REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 254 OF 2006

RICHARD KAMISOI

DAVID MAKORI NYANGAU ……..……...…… APPELLANTS

AND

REPUBLIC ……...……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kisii (Bauni & Warsame, JJ) dated 27th March, 2006

in

H.C.CR.A. NO. 151 OF 2004)

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JUDGMENT OF THE COURT

The appellant *Richard Kamisoi* together with one *David Makori Nyangau* (now deceased), were both charged before the Principal Magistrate's Court at Nyamira in *Criminal Case No. 360 of 2004* with the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. The particulars of the charge were that:

"*On the night of 27th and 28th April, 2004 at Magwagwa sublocation in Nyamira District within Nyanza Province, robbed Norah Nyanchama of 5 iron sheets and 6 kgs beans valued at Kshs.2,050/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nora Nyanchama Momanyi*".

Each of the two also faced an alternative charge of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code. In respect of the appellant, the alternative charge stated in the particulars as follows:

"*On the 28th day of April, 2004 at Magwagwa sublocation in Nyamira District within Nyanza Province, otherwise than in the course of stealing, dishonestly received or retained 5 iron sheets knowing or having reasons to believe them to be stolen goods*".

They both pleaded not guilty to the main charge of robbery with violence contrary to ***section 296 (2)*** of

the Penal Code and each pleaded not guilty to the alternative charges of handling stolen goods under ***section 322 (2)*** of the Penal Code in respect of which each was charged.

The matter came up for hearing before the learned Principal Magistrate at Nyamira (K. W. Kiarie) who, after full hearing found both of them guilty of the main offence of robbery contrary to ***section 296 (2)*** of the Penal Code, convicted them and sentenced David Makori Nyangau to death whereas the appellant whose age was assessed at 16 years was sentenced to be detained at the pleasure of the President.

Both Makori and the appellant were dissatisfied with the conviction and sentence. They appealed against the same to the superior court in *Criminal Appeal Nos. 150 of 2004* and *151 of 2004* which were on 31st May, 2005 consolidated and heard together as High Court at *Kisii Criminal Appeal No. 150 of 2004*. That appeal was heard by the superior court (Kaburu Bauni and Mohamed Warsame, JJ.) and was in a judgment delivered at Kisumu on 27th March, 2006, dismissed. The appellant and Makori were not satisfied still and hence this appeal premised on the grounds of appeal filed on their behalf by their firm of Advocates, M. A. Ochanji – Opondo & Co. Advocates.

When this appeal came up for hearing on 19th June, 2007 before us, we were informed by the prison authorities by way of a letter, that David Makori Nyangau passed on on 10th November, 2005 and so his appeal has abated. The appellant herein Richard Kamisoi who is the first appellant proceeded with his appeal through his learned counsel Mrs. Opondo. The appeal was originally premised on three grounds of appeal, but after it was learned that Makori had passed on, the learned counsel for the appellant abandoned the second ground in the Memorandum of Appeal and argued the first and the last grounds only. These were that the superior court failed to re-evaluate the whole of the evidence as it was by law enjoined to do, and thus failed to recognize and appreciate the contradictions in the prosecution witnesses evidence and that the superior court failed to consider the apparent shift by the trial magistrate of the burden of proof. For what will be apparent later in this judgment, we will not consider these two grounds nor will we consider the evidence on record and conclusion to be drawn from that evidence.

As we have stated hereinabove, the case was heard by K. W. Kiarie, the learned Principal Magistrate. The record does not show when the judgment in which the appellant together with Makori were convicted was delivered. It is not stated at the end of the judgment. It is however, apparent that it was delivered on 14th June, 2004 because, after the evidence of Alfred Mamboleo, a defence witness, although there was no formal close of the defence case, the learned magistrate after releasing the two exhibits, namely, iron sheets and beans to the complainant, made an entry that the judgment was to be delivered on 14th June, 2004; and on 15th June, 2004 he dealt with the question of sentencing after judgment having deferred the sentence on judgment date to the next date. Whatever happened, the learned magistrate later made the following entry:

"*<u>Certificate</u> to certify that judgment and sentence was dated and signed by me in open court in the presence of both accused persons, IP Makori and Omwoyo Court Clerk/Interpreter".*

It is not certain as to what necessitated that entry but it is clear to us that it was made to camouflage the fact that the judgment allegedly delivered resulting in the appellant being convicted and sentenced to detention in prison at the President's pleasure was not itself dated. Both counsel agreed that the alleged judgment was not dated at the time of pronouncing it. What is the effect of that in law?

Section 169 (1) of the Criminal Procedure Code states:

"*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 of 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".*

Mr. Musau, the learned Senior Principal State Counsel submits that such a failure to date the judgment cannot vitiate the entire proceedings and that it is curable by the provisions of ***section 382*** of the Criminal

Procedure Code and urges us to treat it so. With respect, we do not agree. The requirement that a judgment be dated and signed at the time of pronouncing it is mandatory and is a statutory requirement. In our view, a judgment that is not dated is not a judgment at all and so defect in it cannot be cured under ***Section 382*** of the Criminal Procedure Code because for the defect in a judgment to be so cured, the judgment must itself exist. In a case where it is not dated, it is not a valid judgment and therefore a nullity and therefore incapable of being cured.

That being our view of the matter, we do hold that the entire proceedings in the trial court was vitiated. The superior court's attention was not drawn to this serious omission and so did not direct its mind to it. We declare the trial before the trial court in *Criminal Case No. 360 of 2004* a nullity.

The next matter to consider is whether or not a retrial should be ordered in this case. The learned counsel for the appellant asked for a retrial. The learned Senior Principal State Counsel felt a retrial would be mounted without any difficulties. The appellant was arrested on 28th April, 2004 and taken to court on 4th May, 2004. He was sentenced to be detained at Presidents pleasure on 17th June, 2004. Thus, he has been in custody on account of this matter for about three years. In the case of ***Elirema & Another vs. Republic*** [2003] KLR 537, particularly at page 544 this Court stated:

"*Should we order retrial as we were asked by Mr. Gumo to do? We note that the alleged offence took place in January, 1999. That is a period of over four years. The main witnesses, i.e. The victim(s) of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya.* ……

Taking all these matters into consideration, we do not think that it would be just to the appellants to subject them to a fresh trial".

Each case must be considered on its own circumstances. In this case, the appellant's counsel sought retrial and the State would still be able to mount a retrial. The record before us shows that there is need to have matter properly heard. We feel it would be in the interest of justice that we order a retrial in this case and so we order.

The appellant to be produced before court for a retrial before another magistrate competent to hear the matter as soon as is reasonably practicable and at any rate the matter should be listed for mention within ***FOURTEEN days*** with a view to fixing an early hearing date.

Dated and delivered at Kisumu this 22nd day of June, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR