IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 323 OF 2007

BETWEEN

LAWRENCE MUTUKU MUSYOKA ….……....……..…….. APPELLANT

AND

REPUBLIC …….……... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi, J.) dated 7th June, 2005

in

H.C.CR.A. NO. 478 OF 2002 & 123 OF 2002)
****

JUDGMENT OF THE COURT

The appellant herein, ***LAWRENCE MUTUKU MUSYOKA***, was tried and convicted on four counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code by the learned Principal Magistrate (Ms. Mwangi) at Kibera and upon the said convictions the appellant was sentenced to death. He appealed to the High Court but by its judgment dated and delivered at Nairobi on *7th June, 2005* the High Court (Lesiit & Mutungi, JJ.) dismissed his appeal. Being dissatisfied by the dismissal of his appeal by the High Court the appellant has now come to us by way of second appeal.

When the appeal came up for hearing on *6th October, 2010,* Mr. S.A. Wamwayi appeared for the appellant while Mr. Moses O'Mirera (Senior Principal State Counsel) appeared for the State. In his opening address Mr. Wamwayi stated that he would be relying on the Supplementary Memorandum of Appeal containing nine (9) grounds of appeal and also on the Memorandum of Appeal filed by the appellant in person. Mr. Wamwayi then proceeded to argue his first two grounds of appeal in the Supplementary Memorandum of Appeal which grounds stated:-

"1. ***THAT*** *the learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas the trial was conducted in a language which the appellant did not understand.*

2. ***THAT****the learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas all prosecution witnesses were not sworn prior to giving evidence."*

On these grounds Mr. Wamwayi submitted that the record of the trial magistrate did not indicate in

what language the witnesses testified and that the record merely stated "on oath" without stating whether and how the witnesses were affirmed or sworn.

Before Mr. Wamwayi could proceed any further Mr. O'Mirera shot up and informed us that he would concede the appeal on the two grounds already argued by Mr. Wamwayi. It was Mr. O'Mirera's submission that since the language used by witnesses had not been indicated then the proceedings were vitiated. He, however, asked us to order a retrial on the ground that the appellant had been charged with very serious offences and that the State will be able to assemble the witnesses for the re-trial.

On his part Mr. Wamwayi opposed a re-trial on the ground that the appellant had been arrested way back in 2001 in which case he (the appellant) has served the sentence. Mr. Wamwayi asked us to declare that the sentence so far served by the appellant was sufficient.

As already stated, the appellant was convicted on four counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the first count were as follows:-

"LAWRENCE MUTUKU MUSYOKA:- On the 11th day of August, 2001 at Muhoya Avenue Lavington within Nairobi Area, jointly with others not before court, while armed with pistols robbed VICTOR PRATT one mobile phone make nokia and one golden chain all valued at Kshs.26,000/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said VICTOR PRATT."

The particulars in respect of the other three counts were the same save the victims were different. The offences took place at about 3:30 p.m. hence in broad daylight. In the course of her judgment the learned trial magistrate stated:-

"After going through the evidence on record, I do find that the robbery took place at 3 p.m. i.e. during the day. There is no way the accused could have been wrongly identified by witnesses that amounted to over 7 and who were adults. What I find touching is that the witnesses struck me as extremely honest i.e. PW1 who even during the hearing looked still shocked which is not unusual for he was the head of the family and a host to quite a number of guests and clearly that he was not able to identify the accused. Also PW4 said she could not be able to identify the accused because when they got into the house she had her glasses on the table so could not see clearly. However, PW2, PW3 and PW7 were all able to identify the accused very well."

On their part the learned judges of the superior court stated as follows in the course of their judgment:-

"The offence took place in broad daylight and for over half an hour. The appellant was identified by three witnesses whose evidence was not only consistent but also descriptive of the role he played, how he dressed and the way he spoke to them. The identification is confirmed by the ability of all three witnesses to identify the appellant in the identification parade. The parade was conducted 16 days after the robbery. We also examined the record and were satisfied that the identification parade was properly conducted. We find that the identification of the appellant was safe and free from any possibility of mistake or error."

We refrain from commenting on the appellant's conviction since the State has conceded the appeal on the ground that the proceedings were vitiated as the trial magistrate failed to record the language in which the witnesses testified and also failed to indicate whether these witnesses were sworn or affirmed. The State has, however, asked for a retrial while Mr. Wamwayi asked us to consider the period served by the appellant as sufficient punishment. We have set out the particulars in the first count, the findings of both the trial court and the first appellate court in a bid to show the salient features of this appeal. It can safely be said that this is a case in which the family of one, Victor Pratt was relaxing with some visitors on the afternoon of *11th August, 2001* when they were rudely invaded by a gang of robbers posing as police officers. The robbers proceeded to rob Mr. Pratt and his visitors of various items and to achieve their mission, the robbers threatened to use and/or used actual violence on the victims.

Since it has been conceded that the trial was a nullity we accordingly declare the trial of the appellant a nullity with the result that all the convictions recorded against the appellant must be and are hereby quashed and the sentences are set aside.

Should we order a retrial as asked by Mr. O'Mirera to do? We have briefly stated the circumstances that led to the appellant's trial which we have now declared a nullity. The principles governing whether or not a retrial should be ordered were enunciated in ***FATEHALI MANJI V. R. [1966] E.A. 343*** in which Sir Clement De Lestang the then acting President of the Court of Appeal stated:

"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 injustice to the accused person."

In ***M'KANAKE V. R. [1973] E.A. 67*** it was held that a re-trial should not be asked to fill gaps in the evidence or to rectify faults of the prosecution's case. And in ***MWANGI V. R. [1983] KLR 522*** this Court said:-

"We are aware 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: *Braganza v. R.* ***(1957) EA 152 (CA) 469*** *Pyarala Bassan v. R.* ***[1960] EA 854. In our view, there was evidence on record which might support the conviction of the appellant."***

We have considered the background to this appeal and the principles governing whether or not a retrial should be ordered and it is our view that this is a proper case in which a retrial ought to be ordered.

In the premises therefore, the appellant will be re-tried before the Chief Magistrate's Court in Nairobi before another magistrate other than Ms. Mwangi (*Principal Magistrate*). The appellant shall appear before the said Court within 14 days from the date hereof with a view of taking a plea in the retrial. It is so ordered.

Dated and delivered at NAIROBI this 22nd day of October, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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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