REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 34 & 35 OF 2002

PIUS MUTUA WAMBUA…….....……1ST APPELLANT

PETER KARIUKI NGUGI…….....……2ND APPELLANT

VERSUS

REPUBLIC…….....……..……..RESPONDENT

JUDGMENT OF THE COURT

The appellants, Pius Mutua Wambua and Peter Kariuki Ngugi were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on the 14th of February 2000 at Turi farm Elburgon, the appellants jointly with others not before court, while armed with dangerous weapons, robbed Ngugi Njoroge of his personal property, household goods and clothes as particularized in the charge sheet and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ngugi Njoroge. Pius Mutua Wambua was separately charged with rape contrary to **Section 140 of the Penal Code**. The particulars of the charge were that on the same day and in the same place the said appellant unlawfully had carnal knowledge of A W N . The appellants pleaded not guilty to the charge. After a full trial, they were convicted as charged and sentenced to death on the count of robbery with violence. Pius Mutua Wambua was sentenced to serve fifteen years in prison for the offence of rape. The appellants were aggrieved by their conviction and sentence and have appealed to this court against the said conviction and sentence.

At the hearing of the appeal, Mr. Koech learned State Counsel conceded to the appeal on the sole ground that the police officer who prosecuted the appellants in the criminal trial before the magistrate's court was not competent in law to prosecute such criminal cases. He however submitted that the appellants should be retried in view of the overwhelming evidence that was adduced against them by the prosecution witnesses. He submitted that the appellants were recognized by the victims of the robbery and the victim of the rape. The appellants welcomed the conceding of the appeal by the State. They however urged this court not to subject them to a retrial since they had been in lawful custody since the 14th of February 2000 when they were arrested and charged with the non bailable robbery offence. They urged this court to set them at liberty.

We have perused the proceedings of the lower court in this matter. We note that the police officer who prosecuted the appellants was Police Constable Njagi. He is a police officer of a rank lower than that of an Assistant Inspector of Police. He was therefore not authorized to prosecute criminal cases before a magistrate's court in accordance with the provisions of **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 appellants to be a nullity and as a result of which we quash their convictions and set aside the sentences imposed on them.

The issue that remains for our determination is whether or not to order that the appellants be retried. 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 C.A. 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 appellants should be retried in view of the overwhelming evidence that was adduced against them by the prosecution witnesses.

We have re-evaluated the said evidence and we note that the prosecution relied on the sole evidence of identification which was made in difficult circumstances. The robbery and the rape victims told the court that they were able to identify their assailants by the light of the torches that were in possession of the robbers. The robbery took place at night. The victims did not describe their assailants to the police when they made the first report. Although in their evidence they claimed to have identified their assailants, we are unable to comprehend why they failed to inform the police the description of their assailants or their names if indeed they knew them. The source of light could not have enabled the victims of the robbery and rape to be certain as to the identity of their assailants considering the fact they testified that the said robbers numbered more than five. The possibility that the appellants could have been mistakenly identified cannot therefore be ruled out.

We have applied the principles enunciated in the **Ekimat case** (*supra*). We are unable to see the evidence or the potential evidence that the prosecution would adduce against the appellants to establish the two charges against them. The evidence that was adduced in the vitiated trial was insufficient to sustain the conviction of the appellants. No useful purpose will therefore be served if we order that the appellants be retried. They are consequently ordered discharged and set at liberty. They shall be released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 24th day of March 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE