REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 447 of 2000

CYRUS MWANGI MURIMI .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 1973 of 2000 dated 2nd November 2000 by M. R. Gitonga – SRM)

____

J U D G M E N T

This is a first appeal. The appellant, **Cyrus Mwangi Murimi** faced one count of robbery with violence under section 296(2) of the Penal Code before the Senior Resident Magistrate at Nyeri (**M. R. Gitonga**). He pleaded not guilty but after a full trial, the learned magistrate found him guilty, convicted him and sentenced him to death as by law provided. The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal.

The appellant filed on his own, four grounds of appeal. When the appeal came up for hearing however, **Mr. Orinda**, learned Principal State Counsel conceded to the appeal on unrelated and totally different ground. By dint of that action, the grounds advanced by the Appellant in the Petition of appeal became Otiose.

Mr. Orinda conceded to the appeal on the technical ground that the case before the subordinate court was prosecuted by unqualified person and that therefore rendered the entire proceedings before the subordinate court a nullity in view of the provisions of section 85 (2) of the Criminal Procedure Code as read with section 88 of the same code. The appellant for obvious reasons supported the sentiments expressed by the learned Principal State Counsel.

We have, on our own, perused the record before us as we must do and noted that the entire trial started before the chief magistrate at Nyeri (**Kaburu Bauni** as he then was) and the prosecutor was **C.I. Mbeda**. That was on 5th July 2000 when the plea was taken. Thereafter, the matter was allocated to the Senior Resident Magistrate, **Rintari M. G.** who in the course of the trial suddenly became, **M. R.**, **Gitonga**. We suppose perhaps that in the course of the trial, the learned magistrate got married hence changes in her names; or may be she just changed her names.

Be that as it may, the matter remained in her court throughout except on a few occasions when it would go to a different court for mention. The hearing was however throughout conducted by **Senior Sergeant**

Kigera. On this basis we would respectfully agree with the learned principal state counsel and the appellant that the entire proceedings in the subordinate court were thus conducted by a police officer of the rank below that of an inspector of police. The provisions of section 85(2) of the Criminal Procedure Code are now a matter of common notoriety within the legal corridors and we need not repeat the same here. However, in summary, **Senior Sergeant Kigera** who conducted the case was not a qualified public prosecutor. There was no evidence that permission was obtained for him to conduct the prosecution. The court of appeal, in considering a similar situation in the now well known case of **Roy Richard Elirema & Another v/s Republic (2003) KLR 537** stated, inter alia, as follows:-

"**For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an Assistant Inspector of police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences set aside.**

The foregoing is the law and as we have stated, we agree with the learned principal state counsel on that aspect of this case. The matter was apparently not raised before the trial court and the same court did not address itself to it even on its own motion as would have been expected. However, as it is a point of law, it was rightly raised before us in this first appeal.

We think, we have said enough, to indicate that the trial before the subordinate court was a nullity. We declare it so with the result that the conviction recorded must be and is hereby quashed and the sentence set aside.

On conceding to the appeal, **Mr. Orinda** did not however ask us to order a retrial. He surmised that the case was over 8 years old. That the offence was committed at night. However only PW1 testified on the issue of identification. The other witness testified only as to how he had assisted PW1 to go to hospital. He was of the opinion therefore that the evidence was shaky and could not sustain a conviction if a retrial is ordered.

It is true that the appellant has been in confinement since 21st June 2000 when he was arrested to date and that is one of the matters we need to consider. The other matter we need to consider as well is justice to all parties in this case as well as whether, looking at the record before us, a prima facie case existed so as to enable us order a retrial. In the case of **Pascal Ouma Ogolo v/s Republic – Criminal appeal No. 114 of 2006** the Court of appeal stated as follows on the pertinent aspect:-

"**We have considered whether or not we should order a retrial. The alleged offences were committed on 9th February 2000 and the appellant has already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal to the superior court were as to identification and recognition in the circumstances in which both the State Counsel and the court found to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Musau that this is not a suitable case in which to order a retrial."**

We have also anxiously considered other cases and the law on this point. In the case of **Ahmed Sumar v/s Republic (1964) EA 481, at page 483**, the court of appeal for Eastern Africa 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 mistake 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 at paragraph 11 and stated further:-

“**We are also referred to the judgment in Pascal Clement Braganza v/s Republic (1957) EA 152. In this judgment the court accepted the principal that a retrial should not be ordered unless the 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.”**

Taking the queue from that decision the court of appeal in the case of **Benard Lolimo Ekimat v/s Republic – Criminal Appeal No. 151 of 2004 (unreported)** had the following to say:-

“**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 courts 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 the case before us, the appellant has been behind bars for over 8 years. That is considerable period of time. To order a retrial in the circumstances will not be in the interest of justice. In our view if such an order was to be made, it would work injustice on the appellant. It may also end up attracting a constitutional challenge under the fair trial provisions of the constitution of Kenya. Further and as rightly pointed out by the learned state counsel, the evidence tendered in support of the charge was tenous to say the least. The incident happened at night. The learned magistrate did not make inquiries as to the presence of light at the scene, its source, and intensity as required. See **Maitanyi v/s Republic (1986) KLR 198**. Further the learned magistrate did not warn herself of the dangers of convicting the appellant on the evidence of a single identifying witness in difficult circumstances. To order a retrial in the circumstances, we may innocently be according the prosecution an opportunity to feel up the gaps in their case. We are further persuaded that if the self-same evidence was tendered at the retrial it is unlikely that a conviction will result. See **Mwangi v/s Republic (1983) KLR 522**

Thus, in our view, having carefully considered the various aspects of the case including the above plus the evidence that was before the subordinate court, a retrial does not commend itself to us and we decline to make such an order. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 15th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE