

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

H.C.CR. APPEAL NO. 79 OF 2003

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.2456 of 2002 of the Senior Resident Magistrate's Court at Kwale – L.N. Mbatia, SRM)

RASHID SAID MWANGULA
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

Coram: Before Hon. Mr. Justice Mwera

Hon. Mr. Justice Maraga

Miss Mwaniki for the State

Gakuhi for the appellant

Court clerk – Chege

J U D G E M E N T

This appeal came up for hearing on 18.5.04. Mr. Gakuhi for the appellant pointed out that on 16.12.2002 his client appeared before a District Magistrate II (Prof) S.S. Maindi for a plea to the charge of attempted robbery with violence contrary to section 297(2) Penal Code. That the public prosecutor was one P.C. Yegon. That on both aspects the proceedings at this starting point of a trial, were a nullity. That the learned District Magistrate lacked jurisdiction (See First Schedule to the Criminal procedure Code pp.140), while the prosecutor was an unauthorized officer as per S.85(2) Criminal Procedure Code (see also the case of **Roy Elirema & Anr. V. R Cr.A. No.67/2002**)

The learned State Attorney who conceded the appeal on these points nonetheless asked us to order a retrial herein.

Mr. Gakuhi opposed a retrial arguing that as per the charge sheet and evidence there was no attempt to steal any household item from the complainant. That the alleged thugs approached the complainants door, apparently with intention to enter, this was at about 3 a.m. but he pushed them back and closed the door. That the intruders did not take or demand anything from the complainant. That probably the charge to lay should have been attempted house-breaking and burglary. And that the complainant was not even wounded.

The State's position was that the trial in the lower court was defective and in citing **FATENALI MAJI VS. R. (1966) E.A. 343**, we were told that in such a state of things a retrial is warranted. That the appellant was caught within the compound of the complainant holding a stone (an offensive or dangerous

weapon) which had been used to smash the door. That at this late or early hour, the circumstances in which the appellant was found he had even tried a T-shirt round his head, it should be clear that the intention of the thugs was to rob the complainant. That the State was not going to use the retrial to seal holes in its case but that interest of justice warranted a retrial. That witnesses would avail.

We have gone over the evidence on the lower court record, reviewed the submissions of counsel and also referred to S.297(2) Penal Code which incorporates the element of wounding, striking or using violence to the victim. We have come to a conclusion that the evidence is such as may result in a conviction. It could be a conviction of a less offence than charged but still the evidence is worth being heard afresh and may the trial magistrate arrive at the decision he/she does.

In arriving at this conclusion, we appreciate that the power to order a retrial as conferred upon us under S.354 (3) (a) (i) Criminal Procedure Code is a very wide one indeed. It requires however to be exercised judicially. That in each case even as it is considered on its own merits nonetheless, it should appear that evidence, potential or taken, is likely to lead to a conviction. We also are alive to the following principles:

“----- in general a retrial will be ordered when the original trial was illegal or defective; it will not be ordered where a conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to accused persons.”

(See the Fatehali case above pp 344 G, H.)

In sum the appeal having been conceded as said above is allowed. The conviction is quashed and the sentence set aside. But the appellant will remain in custody to be brought in 14 days before a competent court to stand a fresh trial.

Judgement delivered on 15th June, 2004.

J.W. MWERA

JUDGE

D. MARAGA

AG. JUDGE