



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 302 OF 2009**

**BETWEEN**

**EDWARD MARWA MAISORI.....1<sup>ST</sup> APPELLANT**

**ALFRED MOHERE RIOBA.....2<sup>ND</sup> APPELLANT**

**GEORGE VIKERI NYAKUNDI.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from Judgment of the High Court of Kenya at Nakuru*

*(Musinga & Kimaru, JJ.) delivered on 30<sup>th</sup> January, 2009*

*in*

***H.C.CR. Appeal Nos. 181,182 & 183 of 2004)***

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**RULING OF THE COURT**

1. The appellants were charged with various counts of robbery with violence and attempted robbery with violence contrary to **Sections 296 (2) and 297 (2)** of the *Penal Code, Cap 63 of the Laws of Kenya*. The Information against the appellants was that on the 13<sup>th</sup> day of December, 2002, at Lakeview Estate, in Naivasha Nakuru District of the Rift Valley province, jointly while armed with dangerous weapons namely a G3 rifle, a pistol and knives robbed Mary Amina of cash Ksh. 20,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Mary Amina. On the same day and while so armed with dangerous and offensive weapons, the appellants attempted to rob David Kioko Muiya of cash and at or immediately before or immediately after the time of such attempted robbery shot dead the said David Kioko Muiya.

2. The appellants were tried, convicted and sentenced to death by the trial court. Their first appeal to the High Court was heard by Musinga & Kimaru, JJ. who in a judgment dated 30<sup>th</sup> January, 2009, dismissed

the appeal for lack of merit.

3. The three appellants appealed to this Court and for one reason or another, despite the appeal severally being listed for hearing, the appeal has never been heard. On 1<sup>st</sup> April, 2010, learned counsel, Mr. Mbeche, for the 1<sup>st</sup> and 3<sup>rd</sup> appellants sought an adjournment and leave to file a supplementary memorandum of appeal; for the second time on 20<sup>th</sup> April, 2011, Mr. Mbeche was granted leave to file the supplementary memorandum of appeal. On 13<sup>th</sup> January, 2012, the appeal could not be reached for hearing; on 6<sup>th</sup> August, 2012, the appeal was taken out of the hearing list on the ground that the record of appeal was not properly prepared and the names and numbers of some witnesses in the index was different from the names and numbers on the record. On this date, the Registrar of the High Court was ordered to correct the record of proceedings of the Magistrate's court and the proceedings of the High Court. On 2<sup>nd</sup> July, 2013, the appeal was taken out of the hearing list as the spouse for counsel for the 1<sup>st</sup> and 3<sup>rd</sup> appellants was indisposed and the rectified record of appeal had not been received. On 28<sup>th</sup> October, 2013, the appeal was again listed for hearing and counsel for the appellant raised the issue of incompleteness of the rectified record of appeal. The matter was taken out with an order that all the counsel were to proceed forthwith before the Deputy Registrar, and with the help of the original record, to ensure the correctness of the rectified record before a fresh hearing date was given.

4. On the same 28<sup>th</sup> October, 2013, when the appeal was again called out for hearing after counsel had appeared before the Deputy Registrar; this Court ordered the appeal to proceed for hearing and stated as follows:

***“This appeal has been adjourned four times in the past on account of poor state of the record. It was adjourned last time (22<sup>nd</sup> July, 2013) before this session with orders directing the Deputy Registrar to ensure the record is rectified and served upon all counsel representing the appellants within 30 days and that counsel was to confirm the correctness of the record before a hearing date is given. When the matter was called out this morning, we assumed, in view of the foregoing orders that the issue of rectification of the record had been finalized and counsel were satisfied. But that was not so, all counsel before us indicated that the appeal could not proceed without a complete record; that in the absence of the Occurrence Books which the appellant relied on and which both court's below did not consider in their respective judgments, the eight (8) photographs produced in evidence and the non-alignment of the sequence of witnesses, the conviction of the appellants ought to be set aside as ordering a retrial is not a viable option. We have considered these arguments as well as the case of Otieno & Another – v- R, (1990-94) E.A. 510 relied un by Karanja for the 2<sup>nd</sup> appellant for the proposition that when the record is “gibberish and utterly incomprehensible” the proper order to make is to set aside the sentence. On our own assessment, the issues being raised regarding the state of the record are sufficiently raised in the grounds in the memorandum of appeal and ought to be argued as such in the appeal. This Court cannot make orders of setting aside a conviction without hearing the appeal. In the circumstances, we order that the appeal proceeds to hearing as we bear in mind that the confusion as to witnesses, the OBs and pagination have sufficiently been rectified...”***

5. On 22<sup>nd</sup> September 2014, this appeal was once again listed for hearing before this Court. On this date, learned counsel Messrs P.P.O. Mbeche appeared for the 1<sup>st</sup> appellant; Karanja Mbugua for 2<sup>nd</sup> appellant; Moragia Ogaro for 3<sup>rd</sup> appellant. The State was represented by Mr. J.K. Chirchir, Senior Principal Prosecution Counsel.

