



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**Criminal Appeal 134 & 137 of 2003**

AHMED ADEN KORE.....1<sup>ST</sup> APPELLANT

OMAR GALGALO.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(Being an appeal against both conviction and sentence in*

*Cr. Case No. 56 of 2003 in S.R.M. Court*

*Before P.M. Ndung'u P.M. in Isiolo Dated 19<sup>th</sup> June 2003)*

**JUDGMENT**

1. The appellants in this Consolidated Appeal, Omar Galgalo Sabaro and Ahmed Aden Kore were charged in Isiolo Principal Magistrate's Court Criminal Case Number 56 of 2003 with the offence of robbery with violence contrary to s.296(2) of the Penal Code. It was alleged that **“on the 5<sup>th</sup> day of January 2003 at Kiria Market in Kina Location within Isiolo District of the Eastern Province jointly with others not before court and being armed with dangerous weapons namely runigus robbed Mariam Halake Sora of one purse, ID card Bank Plate and cash Ksh.4,700/- and at or immediately before or immediately after the time of such robbery wounded the said Mariam Halake Sora”**.
2. At the conclusion of the trial in the subordinate court, the appellants were convicted of the offence aforesaid and sentenced to death. This Appeal is against both that conviction and sentence and after submissions by the Appellants, separately, the learned State Counsel representing the Republic conceded to the Appeal and sought a retrial. The Appellants in their reply have argued that a retrial would be prejudicial to them because there was no evidence or in the least, sufficient evidence, to warrant their retrial and in any event, that they have been in custody for too long.
3. Firstly, we agree that the Appeal is merited for the single ground that a casual perusal of the proceedings would show that when the trial commenced on 25.2.2003 before Hon. P.M. Ndung'u, Principal Magistrate, the Prosecutor was one Police Constable Ngugi. On that day the evidence of P.W.1 and P.W.2 was recorded and on 18.3.2003 when the trial resumed and the evidence of P.W.2, P.W.3 and P.W.4 was taken, again Police Constable Ngugi was the Prosecutor. On 7.4.2003, P.W.5 testified and he was led in evidence by the same Police Constable Ngugi. In fact all evidence for the Republic was led by the same officer and without belabouring the point, it is now trite law that a police constable by dint of s.85(2) of the Criminal Procedure Code is unqualified to lead evidence as a prosecutor and where such a

situation obtains, then the whole trial is rendered a nullity. This position is best exemplified in the oft quoted case of **Roy Elirema and Another vs R (2003) KLR 537** which has been followed consistently by our courts including in the case of **Jacob Maiyo and Another vs R. HC. Cr Appeal No. 44/2004** where it was held as follows:-

**“We have considered the concession of the Republic in not opposing the Appeal. We agree that the trial amounted to a mistrial on the ground that the prosecutor did not have the capacity or qualification to prosecute. The prosecution ought to have avoided this since the law is statutory and clear. The trial magistrate ought to have been vigilant and inquired into the rank of the prosecutor before starting the trial. On this ground alone the appeal ought to be allowed”**

4. We, on our part, adopt these sentiments and would allow the appeal as sought by the Appellants. Should we order a retrial as prayed for by the Republic?

5. The learned State Counsel argued on this point that a retrial would be the best cause of action because had the Prosecutor been qualified, then the evidence against the Appellants would have moved this court to sustain the convictions and sentences against them. The further argument in this regard and based on the evidence is that the Appellants were recognized by P.W.1 who had known them since childhood and P.W.2 corroborated this evidence as he also met them moments after the robbery and as they fled the scene. Further, that P.W.1 named the Appellants soon after she regained consciousness and that information led to their arrest.

6. Learned State Counsel also added that no prejudice would be caused to the Appellants as they had not been in custody for long and that all witnesses would be readily availed in case of a retrial.

7. We have elsewhere above set out the appellants’ response to the last issues but as regards the evidence against them, it is their argument that the circumstances under which they were purportedly recognized by P.W.1 and P.W.2 are not water-tight because it was late in the night and **“the light, strength thereof, size and position relative”** to them were unclear. They relied strongly on the cases of Kiarie vs R. [1984] KLR 739 and Maitani vs R [1957] KLR 198

8. On our part, we will only order a retrial if certain factors are considered and found to be in support of a case for such a retrial. The first is s.77 of the constitution which provides as follows;

**(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

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

**(a) Shall be presumed to be innocent until he is proved or has pleaded guilty.**

**(b) shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence with which he is charged;**

**(c) shall be given adequate time and facilities for the preparation of his defence;**

**(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;**

**(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; and**

**(f) shall be permitted to have without payment the assistance of an interpreter if he cannot**

understand the language used at the trial of the charge.

**And except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.**

**3. No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.**

**4. No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed, in a written law;**

**Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.**

**5. A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.**

Like in the Jacob Maiyo case (supra) we should only deal with other aspects of a retrial in light of these constitutional and binding provisions.

9. The second principle we need to look at is that a retrial should not be ordered **“where the conviction is set aside because the evidence is insufficient to establish the charges for the purpose of enabling the prosecution to fill up gaps left in their evidence at the first trial”**- See Ahmedi Ali Dharamji Sumar vs R [1964] E.A. 481 at 483 per Duffus JA. This cannot be the case here because although the Appellants have argued that the evidence against them was made up and yet inconsistent, we cannot see that the evidence against the Appellants can be tailored and repackaged to ensure another conviction.

10. The third principle is that best set out in Bell vs Director of Public Prosecutions of Jamaica [1985] 2 All E.R. 585 which is that the length of bringing a suspect to trial and the reasons for so doing are important in determining whether a retrial would cause him undue prejudice. The Appellants have argued this point forcefully and we note that they were arraigned in court on 22.1.2003 having been arrested on 15.1.2003. They have been in custody for 4 ½ years. The charge they are facing is that of capital robbery and the sentence if they were to be found guilty again would be that of death. We are aware also that their trial took five (5) months to conclude as the witnesses were only five (5). We do not see that there would be undue prejudice in such circumstances and we are aware that in a per incuriam statement in Bell (supra) **“at common law, courts have an inherent jurisdiction to prevent a trial which would be oppressive because of unreasonable delay, and can do so by insisting on setting a date for trial and dismissing the charge for want of prosecution if the prosecution does not proceed.”** The point as we shall shortly make is that the trial court knowing these facts would take into account the Appellant’s prior circumstances and ensure a speedy trial or have the charges dismissed

11. In the end therefore and noting the circumstances of this Appeal and while we shall allow the Appeal a retrial is imperative for the ends of justice to be met.

12. The convictions are quashed, the sentence set aside but the Appellants shall be retried on a priority basis at Isiolo Principal Magistrates Court and in the meantime they shall be held in custody.

13. Orders accordingly.

Dated, signed and delivered in open court at Meru this 13<sup>th</sup>. Day of July 2007.

**ISAAC LENAOLA**

**JUDGE**

**WILLIAM OUKO**

**JUDGE**