



REPUBLIC OF KENYA

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

Criminal Appeal 533 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 2333 of 2005 of the Chief Magistrate's Court at Kiambu (G. M. Njuguna – PM)

JOHN KIBE KWENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The State through Miss Gateru, State Counsel has conceded to the Appellant's appeal on grounds that the trial court violated the Appellant's constitutional rights provided under Section 77(2) (b) and (f) and Statutory Rights under **Section 198** of the **Criminal Procedure Code** when it failed to indicate the language of the Court and the one used by the witnesses. I have on my part perused the record of the proceedings and I have confirmed that indeed there was such a violation and in the consequence, the proceedings were rendered a nullity. Accordingly I do set aside both the conviction and the sentence.

The learned trial magistrate has convicted the Appellant for the alternative charge of **HANDLING STOLEN CELLPHONE** contrary to **Section 322(2)** of the **Penal Code** and set him free of the principle charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. I note that the basis of the conviction was the fact that the Appellant was found in actual possession of the Complainant's Cell phone on the same night it was robbed off from her. The Complainant had received severe injuries and was rushed to hospital where she was admitted for five days. The Complainant could not identify the person who robbed her as the scene where the incident occurred was dark.

In considering whether or not to order a retrial, I have taken into account factors which would support as well as those which would not support such an order being made. See **AHMED vs. REPUBLIC 1943 EA 481**.

The Appellant was sentenced to 9 (nine) years imprisonment on 2nd November 2005 and so by the date of this judgment he would only have served 1½ years imprisonment. That period is not substantive as to cause the Appellant any prejudice if an order for retrial were ordered. See **MANJI vs. REPUBLIC 1966 EA 313**.

On the other hand the only evidence against the Appellant was the Cell phone recovered from his house and a receipt which the Complainant used to identify the phone as hers. There is no evidence to suggest to this court that the two exhibits will be available for the retrial hearings. Without them, the prosecution would not secure any conviction against the Appellant. See **MWANGI vs. REUBLIC 1983 KLR 522**. In light of lack of evidence to prove that the two exhibits will still be available I see no need to order a retrial as it will be in vain and courts of law do not act in vain. In the circumstances I decline to order a

retrial and order rather that the Appellant be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 18th day of April 2007.

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LESITT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Miss Gateru for State

Tabitha: CC

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DULU

JUDGE