REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 247 of 2002

SAMWEL MUTHUI MWANGI…………………………………….…….APPELLANT

Versus

REPUBLIC…………………………………………………..………RESPONDENT

(Being an appeal from the judgment of Mrs. M. R. Gitonga, then Senior Resident Magistrate, dated 12

March 2002 in the Chief Magistrate's Court Nyeri, Criminal Case No. 4818 of 2001)

JUDGMENT

The Appellant was charged in two counts each alleging attempted robbery with violence contrary to Section 297(2) of the Penal Code.

In count one particulars state that on the 22nd day of December 2001 at Skuta Estate in Nyeri District, Central Province the Appellant jointly with another not before court attempted to rob Peter Erupe of his property and at or immediately before or immediately after the time of such attempt struck Peter Elupe.

In count two particulars state that on the 22nd day of December 2001 at Skuta Estate in Nyeri District, Central Province the Appellant jointly with another not before court attempted to rob Peter Erupe of his property and at or immediately before or immediately after the time of such attempt struck Mary Ekai. Five Prosecution witnesses gave evidence and after the Appellant had defended himself, the learned trial magistrate in her judgment found the Appellant guilty, convicted him and sentenced him to death on each count.

The Appellant appealed and before us during the hearing of the appeal, Mr. Theuri, Advocate, represented the Appellant while M/S Ngalyuka, a State Counsel, appeared for the Republic. The latter, having told us that she conceded the appeal because the Prosecutor before the trial magistrate was not qualified to prosecute, proceeded to ask for a retrial of the Appellant on the ground that there was strong evidence against the Appellant.

Mr. Theuri welcomed the fact that the State Counsel had conceded the appeal but opposed the request for a retrial pointing out that even if there was strong evidence against the Appellant, the fact that he has already been confined in prison for about three and a half years would, in the circumstances of this case, make a retrial an injustice to the Appellant. He pointed out that the mistake which vitiated the trial was a mistake of the Prosecution made without contribution by the Appellant and that the Appellant should not be made to suffer further strains from a retrial.

We agree with what Mr. Theuri said. In fact, the period the Appellant has been confined in prison after the sentence is now three years and nine months. Add to that the three months the Appellant had been in prison remand before the sentence, the total period inside prison is a full four years.

Mr. Theuri did not comment on the issue of the strength of Prosecution evidence upon which M/S Ngalyuka had relied. We have, however, considered that issue. First, we hold the view that the Appellant ought not to have faced two counts of attempted robbery as whatever injuries Mary Ekai may have received during the struggle with the Appellant must have been injuries received during the alleged attempted robbery upon Peter Elupe and indeed that is what particulars in the second count and the evidence in support are all about. The charge in count two was therefore improper and so were the conviction and the sentence of death respecting that count. We therefore hold the view that the very existence of count two, apart from being improper as pointed out above, also was prejudicial to the Appellant in his defence and a re-trial may either perpetuate that injustice or may afford the Prosecution the opportunity to improve on its case which, according to the principle in the case of Fatehali Margi -vs- Republic (1966) E.A. 343 is a strong reason for disallowing a retrial because it will enable the prosecution to fill up gaps in its evidence at first trial.

That same principle still applies to the Prosecution’s evidence because a close scrutiny will reveal that the evidence is not strong as the learned State Counsel claimed it was. A few examples will suffice.

The watchman, Peter Elupe who was P.W.1 told the court he saw two people jump over the fence. One of them then threw a stone which hit P.W.1 on the cheek but P.W.1 jumped and got hold of the person who threw the stone and a struggle between the two ensued as that person tried to set himself free, probably to escape as the second person had escaped, while P.W. 1 restrained that person from being free and in the process Mary Ekai – P.W.2 rushed to the scene to assist her husband P.W.1, to overpower the person apprehended. He turned out to be the Appellant. The Appellant was overpowered by the two who tied his hands and his legs before P.W. 1 left him to go and call for further assistance as P.W.2 took cover to avoid being seen by anyone who could have gone to assist the Appellant. As a result the Appellant got the opportunity to attempt to escape but unfortunately went to the direction on which the Police on patrol, who included P.W.3 Joseph Nwiti, were and the Police arrested the Appellant.

