



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 495 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 544 of 2004 of the Chief Magistrate's Court at Kiambu (G.M. Njuguna– PM)

MARTIN GITAU MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **MARTIN GITAU MUTHONI** faced one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** before the Principal Magistrate at Kiambu. 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. Being aggrieved by the conviction and sentence, he lodged this appeal.

The Appellant filed in person five grounds of appeal.

When the appeal came up for hearing, it was conceded to by **Miss Gateru**, Learned State Counsel. The State conceded to the appeal on the technical ground that the language of the court and in which the witnesses testified during the trial was not indicated in the record of the court. The Learned State Counsel submitted that this omission was fatal to the prosecution case as it contravened **Section 77(2) (b) and (f)** of the **Constitution** as well as **Section 198(1)** of the **Criminal Procedure Code**. The proceedings were thus a nullity. **Mr. King'ori** learned Advocate who appeared for the Appellant in this appeal was of the same persuasion as the learned State Counsel.

We have, on our part perused the record before us, as we must do. That point of law taken suits this appeal before us though not raised in the petition of appeal.

Having perused the record, we do respectfully agree with the learned State Counsel and Counsel for the Appellant that the entire record of the trial magistrate does not indicate the language of the court as well as the language in which all the witnesses testified. Further, the record does not show the language in which the Appellant gave his statement of defence or whether there was any interpretation of the proceedings to the Appellant. Clearly, these omissions contravened **Section 77(2) (b) and (f)** of the **Constitution** of Kenya as well as **Section 198(1)** of the **Criminal Procedure Code**. As held by the Court of Appeal in the recent case of **SWAHIBU SIMBAUNI SIMIYU & ANOTHER vs. REPUBLIC, CA No. 243 of 2005 (unreported)**, such omission renders the trial a nullity. The Court of Appeal decisions are binding on us. Accordingly we have no hesitation whatsoever in holding that the trial before the Subordinate Court was a nullity. We declare it a nullity with the result that the conviction recorded must be and is hereby set aside as well as the sentence.

As we have stated, **Miss Gateru** rightly conceded that the trial before the Subordinate Court was a nullity. She however asked for a retrial for the ends of justice to be met. Counsel submitted that the offence was serious, that there was strong evidence on record to secure a conviction if an order of retrial was made. Finally, counsel submitted that witnesses could easily be availed by the State in the event of a retrial.

Mr. King'ori argued against a retrial submitting that such an order will not serve the ends of justice but will oppress the Appellant further. Counsel submitted that evidence adduced before court could not sustain the charge. That the ingredients of the charge of robbery with violence were never met.

In the case of **AHMED SUMAR vs. REPUBLIC [1964] EA, 481** at page 483, the Court of Appeal 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 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 then continued at the same page at paragraph 11 and stated further: -

*“We are also referred to the judgment in **PASCAL CLEMENT BRAGANZA vs. REPUBLIC [1957] EA 152** in this judgment the court accepted the principle 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 interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”*

Taking the cue from that decision, the same Court in the case of **BERNARD LOLIMO EKIMAT vs. REPUBLIC CA 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 the Courts is that such case must depend on the particular facts and circumstances of that case but an order for retrial should only be made if justice require it...”

In the case before us, the robbery was committed in broad daylight and the robber was positively identified. Looking at the record before us, we are of the view that a conviction would result if a retrial were ordered. Even though considerable time of 3 years has elapsed since the Appellant was apprehended and tried for the offence, 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 victim of the robbery by an order for retrial. There is an assurance by the State of the availability of witnesses in the event of a retrial.

Thus, in our view, having carefully considered the various aspects of this case including the above including the evidence that was before the trial court, a retrial commends itself to us and we order a retrial of the Appellant before another court of competent jurisdiction. The Appellant will be produced before the Senior Principal Magistrate's Court Kiambu on 15th March 2007 for a plea to the self same charge. Until then he will remain in prison custody.

Dated at Nairobi this 8th day of March 2007.

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LESIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. King'ori for the Appellant

Miss Gateru for the Respondent

CC: Tabitha/Erick

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LESIT, J.

JUDGE

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MAKHANDIA

J