REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 90 OF 2003

BERNARD MUNENE GITONGA…….....……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellant, Bernard Munene Gitonga was charged with two others with four counts of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on 29th of July 2001 at Gwa kungu trading centre in Nyandarua District, the appellant jointly with others while armed with dangerous weapons namely pistols, pangas and rungus robbed Peter Gitau Kamau, Samuel Muchomba Mwangi, Isaac Njoroge Mbugua and James Ndungu Wanjohi of their property listed in the charge sheet and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Gitau Kamau, Samuel Muchomba Mwangi, Isaac Njoroge Mbugua and James Ndungu Wanjohi. The appellant pleaded not guilty to the charges and after a full trial he was convicted as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and appealed to this court.

During the hearing of the appeal, Mr Koech learned State Counsel conceded to the appeal on the sole ground that the appellant had been convicted in a trial which was prosecuted by a police officer who was not competent in law to prosecute such criminal cases. He however submitted that the appellant ought to be retried in view of the overwhelming evidence that was adduced against him by the prosecution witnesses. He submitted that the appellant was apprehended by the members of the public immediately after the said robberies and was found with a radio which had been robbed from one of the complainants. In response, the appellant welcomed the conceding of the appeal by the State. He however submitted that he was not prepared to be retried. He submitted that he has been in lawful custody since the 30th of July 2001 when he was arrested and charged with the non bailable robbery offence. He urged this court to discharge him.

We have perused the proceedings of the lower court in respect of which this appeal arose. We note that the police officers who prosecuted the appellant were Sergeant Migwi and Sergeant Kiama. They are police officers of a rank lower than that of an Assistant Inspector of Police. They were therefore not authorized to prosecute criminal cases before a magistrate's court as provided by **Section 85(2) and 88 of the Criminal Procedure Code**. The Court of Appeal held in **Eliremah & Anor –vs- Republic [2003] KLR 537** that where such police officers prosecute an accused person before a magistrate's court, the proceedings thereto will be a nullity. We are bound by the decision of the Court of Appeal. We therefore declare the criminal proceedings which led to the conviction of the appellant to be a nullity and as a result of which we quash his conviction and set aside the sentence imposed on him.

The issue that remains for our determination is whether or not to order for a retrial. The principles to be

considered by this court in deciding whether or not to order 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) (*unreported*) 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."

Mr. Koech has submitted that the appellant should be retried in view of the overwhelming evidence that was adduced by the prosecution against him in the vitiated trial. The appellant, naturally, does not wish to be retried.

We have considered the said submissions made. Mr. Koech did not indicate to this court whether the prosecution would be able to procure the witnesses to testify against the appellant if a retrial is ordered. Although we concede that there was overwhelming evidence which was adduced by the prosecution against the appellant, we doubt if the prosecution would avail witnesses to testify in the case to be retried five years after the vitiated case was concluded. As was held in the **Ekimat case (***supra***),** this court can only order a retrial if the dictates of justice demands it.

We have carefully considered the facts of this case, and we are of the view that justice would be served in the circumstances of this case if the appellant is discharged. We are of the view that the appellant has learnt his lesson when he had a brash with death. We therefore order that the appellant be discharged. He is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 24th day of March 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE