REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 117 of 2006 & 138 of 2006

LAWRENCE WANJOHI GATHITU …..…… APPELLANT

versus

REPUBLIC……..…….. RESPONDENT

(Being an appeal from the conviction and sentence of R. NYAKUNDI,

Chief Magistrate in Chief Magistrate's Criminal Case No. 128 of 2005 at NYERI)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 138 OF 2006

EPHANTUS MUTAHI KARAGI …..…… APPELLANT

versus

REPUBLIC…….. RESPONDENT

(Being an appeal from the conviction and sentence of R. NYAKUNDI,

Chief Magistrate in Chief Magistrate's Criminal Case No. 128 of 2005 at NYERI)

JUDGMENT

In the lower court three accused persons faced the charge of ***Robbery with violence contrary to Section 296(2) of the Penal code***. The particulars of that offence are as follows;-

1. LAWRENCE WANJOHI GATHITU 2. ERNEST WERU GATAMU 3. EPHANTUS MUTAHI KARAGI: ***On the 3rd day of August 2003 at Githung'ung'u village in Nyeri District of the Central Province, jointly with others not before court while armed with dangerous weapons namely pistols, pangas and rungus robbed JOSEPH MUTAHI of two radio cassettes make Sanyo and Sony, one video deck make Sanyo and cash kshs. 6,000 all valued at kshs.42,900 and at or immediately after the time of such robbery killed the said JOSEPH THEURI MUTAHI.***

At the close of the prosecution's case the trial court found that a prima facie case had not been made out in respect of the 2nd accused. It proceeded to acquit him under Section 210 of the Criminal Procedure Code. At the conclusion of the trial with regard to the two remaining accused the lower court found that the prosecution had proved the case against the first appellant LAWRENCE WANJOHI GATHITU and the 2nd appellant EPHANTUS MUTAHI KARAGI. Both were sentenced to suffer death as prescribed by the law. The appellant's trial in the lower court commenced on 3rd June 2005 before Chief Magistrate R. Nyakundi. On that first day of trial the court received evidence of PW1 and 2. The prosecutor was indicated as 'Lydia prosecutor'. There is no indication whether the said Lydia was a police officer or not. If she was a police officer her rank was not indicated. The evidence of PW 3, 4, 5, 6, and 7 was recorded on the subsequent date of hearing. The prosecutor who led that evidence was indicated as 'Kandia prosecutor'. Again there is no indication whether the said Kandia was a police officer and if so his rank. When the court received evidence of PW 8, 9, and 10 the prosecutor who led that evidence was 'CI Kandia court prosecutor'. We do not know whether the chief inspector of police Kandia who was prosecuting the case at this time was the same Kandia who was prosecuting when PW 1 to PW 7 testified. The prosecutor who was present at the hearing of the defence case was CI Ochieng. From the foregoing it becomes clear that the appellant's case was partly conducted by an unqualified person as per the provisions of ***Section 85(2)*** of the Criminal Procedure Code. That section provides as follows:-

"***The Attorney-General by writing under his hand, may appoint any advocate of the High Court or person employed in the public service not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case."***

This subsection has since July 2007 been amended. It was amended by Act 7/07 by deleting the words in that subsection the word '*not being a police officer below the rank of Assistant Inspector of police.'* However at the time of the trial of these appellants that subsection had not been amended. The Court of Appeal on the matter of prosecution by a non qualified person after quoting Section 77 of the constitution stated in the case of ELIREMA & ANOTHER vs REPUBLIC (2003) KLR:-

"***If the court to be 'impartial' it cannot at the same time perform the role of either the prosecutor or a defence counsel so that the role prosecuting can only be performed by a prosecutor, whether public or private. A private prosecutor has to get the permission of court. Corporals Kamotho and Gitau could not get and did not infact get permission of the magistrate to prosecute. As we have said, they were obviously purporting to act as public prosecutors. In law, they could not so act because they were not qualified to be appointed as public prosecutors but even if the Attorney General had purported to do so, such appointment would not be legally admissible or tenable so that for all practical purposes, the two officers were not entitled to act as public prosecutors."***

In the case of AMOS GITUMA KINYUA VS REPUBLIC Criminal Appeal No. 265 OF 2003 (NYERI) the Court of Appeal dealing with a similar scenario and having referred to the case of ELIREMA (supra) stated:-

