**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 249 of 2003**

**JOSEPH ONYANGO OTIENO ……..…….. APPELLANT**

**VERSUS**

**REPUBLIC ……..……RESPONDENT**

***(From original conviction and sentence in Criminal Case Number 9276 of 2002 of the Chief Magistrate's Court at Kibera – Mrs. W. Karanja – C.M.)***

**JUDGMENT**

***JOSEPH ONYANGO OTIENO***, hereinafter referred to as the Appellant was charged with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code. After a trial involving six Prosecution witnesses the Learned trial Magistrate found the Appellant guilty, convicted him and sentenced him to death in respect of counts three and four. She however acquitted him in respect of counts one and two due to lack of evidence. It is against the conviction and sentence aforesaid that the Appellant now appeals to this Court.

When the Appeal came up for hearing, Miss Nyamosi, the Learned State Counsel, conceded to the same on the ground that the entire Prosecution of the case in the Court below was conducted by an unqualified Police Prosecutor. Counsel submitted that the entire Prosecution case was led by Corporal Osiemo, an unqualified Prosecutor in terms of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. The proceedings were thereby rendered a nullity.

We have on our part perused the record and have confirmed that indeed Corporal Osiemo led the entire Prosecution case and consequently the mandatory provisions of Section 85 (2) and Section 88 of the Criminal Procedure Code as to the qualifications of Public Prosecutors in Criminal cases were violated. Accordingly we are in agreement with the Learned State Counsel that the proceedings were defective and should be declared a nullity. We so hold and declare. The Appeal is therefore allowed and both conviction and sentence set aside.

Miss Nyamosi urged us to order a retrial on the basis that the evidence on record supported the charges and was well corroborated in the sense that the witnesses recognised the Appellant. Counsel further submitted that the trial was concluded on 17th March, 2003. In the circumstances, the Appellant would not be prejudiced if a retrial was to be ordered.

The Appellant opposed the request for retrial on the grounds set out in his written submissions and also that he was not to blame for the participation in the trial by an unqualified Prosecutor. That the

evidence of PW1, PW2, and PW3 was not corroborated. That there was no light at the scene of crime and therefore his purported identification was not positive and watertight.

Having carefully considered both oral and written submissions in support of and in opposition to the order for retrial and also having considered and evaluated the proceedings of the Lower Court, we are satisfied that the ends of justice will not be best served by such an order.

The principles applicable in determining whether or not a retrial should be ordered are now well settled. A retrial should only be ordered where the original trial was defective or a nullity as in the instant case. See ***AHMED JUMA VS REPUBLIC (1964) EA 581.***

An order for retrial should not be made if it has the potential to cause prejudice and on injustice to the Appellant ***MUYIMBA VS UGANDA (1969) EA 433.*** Most important however is that the Appellate Court should not order a retrial unless it is satisfied that upon consideration of the admissible or potentially admissible evidence it is of the opinion that a conviction may result. See ***MWANGI VS REPUBLIC (1983) KLR 522.***

In arriving at this decision we have taken into account the aforesaid principles. We are satisfied that the Appellant will suffer prejudice and or injustice if an order for retrial is made. The Appellant, from the record, was arrested on 22nd December, 2002. Since the charges preferred are non-reliable, the Appellant has been behind bars continuously for a period of over four years. That is relatively a long period of incarceration. We are also satisfied that upon consideration of the evidence on record that a conviction is unlikely to result if the self-same evidence was to be tendered at the retrial. The evidence of PW1 and PW2 did not corroborate each other. PW1 did not identify the Appellant at the scene of crime. It would appear that there was no light at the scene of crime otherwise the robbers would not have been using the torches. In the circumstances the purported identification of the Appellant by the witnesses is doubtful as correctly submitted by the Appellant. It is quite clear that the witnesses were walking home in a single file when suddenly a powerful torch was flashed at them that blinded them momentarily rendering them unable to see anybody. It was then that they were attacked and robbed. This puts in question their ability to identify their attackers who, from the record, were many. It is also apparent that the said witnesses were from a bar where they had been taking alcohol until midnight. The Appellant maintains that the witnesses were under influence of alcohol which could have interfered with their ability to identify the attackers. We cannot discard that possibility. The state did not also state categorically that the witnesses would easily be available in the event a retrial was ordered. The totality of the above is that we are satisfied that this is not a fit case for a retrial. Accordingly we decline to make an order for retrial. Instead we order that the Appellant shall forthwith be released from prison custody unless otherwise lawfully held.

Dated at Nairobi this 23rd day of January, 2007.

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**LESIIT**

**JUDGE**

…….

**MAKHANDIA**

**JUDGE**

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Nyamosi for State

Erick/Tabitha Court clerks

……..

**LESIIT**

**JUDGE**

…….

**MAKHANDIA**

**JUDGE**