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

Criminal Appeal No. 93 94 98 95 96 & 97 of 2003

JOSEPH MBINDA NTHIWA..…….....……..…….. APPELLANT

VERSUS

REPUBLIC …….....…..…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 94 OF 2003

ROBERT CHARAGU ……..….....…….APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 98 OF 2003

PETER WACHIRA MWANGI……..….....….....…….APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 95 OF 2003

ROBERT CHARAGU ……..…….....….....…….APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 96 OF 2003

JOSEPH MBINDA NTHIWA..……..…….....…….APPELLANT

VERSUS

REPUBLIC…….....…..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 97 OF 2003

PETER WACHIRA MWANGI.……..…….....…….APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGMENT

The three Appellants, ***JOSEPH MBINDA NTHIWA, ROBERT CHARAGU and PETER WACHIRA MWANGI*** each have two Appeals before me. The first set of Criminal Appeals are Criminal Appeal Numbers 93/2003, 94/2003 and 98/2003. They arise out of Criminal Case Number 1316 of 2001 which was tried by S. Ndambuki, SRM. The other set of Appeals are Appeal numbers 95/2003, 96/2003 and 97/2003. These Appeals arise from Criminal case number 1317 of 2001 handled by J. N. Wanjala (Mrs) SRM. Apparently, two Criminal cases in the Lower Court arose from the same transaction and ideally they ought to have been consolidated and heard as one. Alternatively the police should have preferred all the counts in one charge sheet. However for unexplained reasons the Police opted to charge the Appellants in two different Courts. Suffice to say that with regard to Criminal case number 1316 of 2001, the Appellants were charged with one count of robbery with violence contrary to Section 296 (2) of the Penal Code, one count of preparation to commit a felony contrary to Section 308 (1) of the Penal Code, one count of being in possession of Firearms without a Firearms Certificate contrary to Section 4 (2) (a) of the Firearms Act and another count of being in possession of ammunition without Firearms Certificate contrary to Section 4 (2) (a) of the Firearms Act. The particulars of the offences were set out in the charge sheet save to point out that all the offences were all committed between 1st June, 2001 and 4th June, 2001.

With regard to Criminal Case number 1317 of 2001, the Appellants similarly faced a joint charge of robbery with violence contrary to Section 296 (2) of the Penal Code. They also faced an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. They were also charged with fraudulent use of reflective number plate contrary to Section 114 of the Traffic Act.

Piecing together the Prosecution case, it would appear that there were two robberies committed by 4 people who the Prosecution claimed were the Appellants on the same day. The first robbery was committed at about 3 p. m. along Mageta Road, Lavington, when the Complainant in Criminal case number 1316 of 2001 was robbed of his motor vehicle registration KAK 689W Toyota Hilux, Mobile phone and cash Kshs.8,000/=. However before the robbers could go far with the motor vehicle it was immobilized consequently, the robbers abandoned it near Muthangari Police Station. Later that evening at about 7.15 p. m. the same robbers staged yet another robbery on the Complainant in Criminal Case number 1317 of 2001 when they robbed him of his motor vehicle registration number KAK 222H make Subaru Legacy Station wagon. They also robbed the Complainant of his mobile phone, wrist watch, silver ring and cash Kshs.15,000/=. This was in South C. They drove off with the Complainant and later abandoned him at the city mortuary along Ngong Road. On 4th June, 2001 Police Constables Lumumba Stephen, Okumu, Yusuf, Bako in the company of Inspector Wachira, whilst on routine patrol along Maua-Meru Road were alerted by traffic Police Officer, P. C. Odhiambo on the said road that there were 2 vehicles which were cruising on the road with suspicious people. One of the vehicles, it turned out was a Subaru that had been robbed from the Complainant in Criminal Case number 1317/2001. The said motor vehicle but had since had its registration numbers altered to read KAN 103Z. The Police officers turned back and proceeded to Tigania Police Station and armed themselves and went looking for

suspicious vehicles. Along the way at Kirindine Area, the Subaru vehicle was sighted. It was parked on an earth road facing Meru town direction. It had four occupants. On seeing the Police vehicle, the subject motor vehicle was suddenly driven off. The Police officers gave chase. They shot in the air in order to force the said motor vehicle to stop. After a short chase the vehicles stopped and the four occupants came out. They were searched by the police officers and various firearms and ammunitions recovered from them.. The motor vehicle (Subaru) too was searched and firearms and ammunitions recovered. This recovery of the firearms and ammunitions are the backbone of the various charges in Criminal Case number 1216 of 2001. Whereas the robbery in South C and the recovery of Subaru motor vehicle along Meru-Maua Road with number plates that have been changed were the basis of the charges in Criminal Case Number 1317/2001.

The Appellants were duly tried. In respect of Criminal case number 1316/2001, the Appellants were acquitted of the charge of robbery with violence. They were all however convicted for the offence of preparation to commit felony and were each sentenced to eight (8) years imprisonment and two (2) strokes of the cane. They were also convicted for being in possession of Firearms and ammunitions and were each sentenced to a term of 5 years. The sentences were ordered to run concurrently.