"***But the*** *Elirema Case* ***did not introduce anything new in the law nor have subsequent cases which have followed that decision. They merely restate the law as it has always existed in the Constitution of Kenya Section 77(1), the Criminal Procedure Code Sections 85, 85(2), 86, 88(1), 202 and the Police Act (Cap 84) Section 3(2). The combined effect of those provisions is that where an incompetent police officer prosecutes a Criminal Case before a magistrate's court, the proceedings therein will be a nullity. Both P.C. Nderitu and Cpl. Kabogo who conducted the prosecution's case in this matter were not Public Prosecutors. The trial in which they purported to be such prosecutors was therefore a nullity, and we so declare."***

We too on our part do hereby declare that the lower court trial was a nullity for having been prosecuted by persons called Lydiah and Kandia. The issue we now need to consider is whether to order for a retrial. The issue we have just dealt with about the prosecution by a non qualified person was not addressed by the learned state counsel at the hearing of the appeal. It was however one of the grounds raised by the 2nd appellant. On our part it is an issue that arose as we began to reconsider the lower courts evidence. Consequently the learned state counsel and even the appellant did not address us on whether or

not a retrial should be ordered. As a general rule whether or not a retrial should be ordered depends on the circumstances of each case. A retrial will be ordered where the interest of justice require it and if it is not likely to cause injustice to the appellant. See the case of MUIRURI vs REPUBLIC (2003) KLR 552 it was held:-

"***That as a general rule, whether a retrial should be ordered or not must depend on the circumstances of the case and will only be ordered where the interest of justice require it, and if it is not likely to cause injustice to the appellant. The Court also held the nature of the defects in the original trial, the length of time which has lapsed since the arrest and arraignment of the appellant, who was responsible for the mistake leading to the order setting aside the conviction and sentence, and the nature of the evidence the prosecution is likely to rely on in support of the charge are also important factors to consider. These factors are not necessarily exhaustive. Each case has to be considered on the basis of its peculiar factors and circumstances."***

In this case the complainant's family suffered a violent robbery which resulted in the death of the complainant's husband. The learned state counsel Ms Ngalyuka at the hearing of the appeal conceded to the appeal in respect of the first appellant. She submitted that although PW 1 and 3 stated that they saw and recognized the first appellant during the robbery they however failed to tell the police of this. We have re-examined the lower courts evidence and we find that what the learned state counsel submitted was not supported by the evidence of PW 1 and PW 3. It is to the contrary of what was submitted by Learned State Counsel. We are of the view that even though the first appellant was arrested on 4th August 2003 while the second appellant was arrested on 4th June 2004 and since it is obvious that there has been a long passage of time since their said arrest, trial and conviction, we however are of the view that the justice of this case demands that the appellant be retried. We are not oblivious to the fact that the appellants have also been in custody for prolonged period but in view of the seriousness of the charge and the fact that a life was lost, we find that the interest of justice would best be served if the appellants were retried. In the case of RICHARD OMOLLO AJUOGA vs REPUBLIC Criminal Appeal No. 223 of 2003 the Court of Appeal faced with a similar situation stated:-

"***In the case before us, it would appear from the record on the night of 26th August, 1997, robbers had a free hand in Kisii town robbing people of their vehicles at will and up in killing one victim of such robbery who was on public duty. Even though we agree that a considerable time has lapsed since the appellant was apprehended and tried for the same, we are of the view, nonetheless, that the circumstances that prevailed as far as this case is concerned demand that justice be done, not only to the appellant but also to the victims of the same robbery and the family of the deceased victim who was killed in cold blood. In our view, justice must be even handed and it must be ensured that all consumers not only receive it but also see it being down."***

We are of the view that those sentiments apply to this case. Accordingly the judgment of this court is that the lower court's conviction of both appellants is hereby quashed and their sentence is hereby set aside. We order that both appellants be retried. Until then we order the appellants to be held in custody. The appellants will be presented before the Chief Magistrate Nyeri on 13th February 2009 for mention of their case.

Dated and delivered this 30th day of January 2009.

MARY KASANGO

JUDGE

M. S. A. MAKHADIA

JUDGE