6. Counsel for the 1<sup>st</sup> appellant made an oral application to this Court seeking an order for re-trial of the case against the appellant. He submitted that this Court made an order on 6<sup>th</sup> August, 2012, where it was found that the record was not properly compiled and the Registrar was directed to correctly compile the record of appeal; that there are documents missing from the record as itemised in the 1<sup>st</sup> appellant's list of authorities filed on 22<sup>nd</sup> September, 2014; that the missing documents are the Occurrence Books (OBs) and photographs of the 1<sup>st</sup> appellant which were produced as exhibits before the trial court. Counsel

submitted that the 1<sup>st</sup> appellant would be greatly prejudiced if this appeal is heard when crucial documents and exhibits produced before the trial court are not part of the record. Counsel urged this Court not to hear the appeal but to order a re-trial of the case.

7. Mr. Karanja for the 2<sup>nd</sup> appellant supported the application for re-trial of the case; he submitted that the link between his client and the other appellants is a photograph which is not part of the record and he as counsel has never seen the photographs; that it would be impossible for him to argue the appeal when the photographs which is key to the 2<sup>nd</sup> appellant's case is not part of the record and was never considered by the High Court. It was submitted that the appeal cannot easily be argued on merit in the absence of the photograph as part of the record. Counsel cited the case of ***Otieno & Another – v- R, (1990-94) E.A. 510*** in support of the application for a re-trial order.

8. Learned Counsel Moragia Ogaro for the 3<sup>rd</sup> appellant in support for the application for a retrial order submitted that the record of proceedings before the trial court is indecipherable; for instance, there is cross-examination of PW15 but the examination in chief is missing from the record. Counsel submitted that **Section 361** of the **Criminal Procedure Act** allows this Court to order a retrial.

9. The State through the Senior Principal Prosecution Counsel, Mr. Chirchir, opposed the application for a retrial order. He submitted that the appellants have not argued that the initial trial was illegal or defective; that the application and arguments presently submitted before this bench was advanced before another bench of this Court on 28<sup>th</sup> October, 2013, and a ruling was delivered directing that the appeal to be heard; that on record there is a letter from the Deputy Registrar indicating that the only exhibits missing is the Occurrence Book. The State emphasized that the offence in this case was committed in 2002 and if a re-trial is ordered, there is a possibility that witnesses may not be found or their re-collection may not be accurate due to lapse of over twelve years; that if an order for re-trial is made, this may be an acquittal using the back door.

10. We have considered the oral application by the appellants for an order of retrial; we have also taken into account submissions by the State. Of significance is the order made by this Court on 18<sup>th</sup> October, 2013, directing that this appeal should proceed for hearing. The order of 18<sup>th</sup> October, 2013, was made by a three judge bench of this Court. The present bench is a bench of coordinate jurisdiction and we cannot vary or set aside orders made by a competent bench of collegial jurisdiction.

11. As regards the merits of the application for a retrial order, the offence in this case was committed in 2002. This court takes cognizance of the fact that memory distortions are introduced by the loss of details in a recollection over time. It is a truism that with every day that passes, the memory of a witness becomes fainter and fainter. For that reason, a witness however honest, cannot have accurate recollection of past events unless it was put down in writing immediately or so soon after the event.

12. In ***Sumar – v- R, (1964) EA 481***, the East African Court of Appeal emphasised 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 it is not likely to cause an injustice to an accused person. In ***Mwangi – v- R, (1983) EA 522***, it was held that an order for a retrial should not be made unless the appellate court is of the view that on a proper consideration of the admissible evidence, a conviction may result. In the case of ***Fatehali Manji – v- R, (1966) EA 343***, the Court of Appeal for Eastern Africa held that a retrial can only be ordered when the original trial was illegal or defective. The court stated:

***“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 retrial should only be made where the interest of***

*justice require it”.*

13. Guided by the dicta in the above cited cases, we are not satisfied that the interest of justice will be served by an order for retrial in this matter. There is no allegation that the initial trial was illegal or defective; a retrial order cannot be made when a court has not examined and considered the record. In the present case, this Court has neither examined nor considered the record of appeal; a retrial order cannot be made *suo moto* or *extempore* without hearing the merits of the appeal. A retrial cannot be ordered without hearing the parties on substantive points of law as urged in the grounds of appeal and for these reasons; we find that the grounds raised by the appellants in the application do not meet the criteria for a retrial order. We reiterate and re-affirm the orders made by this Court on 18<sup>th</sup> October, 2013, and direct that this appeal should proceed to hearing. A new hearing date is to be given by the registry on a priority basis. The application for re-trial is hereby dismissed.

*Dated and delivered at Nakuru this 23<sup>rd</sup> day of October, 2014.*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**