As for Criminal case number 1317/2001, the Appellants too were acquitted on the main count of robbery with violence. However they were convicted on the alternative count of handling stolen property and fraudulent use of number plates. On the alternative charge of handling stolen property each Appellant was sentenced to serve five years imprisonment with hard labour. On fraudulent use of number plates each Appellant was sentenced to a fine of Kshs.4,000/= or in default 12 months jail imprisonment.

The Appellants were aggrieved by the convictions and sentences in both cases. They therefore lodged the aforesaid Appeals which were consolidated for purposes of hearing by Justice Ochieng on 23. 5. 2005. When the Appeals came up for hearing, Miss Nyamosi Learned State Counsel conceded to both Appeals.

With regard to Criminal Appeal numbers 93/2003, 94/2003 and 98/2003, Miss Nyamosi conceded to the Appeals on the ground that part of the prosecution of the case in the subordinate Court was undertaken by a Police Prosecutor who was not qualified. Learned Counsel referred the Court to part of the proceedings in which Corporal Osiemo appeared as the Prosecutor and opposed the Application by the Appellants to have certain witnesses recalled pursuant to the provisions of Sections 200 of the Criminal Procedure code. His objection was sustained. Similarly Counsel pointed out that on 13th and 28th November, 2002 when PW4 and PW1 testified the Court coram of the day did not indicate the rank of the Prosecutor. It merely indicated "Prosecutor – Kababai." In the circumstances it was difficult to tell whether the said prosecutor was qualified to prosecute the case in terms of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. Counsel referred the Court to the Court of Appeal decision in ***ELIREMA & ANOR VS REPUBLIC (2003) KLR 537*** wherein it was held that a trial would be deemed to be a nullity if the prosecution was conducted by a person not authorised to do so by the law. The law provides that for a Police officer to be qualified and recognized as a Police Prosecutor, he must not be of the rank below an Assistant Inspector of Police.

Counsel submitted that by Corporal Osiemo participating in the proceedings as aforesaid and being a Police Officer of the rank below that of an assistant inspector of Police, the proceedings were thus rendered a nullity. The same goes for the failure by the trial Magistrate to disclose on the two occasions aforesaid the rank of the Prosecutor known simply as "Kababai". It was thus difficult to tell whether the said prosecutor was a police officer, and if so whether he met the strict requirements of a police Prosecutor aforesaid. For those reasons the Learned State Counsel invited me to annul the proceedings, set aside the conviction and sentence.

As for Criminal Appeal numbers 95/2003, 96/2003 and 97/2003 of 2003 respectively, Counsel also conceded to the same on a technicality. The technicality being that on two occasions during the trial in the Lower Court, that is on 13th and 14th November, 2002 respectively the coram of the Court did not indicate the rank of the Prosecutor who conducted the case on behalf of the state. The coram regarding the Prosecutor on both occasions merely read:-

"***CP Onyango***"

By parity of reasoning as in the other Appeals it is difficult to tell whether this Prosecutor was qualified Police Prosecutor. Once again I was invited by the Learned State Counsel to annul those proceedings as well, set aside the conviction and sentence.

The Appellants were ofcourse elated by the turn of events and could only say that they supported what the Learned State Counsel had submitted.

I have carefully considered both the original and typed record of the Proceedings in respect of the two set of Appeals. The omissions outlined by the Learned State Counsel in conceding to both Appeals are clearly discernable from the record. As I am bound by the Elirema Case, I can do no more than accede to the request by the Learned State Counsel. Accordingly I annul the proceedings in both set of Appeals and set aside the conviction and sentence.

As for retrial, the Learned State Counsel submitted that the Appellants had served a substantial portion of the sentence imposed by the two Courts. That being the case, it would not be in the interest of justice for the state to seek a retrial

In general a retrial is ordered where:-

(i). The original trial was illegal or defective.

(ii). Where the interest of justice require it.

(iii). It will not cause an injustice.

(iv). It will not be ordered if it will enable the prosecution to fill up the gaps in the evidence at the first trial.

(v). Each case must be considered on its particular facts and circumstances.

(vi). A retrial should not be ordered unless the court is of the opinion that on a proper consideration of the admissible and potentially admissible evidence a conviction might result.

Applying these principles to the circumstances of the two sets of Appeal, I find that the proceedings have been nullified because the original trials were found to be illegal and defective. The longest sentences imposed in both Appeals were 8 and 5 years respectively.

The Appellants have been in prison for 4 and not 3 years as submitted by the Learned State Counsel. In the circumstances if orders of retrial were to be made, they will occasion the Appellants injustice and prejudice. It may even open the Appellants to double jeopardy. It is not also lost on me that it is so long after the events giving rise to the charges against the Appellants arose as to make an order of retrial impracticable.

In the end I agree with the Learned State Counsel and decline to make an order for retrial and order instead that the Appellants and each one of them be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Nairobi this 27th day of March, 2006

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MAKHANDIA

JUDGE