REPUBLIC OF KENYA

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

Criminal Appeal 104 Of 2004

PETER NJUGUNA KIMURI…..…..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

J U D G M E N T

The Appellant **PETER NJUGUNA KIMURI** was together with one **JOHN NJUGUNA JEREMIAH** charged with Robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged that both of them jointly with others not in court and while armed with dangerous weapons, that is a panga and rungus violently robbed the Complainant **SAMUEL MIRIE** of his belongings at Kijabe village on the 14th February 2003. After the case was heard fully, the learned trial magistrate **EZRA AWINO** esquire found both the Appellant and his co-accused guilty of the lesser offence of **SIMPLE ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and sentenced the Appellant to 8 years imprisonment. The sentence imposed on the co-accused is not indicated in the file. It's from this conviction that the Appellant now appeals to this court.

When this appeal came up for hearing, **MISS NYAMOSI**, learned counsel for the State conceded to the appeal on grounds that on 2nd September 2003 the record of the proceedings does not indicate who the court prosecutor was. Learned counsel relied on the Court of Appeal decision of **EKIMAT vs. REPUBLIC CA No. 151 of 2004**.

I have perused the record and confirmed that on 2nd September 2003, the Coram of the court was indicated as follows: -

"2.9.2003

Coram as before

Accused present

Pros …"

Truly as the learned counsel submitted the court's Coram was not indicated. As held in the cited case, failure to indicate the court Coram means that the appellate court would not be able to ascertain whether the person who prosecuted the case on such a day was qualified to do so as provided under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**. I also noted that on the day in question the court recorded the evidence of PW5 one **PC Nyathi** who was the investigating officer and also the defence of both the Appellant and his co-accused. I find that the omission to record the Coram of the

Court rendered the entire proceedings a nullity.

The issue which remains to be considered is whether or not to order a retrial. **MISS NYAMOSI** has urged the court to order a retrial on grounds that the Appellant was identified by the Complainant and further that the case was only concluded on 20th January 2004. The Appellant opposed a retrial arguing that he should not be blamed for the mistakes which occurred during his trial. He also submitted that he had served 2 years out of the 8 years imposed against him.

The principles applicable in determining whether or not to order a retrial are now well settled. One of these principles is that no order for retrial should be made unless the appellate court, upon considering the admissible evidence is of the opinion that a conviction may result. See **MWANGI vs. REPUBLIC [1983] KLR 522**.

The other one is that no order for retrial should be made if the interests of justice do not require it and if the order would cause the accused person to suffer prejudice. See **SUMARU vs. REPUBLIC 1964 EA 481**.

I have taken these principles into consideration and have re-examined and re-evaluated the evidence adduced before the lower court. The conviction of the Appellant was based on two grounds judging from the learned trial magistrate's judgment at page J2 and J3.

"***I have duly considered the evidence on record. This robbery occurred during the day, the Complainant is certain that the two accused persons robbed him and seriously injured him. I am of the belief, that the identification he did in the parade is without mistake, considering the accused persons were also arrested with toy pistols. I have no doubt that they are the ones causing terror in this area…***"

The first basis of the conviction was the trial magistrate's "*belief*" that the Complainant properly and without mistake identified the Appellant in an identification parade conducted two months after the incident. The second was the fact that the Appellant and his co-accused were found in possession of toy pistols.

On the first basis of conviction, I would say it was a gross-misdirection. From the Complainant's evidence, nowhere does he state what it was that enabled him to identify the Appellant. The Complainant gave no description of any of his assailants in evidence except to merely state that he saw the Appellant and was able to identify him later in the parade. The Complainant's evidence on identification was scanty, bare and totally wanting. To base a conviction on the identification by the Complainant in identification parade conducted 2 months later and where the basis of identification were never disclosed was a gross misdirection.

On the second basis of conviction that the Appellant had toy pistols at the time of arrest two months after the incident and to find that as proof the Appellant and others with him were causing havoc in the area was also a very serious misdirection made without any evidence to support such a conclusion and highly prejudicial to the Appellant. The convictions entered were clearly not safe.

I must also comment on the Complainant's credibility based on the doctor's remarks in the P3 form issued to him which was exhibit 1. The Doctor commented first that the Complainant suffered forgetfulness due to an earlier injury. The Doctor then went on to contradict the Complainant on the nature and severity of the injury he sustained in this incident. The Doctor said he suffered '*harm'* due to a sprain of his ankle and bruises in his body. The Complainant in his evidence and said that he had fractured a leg during this incident.

The Doctor was an independent witness who had no interest in the case. His findings raised doubt on the reliability of the Complainant's evidence due to a medical condition the Complainant already had prior to this incident. The extent of that reliability was not inquired into during the trial.

As far as this case is concerned I am of the opinion that no conviction will result if an order for a retrial were made. Besides, such an order would cause the Appellant to suffer prejudice and I believe it is against the interests of justice to subject him to a retrial.

I decline to order a retrial and direct that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of February 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present for the state- present

Huka CC

LESIIT, J.

JUDGE