



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, WAKI & NYAMU, JJ.A)
CRIMINAL APPEAL NO. 224 OF 2003

BETWEEN
NIXON OMONDI OKOTHAPPELLANT
AND
REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ.) dated 22nd September, 2003

in

H.C.CR.C. NO. 1154 & 1216 OF 1998)

JUDGMENT OF THE COURT

The State, through Mrs. Ouya, (DPC) concedes this appeal on the one ground raised by the appellant that the trial was a nullity as the prosecution was conducted in part by a person who was not qualified under **section 85 (2)** of the Criminal Procedure Code to do so. It is indeed so, that the prosecution of the charge laid against the appellant commenced before Vihiga Principal Magistrate on 28th March, 1997 and was conducted by an Inspector of Police, one **Simiyu**, who was qualified to prosecute. Eight of the nine prosecution witnesses who testified in the trial were summoned by that prosecutor, but the record shows that on the 8th January, 1998 when PW5 testified, the prosecutor was one **Senior Sergeant Sirengo**, who had no business conducting the prosecution. As such, the entire trial was vitiated since that part of the trial cannot be separated from the rest. It was a nullity. It follows that the conviction recorded against the appellant must be and is hereby quashed and the sentence set aside.

The only issue that arises for our consideration is whether, as pleaded by Mrs. Ouya, a retrial of the appellant ought to be held. Mrs. Ouya, submitted that the evidence on record was capable of sustaining a conviction; that there would be no prejudice against the appellant; and that this was a serious offence in which one person almost lost his wife after serious injuries. On the other hand, learned counsel for the appellant, Mr. Ondieki submitted that a retrial was not appropriate since the alleged offence was committed about 15 years ago in 1997 when the appellant was arrested and has since been in custody; that memories have faded even if it was possible to trace the witnesses; and that it would be unjust in the circumstances of the case since the prosecution would have an opportunity of filling in gaps which are evident in the earlier trial.

We have considered those submissions. Whether or not a retrial would be ordered must, of course, depend on the facts and circumstances of each particular case and an order should only be made where the interests of justice require it. As this Court has held before, various factors would guide the court such as: the illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecutions making or not – see **Muiruri v Republic [2003] KLR 552** and **Mwangi v Republic [1983] KLR 522**. What were the circumstances in this case?

The appellant was one of the three accused persons tried for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged that the three of them, on the night of 5th and 6th February, 1997, at Mudete Tea Centre, in Vihiga, jointly robbed one **Eliphias Mulira Ashioya** of several shop items worth Shs.43,880/= and at or immediately before or immediately after the time of the robbery, wounded the said Eliphias Mulira Ashioya. The robbers accessed the shop from which the goods were stolen by cutting a hole through the corrugated iron sheet roof and they viciously cut the complainant with a panga on his head, left ear and chin fracturing his skull and mandible. They left him for dead but he was later rescued and treated in Mukumu Hospital. Two of the appellant's co-accused were acquitted before the two courts below but there was ample evidence through recovery of the stolen items in possession of the appellant and other compelling evidence from the appellant's girlfriend to support the opinion that on consideration of such evidence or potentially admissible evidence, a conviction may well result. We have considered this possible eventuality together with the guiding principles cited above and we think in all the circumstances, a retrial would not be appropriate in this case. We are particularly concerned that the appellant has been in custody for a period of 15 years which may well be equivalent to a life sentence, and it will take even longer to decide whether or not he committed the alleged offence. There is no assurance from the State, at any rate, that all the witnesses will be available or the integrity of their evidence after such a long lapse of time. The order that commends itself to us in the circumstances is that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of May, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR