



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL CASE NO. 81 OF 2012

(From original Conviction and Sentence in Criminal Case No. 172 of 2010 of the Principal Magistrate's Court at Lamu Before Hon. A. R. Kithinji – PM)

MOHAMED ZUBER APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The facts of this case which can be discerned from the record are that the appellant is the proprietor of a land parcel in Lamu described as Plot No. Block 1/679.

Since the year 2008 he has had run-ins with Public Health and Physical Planning authorities in Lamu following complaints by neighbours that the appellant had blocked a public lane, by constructing an unauthorized extension to his house. The said obstruction allegedly hindered public access and drainage of storm water.

2. The appellant was charged for various alleged contraventions including nuisance under the Public Health Act (Lamu Criminal case No. 190/2008 and 365/2009); unauthorized development under the physical Planning Act (Lamu Criminal Case No 385/09). While he was acquitted under Section 215 of the Criminal Procedure Code in criminal case No. 190/2008, Criminal cases No. 365/09 and 385/09 were withdrawn under Section 87(a) of the Criminal Procedure Code after the prosecution. Witnesses failed to attend court.
3. The present appeal relates to the latest prosecution being Lamu Criminal Case No. 172/2010 which was filed against the appellant on 20th April, 2010. Therein he faced two counts, namely Nuisance contrary to Section 115 of the Public Health Act and Embarking on a development without a development plan contrary to Section 30(2) of the Physical Planning Act. The dates of the commission of the offences are stated in the particulars to be between 12th April, 2009 and 13th March, 2010 which is a different period from that cited in the earlier cases. For that reason, these offences differ in particulars with the charges preferred in criminal case no. 190/2008 for which he was acquitted on 5th May 2009. Criminal case No. 365 and 385 of 2009 did not proceed to full hearing as both were withdrawn under Section 87(a) of the Criminal Procedure Code.
4. The appellant's complaint that he has been charged four times for the same offence has no basis therefore. Of significant concern to this court however, was the nature of 'judgment' rendered in the case appealed from at the end of the trial on 17th January, 2012. The said decision does not fully comply with Section 169 of the Criminal Procedure Code which is in the following terms;

“169 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

5. The judgment appealed from did not set out the points for determination, decision thereon and reasons. Neither does it specify whether the accused was convicted or acquitted, and on which counts. The court rendered itself thus in the final portion of the judgment:

“I therefore find that accused blocked such an opening but because by the time he built his plot it was the last on that row and now other people have occupied the lower part of the best order would be to order the physical planer to organize a meeting with accused and other neighbours and have the opening unblocked to provide a lasting solution. He may be assisted by other District experts and if any persons fail to comply their orders may be referred to court for enforcement as per Cap. 286 Laws of Kenya. This matter will be mentioned after 90 days” (sic).

6. There followed several mentions before the succeeding magistrate Kasavuli _ Resident Magistrate. Eventually on 27th August, 2012 the said magistrate made the following order:

“I have considered the judgment of this court where the court found that the accused blocked the opening and having also considered the accused(s) several promises to unblock such opening in vain, I am now satisfied that the accused has no will in unblocking such an opening and I therefore order the Lamu County Council to demolish and create or do such acts that will cause the unblocking of such an opening at the accused’s own costs in order to finally determine this dispute as ordered by the court on 17th January, 2012.”(sic)

7. It is evident from the judgment that the trial court did not expressly convict or acquit the appellant in respect of the preferred offences although the proceedings subsequent to the judgment seem to suggest so. Secondly, no sentence was passed on the appellant in respect of any offence(s) despite the clear penalties provided for the offences preferred against the appellant.
8. A perusal of the entire record of the trial is equally discomfiting. The testimonies of various witnesses are difficult to follow because the poor state of the record poor. In the recent case of **Samson Matende v R (Criminal Appeal Criminal Appeal No. 526 of 2010 (UR)** the Court of Appeal grappled with the consequence of failure by the High Court to comply with Section 169 of the Criminal Procedure Code. In that case the judgment of the court was not signed by the judges. The court stated:

“It is not contested that the judgment of the superior court was not signed by the two judges. In the case of Lokwachama v Republic [2005] KLR 379 this court in declaring invalidity of such a judgment stated as follows:

The Judgment of the High Court was not signed; hence there was no valid judgment. We are precluded from considering the merits and demerits of the judgment of the High Court. The same position was taken in the case of Paulina Amana vs Republic Eldoret Criminal Appeal No. 604 of 2010 (UR). It is our view that in the instant case there is

no judgment to be considered.”

9. Similarly the judgment delivered herein by the Lower Court is a nullity. Strictly speaking therefore, in terms of Section 347 of the Criminal Procedure Code there exists no conviction upon which the appellant can base his appeal. What next? In the **Samson Matende** case, the Court of Appeal ordered a retrial. Citing **Muiruri v Republic [2003] KLR 552**” the court observed:-

“3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice required it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not...”

10. In the past, the courts have pronounced principles for ordering retrial. In **Mwangi v R (1983) KLR 520**, the court, following the dicta in **Braganza v R [1957] EA 152 CCA**) 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.”

The principle stated in **Ahmedi Ali Dharamsi Sumar V. Republic 1964 E.A. 481** and restated in **Fatehali Manji V. Republic 1966 E.A. 343** was 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 an injustice to the accused person”.

11. Considering the history of this case as disclosed by the record of the Lower Court, it does appear that there is a strong public interest element in this case, namely the right to a public access by the complainants as well as the question of planned developments. It is true the appellant has faced different cases in the past but it would seem that the cause of the complaint – his alleged blocking of a public access – is still unresolved. Secondly the potentially admissible evidence could result in a conviction. In the interest of justice this question needs to be addressed. I do therefore make the following order.

12. The appellant is to be retried in connection with the charges giving rise to this appeal. The retrial will be conducted before the Chief Magistrate’s Court at Malindi. For this purpose, the appellant is ordered to appear before the said court on 30th June, 2014 in order to take plea.

Delivered and signed at Malindi this 5th day of June, 2014 in the presence of:

C. W. Meoli

JUDGE