



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 71 OF 2009

(From original sentence and conviction in Criminal Case No. 2045 of 2002 of the Senior Principal Magistrate's Court at Malindi before K. Ogolla - SRM)

FRANCIS NGANGA MWANGI,

KHAMIS ABDALLA MAGIGE &

JAMES MAINA NYAGA.....APPELLANTS

VERSUS

REPUBLICPROSECUTOR

JUDGMENT

The three appellants herein, Francis Nganga Mwangi, James Maina Nyaga and Khamis Abdalla Magige were charged jointly with others not before the court with robbery with violence contrary to section 296(2) of the Penal Code. After a full trial in which 15 witnesses gave evidence for the prosecution and the appellants made unsworn statements in their defence, the appellants were found guilty of robbery with violence and sentenced to death. They appealed to this court against conviction and sentence.

At the hearing of the appeal, the three appellants appeared in person and Mr. Ogoti, assistant Director of Public Prosecutions, appeared for the Republic. Mr. Ogoti conceded the appeal on the ground that the prosecution case was partly conducted by an unqualified person. However, he urged the court to order a retrial on the basis of the facts that the witnesses will be available to testify; the proceedings disclose a strong case against the appellants, and the prosecution will not be seeking to seal any loopholes.

Each of the three appellants opposed the application for retrial basically on the ground that the prosecution witnesses are non Kenyans and will not be available to testify. Secondly, the appellants said that they had incarcerated since 2003.

Upon studying the record, we do confirm that Police Constable Maina conducted part of the prosecution case on 20th February, 2003. He led prosecution witness No. 15, one Paul Ngugi Mwangi through his evidence in chief, and after the cross examination offered not to re-examine him. On that note he also closed the case for the prosecution. He also appeared in court on 6th March, 2003, for the ruling as to whether the appellants had a case to answer.

Under Legal Notice No. 234 of 1972, all police officers other than administration police officers, of the rank of assistant Inspector or above were appointed public prosecutors for Kenya generally. Police Constant Maina was therefore not competent to prosecute this or any other case. From the decision made

in **RICHARD LIREMBE V REPUBLIC CR. APP. NO. 67/02 (Mombasa)** which has been followed in many subsequent decisions, it is now trite law and practice in this country that any prosecution conducted on unqualified person is a nullity.

The next issue to determine is whether we should order a retrial. The guiding considerations in that regard are whether the evidence is such that a prosecution would probably lead to a conviction and whether the appellants would be prejudiced by a retrial.

Having studied the evidence adduced at the trial, we have taken the view that the complainants no doubt had a fairly strong case. However, it is also not lost on us that all the complainants in this matter were Italian nationals. One of them told the court that he would be leaving the court that he would be leaving Kenya on 9th November 2002, while seven others said they would leave on 10th November 2007. Only one did not disclose the date of his departure.

Another issue which Mr. Ogoti did not mention relates to the exhibits. The record shows that on 12th November 2002, the court ordered that the exhibits produced in the case be given back to the respective complainants. We understand this to mean that the exhibits were returned to the respective owners. That being the case, and the owners being the same foreign nationals who were the complainants, we don't think that we can interest them in coming back in respect of a case in which they have already got back their stolen properties. The very experience under which they underwent at the hands of the robbers is a sufficient deterrent for them to come back.

In those circumstances, the chances of mounting a successful retrial in this case are below minimal and to keep the appellants waiting for a retrial which eventually may never take off is highly prejudicial to them.

We therefore allow the appeal, quash the appellants' conviction for robbery with violence and set aside the death sentence in respect of each of them. They are accordingly set free unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Malindi this 24th day of September 2008.

L. N. Njagi

H. A. Omondi

JUDGE

JUDGE