REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 338 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 12 of 2003 of the Principal Magistrate's Court at kikuyu (M. W. Murage – PM)

GEOFFREY NG'ANG'A MIIKA…….…….....……..APPELLANT

VERSUS

REPUBLIC……..……....RESPONDENT

J U D G M E N T

GEOFFREY NG'ANG'A MIIKA was convicted on one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was sentenced to death as mandatorily provided in the law. It is against the conviction that he now appeals to this court.

Miss Gateru, learned State Counsel conceded to the appeal on a technicality on the basis that the trial was defective in that the Appellant was not given an opportunity to cross-examine the Complainant. We have on our part perused the record of the lower court proceedings. The trial of the Appellant begun before **A. ONGERI, Mrs**. (SRM) on 18th July 2003. After hearing the Complainant's evidence, **Mrs. Ongeri** was transferred to a new station. **Mrs. Murage, M.** (**SRM**) who took over from her started the case *denovo* on the 22nd October 2003. On that date, the succeeding magistrate **Mrs. Murage** heard the evidence of the Complainant and then adjourned the case on the Appellant's request due to illness on the Appellant's part. The Appellant had not cross-examined the Complainant by the time **Mrs. Murage** adjourned the case on the 22nd October 2003. On the resumed hearing on 28th April 2004 and subsequently, the Complainant was not recalled for cross-examination by the Appellant. Eventually the prosecution closed its case without re-calling the Complainant.

Section 77 of the **Constitution** provides protection to a person charged with a criminal case. Under **Section 77(2) (e)** the **Constitution** provides thus: -

"***(2) Every person who is charged with a criminal offence –***

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses

called by the prosecution."

The cross-examination of a witness called by the prosecution by an accused person in a constitutional right. It was therefore a contravention of the Appellant's constitutional rights not to give him the opportunity to cross-examine the Complainant before his case in defence was heard. We agree with the State that the Appellant's trial before the lower court was in those circumstances defective. In the circumstances, we declare the trial a nullity and set aside both the conviction and the sentence.

SWAHIBU SIMIYU & ANOTHER vs. RRPUBLIC CA 243 of 2005 followed.

Miss Gateru has urged us to order a retrial on the basis that the evidence available against the Appellant was strong and could sustain a conviction. The Appellant was opposed to a retrial. He submitted that he had been in custody for long and that he was innocent of the charges.

The principles applicable in determining whether or not to order a retrial are now well settled. An order for retrial should not be made if it will cause the accused person to suffer prejudice. See **MANJI vs. REPUBLIC 1966 EA 313**. Whether or not an order for retrial should be made depends with the peculiar circumstances of each case. See **AHMED JUMA vs. REPUBLIC 1964 EA 481**.

In any event, before making an order for retrial, an appellate court must be of the opinion, upon considering the admissible evidence, that a conviction would result. See **MWANGI vs. REPUBLIC [1983] KLR 522**.

We have considered the admissible evidence in this case. We note that the Complainant's evidence given before **Mrs. Ongeri** on 18th July 2003 was materially different from that given by him before **Mrs. Murage** three months later. One of the contradictions was the reason the Complainant gave for leaving the bar on the material night just before the alleged attack. The second contradiction concerned the sequence of events leading to the alleged attack. The most important factor however is the fact that from the Complainant's evidence, he could not have seen his attackers since they approached him from behind and hit him suddenly on the head. His evidence implicating the Appellant was based more on suspicion than identification. Suspicion, however strong cannot form the basis of a conviction. For these reasons, we are of the opinion that no conviction would result if we ordered a retrial. In any event, we are satisfied that such an order would cause the Appellant to suffer prejudice. We decline to order a retrial. We order rather that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of January 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for the Respondent

CC: Tabitha

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE