



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 148 OF 2017

BETWEEN

KAPELISIA KANYANGONY.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kapenguria (S. Githinji, J.) dated 19th November, 2016

in

HC.CR. A. No. 9 of 2016)

JUDGMENT OF THE COURT

[1] **Kapelisia Kanyangony** the appellant herein is aggrieved by the judgment of the High Court sitting at Kapenguria in which his appeal was dismissed. The appellant had been tried and convicted by the principal magistrate's court at Kapenguria for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code.

[2] According to the record of the trial court the appellant was initially charged before the Principal Magistrates Court on 18th February 2015 with one count of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code to which he pleaded not guilty. Before the trial commenced on 1st April 2015 the prosecution substituted a new charge sheet in which the appellant was charged with seven counts of the offence of robbery with violence contrary to **section 296(2)** and he pleaded not guilty to all the seven counts.

[3] On perusal of the record we have not been able to find a copy of the original charge sheet however, the substituted charge sheet is available. The hearing of the prosecution case proceeded from 22nd May, 2015 to 17th February, 2016 during which period the prosecution called eight witnesses and closed its case. The trial magistrate then ruled that a *prima facie* case had been established against the appellant. The magistrate explained to the appellant his rights under **section 211** of the **Criminal Procedure Code**. The appellant having opted to give unsworn evidence the matter was reserved for defence hearing on 5th April, 2016 when the appellant gave unsworn evidence. In his judgment the trial magistrate noted that the appellant was charged with robbery with violence contrary to **section 296(2)** of the **Penal Code** and gave the particulars of the charge as:

“That on the 24th day of April 2010 at Karaper Village of Sulian sub location in Muino Location West Pokot county jointly with others not before the court while armed with offensive weapons namely AK 47 rifle robbed Kiradomo Lomanila herein after referred to as a complainant, sixty cows, eighty goats, thirty six sheep all valued at Ksh. 1,460,000/= and immediately before or immediately after such robbery threatened to use violence to the said complainant.”

[4] Upon considering the prosecution evidence and the defence of the appellant, the trial magistrate concluded that the prosecution had discharged its mandate of proving its case beyond reasonable doubt. He therefore convicted the appellant of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. Although it is evident that the particulars referred to by the trial magistrate relate to count one of the substituted charge sheet, the trial magistrate made no reference to this count nor did the trial magistrate make any specific finding on any of the seven counts.

[5] Likewise in his judgment the learned judge of the first appellate court only addressed the conviction by the trial magistrate and made no

reference to the substituted charge or any of the seven counts. In prosecuting the appeal the appellant who was represented by the counsel did not raise this issue either in the first appellate court or before this Court. We have agonized as to whether we can ignore the apparent error committed by the trial magistrate in failing to try the appellant and making a determination on all the charges as contained in the charge sheet. We find that this was a serious infraction that vitiated the proceedings before the trial court and rendered the trial a mistrial.

[6] The question is whether it would be appropriate to order a retrial of the appellant. In *Fatehali Manji vs. Republic* [1966] EA 343 the Court of Appeal following an earlier decision in *Ahmedi Ali Dharamsi Sumar vs. Republic (1)* [1964] EA 481 held as follows:

“(i) 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 or 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 retrial should only be made where the interests of justice require it.”

[7] In this case the trial was defective as the trial magistrate did not try the appellant on the substituted charges that were laid before the court, nor is it clear on which charge sheet the appellant was convicted. It is apparent that the offences were allegedly committed on 24th April, 2010, and the appellant was only charged four years later in February, 2015. This means that an order for retrial being made now would result in trying the appellant with offences committed about nine years ago. We have considered whether this would result in injustice in view of the fact that the appellant has been in custody for about four years. However we take note that the charges against the appellant were serious and involved loss of property and livestock belonging to several complainants. In the circumstances it would only be fair and just that an order for retrial be made so that the matter can be fully heard and properly determined on merit.

[8] Accordingly we allow this appeal, quash the appellant’s conviction, set aside the sentence, and direct that the appellant be produced before the magistrate’s court at Kapenguria for a retrial to be conducted by a magistrate other than the one who heard his case.

Those shall be the orders of the Court.

Dated and delivered at KISUMU this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR