



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 388 OF 2001

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 389 OF 2001

DAVID TSORI SINARAHA.....1ST APPELLANT

JOHN MURAI MACHARIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellants, David Tsori Sinaraha and John Murai Macharia were charged with five counts of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the said counts were that on the night of the 13th of November 1999 in various Estates within Nakuru Municipality, the Appellants whilst armed with dangerous weapons, namely pistol and rifles robbed the five complainants of their personal properties as stated in the charge sheet and at or immediately before or immediately after the time of robbery either used personal violence or threatened to use personal violence on the said five complainants. The Appellants pleaded not guilty to the said charges. After a full trial the Appellants were convicted as charged. They were sentenced to death as mandatorily provided by the law. The Appellants were aggrieved by the said conviction and sentence. They have appealed to this Court against said conviction and sentence.

At the hearing of the Appeals, the two separate Appeals filed by the Appellants were consolidated and heard as one. Mr. Koech, Learned State Counsel conceded to the Appeal on the sole ground that the proceedings before the trial Magistrate were prosecuted by a Police Officer who was not authorised by law to Prosecute such cases. Mr. Koech however submitted that in view of the overwhelming evidence that was adduced by the Prosecution in the vitiated trial, the Appellants ought to be retried. The Appellants welcomed the conceding of the Appeals by the State. The Appellants were however opposed to being subjected to the rigours of a retrial. The Appellants submitted that they had been in lawful custody for a period of over five years. They submitted that they had suffered in prison. They further submitted that the mistakes of the Prosecution should not be visited on them. They urged this Court to discharge them.

We have read the proceedings of the trial Magistrate in the instant Appeals. We have noted that the Prosecution thereto was conducted by Sergeant Winnie. She is a Police Officer of a rank lower than that of an Assistant Inspector of Police. She was not authorised to Prosecute as provided by the provisions of **Section 85(2) and Section 88 of the Criminal Procedure Code** which provides that only Police Officers of the rank above that of an Assistant Inspector of Police can be authorised to Prosecute Criminal Cases

before a Magistrate's Court. In **Roy Richard Eliremah & Anor. Versus Republic Cr. App. No. 67/2002 (Mombasa) (unreported) and Silvester Keli Kakumi Cr. App. No. 142 of 2002 (Mombasa) (unreported)** the Court of Appeal held that where such an incompetent Police Officer prosecutes a criminal case before a Magistrate's Court, the proceedings thereto will be a nullity. We are bound by the decision of the Court of Appeal. We hereby declare the proceedings before the trial Magistrate in the instant Appeals to be a nullity as a consequence of which we allow the Appeals, quash the convictions of the Appellants and set aside the sentences imposed.

The issue remaining for determination by this Court is whether a retrial of the Appellants should be ordered. The principles governing whether or not a retrial should be ordered was enunciated in **Fatehali Manji –versus- Republic [1966] E.A. 343** Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:

“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 purposes 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 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 the accused person.”

In **M’Kanake –versus- Republic [1973] E. A. 67**, it was held that a retrial should not be asked for to fill gaps in the evidence or to rectify faults of the Prosecution's case. In **Mwangi versus Republic [1983] E. A. 522**, the Court of Appeal held at page 538 that:

“We are aware that a retrial should not be ordered unless the Appellate Court is of the opinion that a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza versus R [1957] E. A. 469, Pyarala Bassan versus Republic [1960] E. A. 854.”

Applying the above principles to this case, we are satisfied that there is sufficient evidence to enable this Court order that the Appellants be retried. The evidence adduced in the vitiated trial before the Magistrate's Court was such that if the same evidence were to be offered by the Prosecution, the Appellants would be convicted.

What is this evidence we are referring to? PW 2 Joseph Maina Kanini, a medical practitioner at Thika was approached by one Karanja whom he knew and forced to operate on the 2nd Appellant, John Murai Macharia. He had bullet wounds. A bullet was lodged in his body. The said bullet was removed and taken by the 2nd Appellant. PW 2 positively identified the 2nd Appellant as the person whom he had operated on when an identification parade was held. PW 2 operated on the 2nd Appellant on the 14th of November 1999, a day after the 2nd Appellant had been shot by PW 5 Corporal Raphael Mbutia in the botched robbery. The 2nd Appellant did not give a satisfactory explanation of how he came to be having bullet wounds.

The 1st Appellant, David Tsori Sinaraha was likewise shot by PW 5 in the said robbery incident. PW 11 Dr. Maurice Peter Siminyu was called upon on the 16th of November 1999 to operate the 1st Appellant to remove a bullet which was lodged in his body. After the operation, the bullet was examined by the Firearm examiner who formed an opinion that the said bullet was fired from the gun then possessed by PW 5. The defence offered by the 1st Appellant was a cock and bull story. In the circumstance of this case, the two Appellants were placed at the scene of the robbery whereby they threatened PW 5, PW 8 Police Constable Saverio Murage and PW 6 Police Constable James Mwangi with a pistol while they were having a drink at Rumours Bar, Shabab Estate, Nakuru. They robbed them of money and personal documents. They tried to get away in motor vehicle registration number KAA 286W Toyota Corolla Saloon which they have robbed from PW 3 Peter Mwema Mutie at gun point. All the ingredients of robbery with violence was thus proved by the Prosecution in the vitiated trial; the

Appellants were more than one, they were armed with an offensive weapon, they threatened and in some instances used actual violence against the Complainants.

We acknowledge the fact that the Appellants have been in lawful custody for a period of five years. The Appellants may rightly feel that to subject them to a retrial may not serve the ends of justice. We have however considered the fact that the punishment that the Appellants were to face upon conviction is a mandatory death sentence. The offences which the Appellants were charged with is serious. The Appellants were armed with offensive weapons which they used to terrorise the wananchi. It would be a travesty of justice if the Appellants are ordered discharged.

In the premises therefore, the Appellants will be retried before the Senior Principal Magistrate's Court Nakuru before another Magistrate other than Mrs H. Wasilwa, Principal Magistrate. The Appellants shall appear before the said Court on the 9th of August 2004 with a view of taking plea in the retried case.

It is so ordered.

DATED at NAKURU *this 4th day of August 2004.*

MUGA APONDI

JUDGE

L. KIMARU

AG. JUDGE