IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, O'KUBASU & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 151 OF 2004

BETWEEN

BENARD LOLIMO EKIMAT …… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale (Gacheche & Dulu, JJ) dated 25th March, 2004

in

H.C.CR.A. NO. 139 OF 2002)

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JUDGMENT OF THE COURT

The appellant ***Bernard Lolimo Ekimat alias Paiya*** (to whom we shall refer as the appellant in this judgment) was charged in the subordinate court with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the offence were that on 7th day of January, 2002, at Mitume Estate in Trans Nzoia District within Rift Valley province, jointly with another not before court, while armed with dangerous/offensive whips robbed Francis Wandei of one radio cassette make National valued at Kshs.2,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said ***Francis Wandei.*** He pleaded not guilty to the charge and the case came up for hearing before the Senior Resident Magistrate, D. K. Gichuki who after full hearing found the appellant guilty as charged, convicted him and sentenced him to death.

The appellant was dissatisfied with the same conviction and sentence and he appealed to the superior court against the same. In a judgment delivered on 25th March, 2004, the superior court (Gacheche, J. and Dulu, Ag. J) dismissed the appeal and upheld the conviction and the sentence. Still dissatisfied, the appellant filed this appeal before us through his counsel citing only one ground of appeal which is as follows:

"That the proceedings in the trial court are a nu llity".

Mrs. Nyaundi, the learned counsel for the appellant submitted that the trial was a nullity because from the records, hearing of the prosecution case against the appellant started and was concluded on 12th February, 2002, and yet at the start of the same hearing, there is no entry to indicate the Coram of the court. In particular, she contended, there was no entry to show whether or not the prosecutor was present and of what rank. Miss. Oundo, the learned State Counsel supported both conviction and sentence maintaining that as the record shows that on 24th January, 2002 IP Irungu was the prosecutor and on 15th February, 2002, the same IP Irungu appears on the record as the prosecutor, it must be assumed that the same IP Irungu was the prosecutor on 12th February, 2002, when the prosecution's case started and was concluded. She however, stated further that in case the omission in the record as to who was the prosecutor on 12th February, 2002 results into any doubt in the mind of the court, then a retrial should be ordered as witnesses would still be available and exhibits are also still available.

We have anxiously considered this appeal. The record before us shows that on 10th January, 2002 when the case came up for plea before the learned Senior Resident Magistrate, IP Irungu was present in court and was recorded as the Court prosecutor. The case was then set down for hearing on 12th February, 2002 and was to be mentioned on 24th January, 2002. On 24th January, 2002, the case came up for mention and IP Irungu was present. The case was fixed for mention on 30th January, 2002. On 30th January, 2002, the record shows the Coram as follows:

> ***"30.1.2002***
>
> ***Coram as before***
>
> ***Accused present***
>
> ***C/c Makori".***

It is difficult to appreciate what the phrase "Coram as before" meant in the records as that entry is followed by specifically stating that the Accused and Court Clerk Makori were present but does not specifically state whether the prosecutor was also present. Be that as it may, on that day it was again stated that the hearing of the case would be on 12/2/2002. On 12th February, 2002, the only entry made by the court before the first witness took to the witness box was:

"ORDER: hearing to proceed".

There was no entry as to the Coram but it seems to us clear that the learned Senior Resident Magistrate and the appellant must have been there. Other than the two, there is nothing to show as to whether a prosecutor was before the court when the prosecution witnesses gave evidence and if such a prosecutor was indeed before the court as was required, what was his rank. It is on record that on the same day at the end of the prosecution case, a prosecutor referred to only as "Court Prosecutor" closed the prosecution case, but it was not stated as to the rank of the same prosecutor and when he came into the case.

On our own perusal of the record as reflected above, we agree with the learned counsel for the appellant, that there was nothing in the record to show that a prosecutor was present and prosecuted the case before the trial court. As there was no Coram entered in the record, it is not possible to know whether, if there was a prosecutor on the hearing day, i.e. on 12th February, 2002 as indicated towards the close of the prosecution case, the same prosecutor was of the rank specified in section 85 (2) of the Criminal Procedure Code and was thus a qualified prosecutor. We cannot assume, as urged by Miss Oundo that IP Irungu must have been the prosecutor on 12th February, 2002 when the prosecution case was presented.

This matter was not taken before the superior court, perhaps because the appellant was not represented by a counsel in that court, and so that court's attention was not drawn to this serious omission in proceedings and consequently that court did not consider it. As it is a matter of law, relating to jurisdiction, we cannot ignore it (see case of Roy Richard Elirema & Another v R Criminal Appeal No. 67 of 2002). Having considered it, we are unable to conclude that the case was properly prosecuted as required by law. In the case of Roy Richard Elirema & Another v R (supra) this Court stated inter alia:

> ***"In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of constitution and the code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue the prosecution".***

The same prosecutor, if a public prosecutor must be shown to be of the rank of Inspector of Police and above.

The proceedings of 12th February, 2002 were a nullity. As we have stated above, the same proceedings covered the entire prosecution case and even if thereafter the record shows that there was a prosecutor, that part cannot be separated from the rest and therefore it follows that the entire proceedings before the trial court was a nullity. The result is that the conviction recorded against the appellant must be and is hereby quashed and sentence set aside.

The learned State Counsel asked us to order a retrial and that is the next issue for us to consider. The alleged offence took place on 7th January, 2002, slightly over three years ago. The appellant was arrested on 8th January, 2002 and has been in confinement since that date. On the other hand, Miss Oundo, the learned State Counsel says the witnesses and the exhibits would still be available to enable a successful retrial to proceed. In the case of ***Ahmed Sumar v Republic*** [1964] EA 481, at page 483, the predecessor to this Court stated as follows:

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mis take of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".***

The court continued at the same page paragraph H and stated:

> ***"We are also referred to the judgment in Pascal Clement Bragan za v R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.

In our view, having carefully considered various aspects of the case including the charge, that was before the court plus the evidence that was adduced in support of it and the period the appellant has stayed under confinement, we are of the view that it would not be in the interest of justice to order a retrial and we decline to do so.

The appellant is set free unless otherwise lawfully held.

Dated and delivered at Eldoret this 18th day of February, 2005.

R. S. C. OMOLO

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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