Up to that point, there was completely no evidence of attempted robbery either upon P.W.1 or upon P.W.2. All there was, if Prosecution evidence to that point is believed, is evidence of two people jumping over a fence. They may have been mere passers-by whose only offence may have been trespass. If they saw or anyone of them saw P.W.1 and threw a stone at P.W.1, the watchman may have provoked them or they may have taken P.W. 1 to have been a dangerous person not safe to meet and therefore a person to be scared away. But if it is true that P.W.1, the person to be scared away, was not so scared and that instead of bottling away, he sprung forward towards them and apprehended one of them who happened to be the Appellant, then still up to that stage there is no evidence of those two people attempting to rob anything from P.W.1 and/or from P.W.2.

Further from that point, the Police who arrested the Appellant, said to have been escaping from P.W.1 and P.W.2, told the court:

> **“He was tied on the hands with a red rope and Nylon rope. He was also tied on the legs with a belt which was loose.”**

A person so tied could have been walking away escaping. He was alone and if he could walk, the tyings were loose. What prevented him from removing them to free himself completely before P.W.3 and the other Police Officer saw him to arrest him? That part of the evidence clearly raises questions and that is more so as it is from that stage that more other things, which had not apparently been seen before that stage, started to be brought into the Prosecution’s story, started by P.W.3 who said in his evidence:

> ***“We questioned him and he said he was a watchman at one John Wariithi. As we walked towards the place we met the watchman and he told us that the accused does not work there. He, “ (now meaning the watchman P.W.1)” then told us that 6 armed robbers had***

> ***tied him. We went to the resident where Ekai was guarding. Ekai told us he is the one who had tied accused. That the accused and another had broken into his employer's house. Ekai (P.W.1) later identified the ropes and belt as his properties. We collected 3 stones (MF1 4) and a metal rob (MF1 5) outside the broken window within the compounds. We recovered one watch and torch (MF1 6 and 7). The watch and torch belong to the robbers."***

During cross-examination P.W.3 said:

> ***"We arrested you about 20 metres from the homestead you had broken into--------------. The window had been broken and the door lock inside the house was broken."***

From such evidence it may be suspected that P.W.3 Police Constable Joseph Nwiti, was the witness who educated P.W.1 to say in the court at the end of his evidence in chief, perhaps following a short adjournment, that:

> ***"One had managed to break my employer's window and entered. They had also cut all electricity lines and cut locks to four rooms."***

During cross-examination P.W.1 said, among other things,

"I heard noise at the window----------You were already breaking into the house-------"

Firstly, we note that the evidence of breakages at a house is disjointed from the evidence concerning the two people who had been seen jumping over a fence, so that P.W.3 completely says nothing about evidence from P.W.1 concerning suspects having jumped over the fence yet that was the most important part and almost the whole of the evidence of P.W.1 and P.W.2. Secondly, if the alleged breaking into the house and being seen into " the compounds" were so prominent as had been put in the evidence of P.W.3, then P.W.1 and P.W.2 could not have down-graded that part of the evidence so much in their respective evidence, P.W.1 having talked about it only as an afterthought at the close of his evidence in chief and P.W.2 having completely said nothing about it in her evidence in chief. Moreover, if the alleged breakings were the case, then the offence of burglary, rather than attempted robbery, would have been the proper one.

We think we have said enough to dispose of the question of re-trial in this matter. Other short-comings; like the discrepancy in the number of robbers in the evidence of P.W. 1 and P.W.3; who Ekai was when the evidence of P.W.3 is considered; the date of the alleged offence when comparing the charge in each count with the evidence of P.W.1, the evidence of P.W.2 and the evidence of P.W.3; are also important defects in this case. That being the position, we do not, with due respect, accept that there was strong prosecution evidence. We therefore hold the view that re-retrial will give the Prosecution the opportunity to improve on its case against the Appellant and that will definitely be prejudicial to the Appellant.

From the foregoing therefore, we do hereby declare the trial of the Appellant a nullity on the ground that the Prosecutor was not qualified in terms of Section 85(2) of the Criminal Procedure Code. We therefore allow the Appellant's appeal. Quash his conviction on each count and set aside the sentence imposed upon him in each count.

We do reject the State Counsel's application for re-trial and instead order that the Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 6th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE