REPUBLIC OF KENYA

HIGH COURT AT NAKURU

CRIMINAL APPEAL 169 & 170 OF 2003

ISMAEL LEKUNA……………..……………1ST APPELLANT

TOPOIKA LEMURTI……………….………2ND APPELLANT

VERSUS

REPUBLIC……………………………………….RESPONDENT

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 939 of 2001 [Kathoka Ngomo {P.M.}]

JUDGMENT OF THE COURT

The appellant, Ismael Lekuna was charged with three others with several offences under the **Penal Code**. The material charge of this appeal is that of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 1st April 2001 at Narok Farm in Laikipia District, the appellant jointly with others not before court, while being armed with dangerous or offensive weapons, namely firearms and rungus robbed Abduba Haro Galgalo of 136 goats/sheep and one cow, all valued at Kshs 289,000/= and at or immediately before or immediately after the time of such robbery wounded the said Abduba Haro Galgalo. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, he was convicted as charged. He was sentenced to death as is mandatorily provided by the law. One of his co-accused Topoika Lemurti was similarly convicted and sentenced to death. They both separately appealed against the said conviction and sentence. Before the appeal could be heard, the appellant's co-appellant Topoika Lemurti died on the 28th May 2005. His appeal was consequently marked as abated.

Although the appellant presented several grounds of appeal challenging his conviction by the trial magistrate, at the hearing of the appeal, Mr. Mugambi, learned state counsel conceded to the appeal on the sole ground that part of the proceedings of the subordinate court were conducted by Sgt. Migwi. He however submitted that this court ought to order for a retrial in view of the overwhelming evidence that was adduced by the prosecution in support of the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** against the appellant. He submitted that the prosecution would not be calling any new evidence that would be intended to fill the gaps in the prosecution's case in the event that an order of retrial would issue. He reiterated that it would be in the interest of justice if an order of retrial is made. The appellant, naturally, while welcoming the concession of the appeal, was not willing to be subjected to a retrial. He submitted that he has been in lawful custody since the 27th April 2001 when he was arrested and charged with the capital robbery offence. He submitted that the trial magistrate had oppressed him and urged this court to order that he be discharged.

We have carefully perused the proceedings of the trial magistrate in respect of which this appeal arose.

While it is evident that a substantial part of the proceedings were prosecuted by IP Muriuki, when PW8 testified, the prosecutor who prosecuted the case was Sgt. Migwi. He is a police officer of a rank lower than that of an assistant inspector of police. In accordance with **Section 85(2) and 88 of the Criminal Procedure Code** such a police officer is not authorised to prosecute criminal cases before a magistrate's court. Although the said incompetent officer only prosecuted when one witness was testifying, his appearance as a prosecutor on that particular day rendered the entire proceedings a nullity. As was held by the Court of Appeal in **Eliremah & Another –vs- Republic [2003] KLR 537**, where an unqualified police prosecutor prosecutes a case before a magistrate's court, the entire proceedings would be a nullity. We hereby declare the proceedings that led to the conviction of the appellant by the trial magistrate to be a nullity as a consequence of which the conviction of the appellant is quashed and the sentence imposed set aside.

The issue that remains for determination by this court is whether the appellant should be retried. The principles to be considered by this court in determining whether or not to order for a retrial are well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004** (Eldoret) that:

"***In the case of*** *Ahmed Sumar v Republic* ***[1964] EA 481, at page 483, the predecessor to this court 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 a 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 continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] EA 152*. ***In this judgment the Court accepted the principle that a retrial should not be ordered unless 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 the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

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 court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In the present appeal, Mr. Mugambi has submitted that there is overwhelming evidence that would enable any subordinate court hearing the retried case to convict the appellant. He submitted that the prosecution would only rely on the evidence that was adduced against the appellant in the vitiated trial. The appellant does not wish to be subjected to a retrial.

We have carefully considered the said evidence that was adduced by the prosecution in the vitiated trial. The appellant was convicted substantially on the evidence of identification that was made in circumstances that can be described to be difficult. The victims of the robbery were not known to the appellant at the time of the robbery. Having re-examined the said evidence, we are unable to agree with the submission by Mr. Mugambi that based entirely on the said evidence of identification the appellant could be convicted. We have also taken into account of the fact that the appellant has been in lawful custody for over six years. Mr. Mugambi did not tell us whether the prosecution would be in a position to secure the attendance of the witnesses before a magistrate's court if retrial is ordered after this long period of time.

In the **Ekimat** case (*supra*), the Court of Appeal held that in deciding whether or not to order a retrial, the court should consider whether the interests of justice would be served. In the present appeal, we do

hold that the interests of justice would not be served by the appellant being retried. We therefore order that the appellant shall not be retried. He is hereby ordered discharged. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 11th day of May, 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE