REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 430 OF 2002
(From Original Conviction and Sentence in the Criminal Case No. 1025 of 2001 of the Chief Magistrate's Court at Mombasa J. Oseko,SRM)

GEORGE THOMAS NYAMBEGA …………………… APPELLANT

- Versus -

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

R U L I N G

George Thomas Nyambega was charged before the Senior Resident Magistrate at Mombasa with 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. It was alleged that on the 26th day of February 2001 at about 2.30 a.m. at Bamburi Government Staff Quarters in Mombasa District within Coast Province the Appellant jointly with others not before the court being armed with dangerous weapons namely pangas and metal bars he robbed Kagendo Murigu of one TV set, make Sanyo, two portable radios, a radio cassette, a tuner, one wrist watch, one mobile phone make motorolla and cash Ksh. 1100/= all valued Ksh. 91,200/=. The particulars of the rape charge were that on the 26th day of February 2001 at about 2.30 a.m. at Bamburi Government Staff Quarters in Mombasa District within Coast Province, the Appellant had carnal knowledge of KM without her consent. The Appellant pleaded not guilty to both counts but after a full trial he was convicted on both counts and sentenced to suffer death on count one and to life imprisonment with three strokes of the cane on count two.

He has appealed against both convictions and sentence.

When the appeal came up for hearing before us Mrs. Mwangi, the Assistant Deputy Public Prosecutor, conceded it on the ground that part of the prosecution case was conducted by P.C. Walucho contrary to section 85(2) of the Penal Code but sought a retrial. Section 85(2) of the Penal Code requires that public prosecutors should be either Advocates of the High Court of Kenya or police officers of the rank of Assistant Inspector of police or above. P.C. Walucho not being of or above that rank the trial of the Appellant was a nullity and we accordingly so declare it. In the circumstances we allow this appeal quash the convictions and set aside the sentences.

The Appeal having been conceded and allowed, the only issue we are now left with is whether or not we should order a retrial of the Appellant. When and under what circumstances is a retrial ordered?

The law as to when a retrial should be ordered has long been settled. In the case of **Fatehali Manji Vs Republic [1966] EA 343** the Court of Appeal for Eastern Africa when dealing with the same issue gave the following guideline:-

> **"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when 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 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it".**

In **Sumar Vs Republic [1964] EA 481** the same court had stated that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each case but it should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person. In **Mwangi Vs Republic [1983] KLR 522** the Kenya Court of Appeal following *Braganza Vs Republic (1957) EA 152 (CA) and Pyarala Bassam Vs Republic [1960] EA 854 stated at page 538 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."**

What are the facts and circumstances in this case? Is there evidence that may result in a conviction or will a retrial cause injustice to the Appellant?

The Assistant Deputy Public Prosecutor submitted that the evidence against the Appellant was watertight. The Appellant, she said, was properly identified as the person who raped the complainant, P.W.1, and one of the people who robbed her. She further submitted that no prejudice will be caused to the Appellant as the prosecution is not seeking a retrial to fill up any gaps in its case.

The Appellant on his part strongly opposed a retrial. He submitted that it was not his fault that part of the prosecution case was conducted by an unqualified person. He further submitted that the robbery charge was fatally defective as the particulars of the charge were at variance with the evidence given and that P.W.1's report to police was only on rape and did not include robbery. On the evidence against him, the Appellant submitted that it was weak and did not support the charges. He said there was, for instance, no evidence that he was the one who took the stolen items to P.W.5 and P.W.8 for repair. According to him those witnesses were arrested and remanded for eleven days only to be released and used as prosecution witnesses against. He also submitted that a retrial is going to enable the prosecution to fill up gaps in its case like the medical evidence on rape which was not conclusive. Regarding identification the Appellant argued that the identification parade was flawed as it was not conducted in accordance with the Force Standing Orders and that the evidence of P.W.1, especially on identification, should not be relied upon. According to him the people who allegedly watched him rape P.W.1 should have been in a better position to identify him but they did not. He concluded that P.W.2, the investigating officer, is dead and cannot therefore testify and urged us not to allow a retrial.

In reply Mrs. Mwangi submitted that the robbery charge is not defective as alleged by the Appellant. The fact that only a few of the stolen items were recovered does not make the charge defective. She also submitted that the evidence of P.W.2 shows that the complainant reported both the robbery and rape crimes to the police. Regarding the identification parade which the Appellant had alleged was conducted by the investigating officer, she submitted that the same regularly and properly conducted by P.W.10.

Those in a nutshell are the rival submissions made before us in this appeal.

We have considered them. We have also carefully considered the lower court record in the light of the above stated legal position regarding when and under what circumstances an order of retrial should be made. P.W.1 testified that during the night of 25th/26th February 2001 while asleep, her house was broken into and about four people armed with rungus and iron bars went in. They demanded money and mobile telephones. After taking what they wanted one of them demanded to have sexual intercourse with her. Inspite of her protestations he threatened to kill her and her child if she did not oblige. She gave in and she was raped as she cried and her family members watched helplessly. Needless that that must have

been traumatizing to her and indeed her whole family. No wonder her husband was so livid that he took leave to assist the police in investigating the matter.

P.W.1 said the person who raped her was the Appellant. She was emphatic on her identification of the Appellant. She said that she was able to positively identify him because her bedroom has glass window which allowed the security lights outside to shine the room. She also said that the whole episode took over an hour and she had time to talk and watch the Appellant. When he finished with her and went out he stood under the security light as he instructed the victims to sleep and warned them not to say anything. Two other witnesses, P.W.3 and P.W.6 also confirmed and corroborated the evidence of P.W.1 that there were security lights all around the house which threw light into the rooms. They also confirmed that they saw through a half open door P.W.1 being raped in another room although they were not able to identify the rapist.

Some of the stolen items were traced to the shop of P.W.5 who with P.W.8 said the items had been taken there by the Appellant. He was their customer whom they had known for sometime. Using a mobile phone Appellant had left behind with P.W.5 being charged police were able to trace and arrest the Appellant. Piecing together all this evidence, which we believe, along with that of the identification parade and the rest, we are satisfied that there is evidence which may result in a conviction in a retrial and that the Appellant will not be prejudiced. Accordingly we order that the Appellant be retried by another court of competent jurisdiction.

DATED this 13th day of July 2004.

J. MWERA

JUDGE

D.K. MARAGA

AG. JUDGE