REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL APPEAL NO. 397 OF 2002

DESDELIO FAUSTO MURIUKI …….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from Original Judgment and Conviction in Princ ipal Magistrate's Court Criminal Case No. 744 of 2001 dated 22 nd August 2001 by Mr. W. N. Njage – P.M. – Kerugoya)

HIGH COURT CRIMINAL APPEAL NO. 398 OF 2002

VICTOR WAGACERE GICHIRA…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

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J U D G M E N T

Desdelio Fausto Muriuki and Victor Wagacere Gichira (hereinafter referred to as 1st and 2nd Appellants respectively) were jointly charged before the Principal Magistrate Kerugoya with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 6th April 2001 whilst armed with a dangerous weapon namely a hammer they jointly violently robbed Emilio Nthika Njeru of a motor vehicle Registration No. KAD 262 U Toyota Corolla, a pair of shoes and a driving licence all valued at Kshs.251,000/=.

In the alternative the two Appellants were jointly charged with Handling suspected stolen property contrary to section 322(2) of the Penal Code in that on 6th April 2001 at Naivasha Township otherwise than in the course of stealing, they dishonestly received or retained a motor vehicle Registration No. KAD 262U and a driving licence No. CJ 684016 (HUT 108) knowing or having reasons to believe them to be stolen goods.

On the 5th November 2001 the case came up for hearing before the Principal Magistrate W. N. Njage.

The prosecution applied for adjournment on the ground that they did not have the police file. It was then that the 1st Appellant told the Magistrate that he did not want to proceed with the case in his court because the complainant was a friend to the Judge and that it was the complainant who had informed him that he knew the Judge.

The 2nd Appellant also similarly stated that he did not have confidence in the court as the complainant was known to the Judge.

In his ruling the trial magistrate held that the allegations were baseless, malicious and defamatory and that the Appellants were merely trying to avoid his court because of his reputation for condemning robbers to hang. He denied knowing the complainant and rule that the allegations were meant to bring the court into contempt or ridicule. He decided to summarily sentence each of the Appellants to serve 12 months imprisonment under section 121(1) i of the Penal Code. He also refused to disqualify himself from the case. Thereafter the matter came up for hearing on two occasions but the Appellants were not ready to proceed with the matter. On the 3rd occasion the trial magistrate refused to adjourn the case further whereupon the Appellants indicated that they would go back to the cells and not participate in the proceedings.

It is not clear from the record whether the Appellants did go back to the cells, nevertheless 4 witnesses testified for the prosecution and none was cross-examined by any of the Appellants.

Hearing was then adjourned to 29th July 2002 when the Appellants were both present. Three other witnesses testified. The Appellants opted not to cross-examine one of the witnesses as for the other two witnesses, there is no indication as to whether the Appellants were given an opportunity to cross examine the two witnesses. At the close of the prosecution case both Appellants were found to have a case to answer. The Appellants then applied for time to make their defence but the trial magistrate refused to adjourn. Whereupon each of the appellants indicated that he had no defence to make.

In his judgment the trial magistrate convicted both Appellants for simple Robbery contrary to 296(1) of the Penal Code and sentenced each Appellant to serve 10 years imprisonment plus 10 strokes of the cane.

Being dissatisfied the Appellants have now each appealed to this court. Their appeals have been consolidated for the purposes of hearing.

It is evident from the above that the participation of the Appellants at the trial was affected by the action of the trial magistrate of holding them to be in contempt of court. Section 121(1)(2) of the Penal Code under which the Appellant were held to be in contempt states as follows:

> *"121(1) Any person who _____*
>
> ***(i) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being held or taken, is guilty of an offence and is liable to imprisonment for 3 years.***
>
> ***(2) when any offence under paragraph (a)(b)(c)(d) and (i) o f subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody and at any time before the rising of the court on the same day take cognizance of the offence and sentence the offender to a fine not exceeding o ne thousand four hundred shilling or in default of payment to imprisonment for a term not exceeding one month."***

In this case the Appellants were deemed to be in contempt of court for expressing their fear that they were not likely to get a fair trial because the complainant had informed them that the Judge was known to him. The right of an Accused person to a fair trial is a fundamental right enshrined in section 77(1) of the constitution which provides:

"If a person is charged with a criminal off ence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The Appellants made it clear that their information was from the complainant. The trial magistrate did not make any enquiry as to whether as to whether the complainant had indeed made such a remark to the Appellants. The trial magistrate apparently took offence that his integrity was being questioned. As a result the trial magistrate lost focus, became subjective and defensive and used the law of contempt erroneously without establishing that there was any intentional disrespect to the court.

As a person exercising judicial powers the trial magistrate was expected to consider the issue in a dispassionate manner hence the saying "as sober as a judge"! The emotional manner in which the trial magistrate dealt with this matter is evident in the fact that the Appellants were each sentenced to 12 months imprisonment which exceeded the maximum provided by law as section 121(2) of the Penal Code provides for a fine not exceeding Kshs.1400/= or in default of payment to imprisonment for a term not exceeding one month where the alleged contempt is committed in view of the court which opts to deal with it summarily as was the case herein.

It is clear that the trial magistrate exhibited extreme bias and prejudice against the Appellants in sentencing them to a term of imprisonment for pursuing what was clearly their fundamental right under the constitution.

Moreover the remarks made by the trial magistrate in his ruling clearly indicated a prejudice in that the magistrate had formed an opinion that the Appellants were trying to avoid his court because they were guilty and were likely to be convicted in his court. In his judgment the trial magistrate stated that he invoked section 77(1) to the constitution in proceeding with the trial without the Appellants as the Appellants had conducted themselves in a manner which rendered the continuance of the proceedings in their presence impractible. We find however that in the circumstances of this case the Appellants had reason to be apprehensive about not receiving a fair from the trial magistrate and their reluctance to participate in the anticipated infringement of their fundamental right was understandable. We find that the trial of the Appellants was defective as the Appellants were denied their constitutional right to a fair trial. Accordingly the Appellants conviction cannot stand and we quash the same.

We have considered whether to order a retrial. In the case of Fatehali Mangi v/s The Republic [1966] EA 343, the court of appeal held that in general a retrial will be ordered only when the original trial was illegal or defective but that each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.

In the instant case it is evident that the trial was defective. It is also apparent that the two Appellants were facing a very serious charge and that the evidence which was adduced by the prosecution was prima facie strong evidence. Although the offence is alleged to have been committed about 3 ½ years ago, there is no indication that it would be impossible to trace the witnesses.

We find that in the circumstances of this case it is only fair and just that a retrial be ordered.

Accordingly we do allow this appeal quash the conviction of each Appellant and set aside the sentences imposed on each of them.

We order that the Appellants shall be produced before the Principal Magistrate Kerugoya for trial before a court of competent jurisdiction other than the trial magistrate.

Dated signed and delivered this 8 th day of November 20 04.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE