon after the commission of the offence, the Appellant was chased and arrested not very far from the scene of the crime. He was arrested by Police officers on patrol duties after they saw the Appellant running and being chased by members of the public. On being arrested he was taken to the scene of crime and was positively identified by the Complainant.

We are persuaded that if a retrial is ordered and the same evidence is tendered, a conviction may result. No doubt offences of robbery with violence are rampant and ought to be curtailed. It would be most unfair to the victims and indeed the public at large if convicts were allowed to walk scot free on a mere technicality. In so saying, we are not ofcourse oblivious of the fact that the Appellant has been in custody for a period of about 4 years and that he too has certain fundamental rights that need to be secured. However compared to the seriousness of the offence and the severity of the sentence, we do not think that a period of 4 years incarceration is such a long time as to be prejudicial to the Appellant if an order of retrial was to be made. Learned State Counsel stated that the witnesses are readily available such that if a retrial was ordered, the same will commence in earnest and without undue delay. Further Learned State Counsel submitted that if an order of retrial is made it will not afford the prosecution the

opportunity to fill in any gaps in the prosecution case. Had that been the intention in seeking a retrial, we would definitely have declined to make such an order.

All in all and on our own evaluation of the evidence on record, we are satisfied that this is a fit and proper case for an order of retrial. In the result we order that the Appellant shall undergo a retrial on the self same charge before the Chief Magistrate's Court at Makadara. For that purpose, the Appellant shall appear before the said Court on 2nd November, 2005. Pending his appearance in Court as aforesaid, the Appellant shall remain n custody.

Dated at Nairobi this 1st day of November, 2005.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE