



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL 129 OF 2004**

**GEORGE MBUGUA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**GEORGE MBUGUA MWANGI**, though charged with the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** was after a full trial convicted of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to 7 years imprisonment. He was dissatisfied with the conviction and sentence and therefore lodged this appeal.

When the appeal came up for hearing, the learned State counsel, **MRS. KAGIRI**, conceded to the appeal. Counsel submitted that the trial of the lower court was defective in that on 7<sup>th</sup> January 2004 when the case came up for further hearing, the learned trial magistrate did not indicate the Coram of the court. That the proceedings were defective. Learned counsel relied on **EKIMAT vs. REPUBLIC CA No. 151 of 2004**.

I have perused the record of the lower court. I agree with the learned counsel that the proceedings of the trial court were defective in that on 7<sup>th</sup> January 2004 when the defence case was heard, the learned trial magistrate did not indicate the Coram of the Court. In the circumstances I am unable to tell whether there was a prosecutor in court that day, and if there was, whether he was qualified to act as same. I will therefore quash the conviction and set aside the sentence.

The learned counsel urged the Court to order a retrial and submitted that there was strong evidence of identification and that the same could sustain a conviction if the order was made.

The Appellant opposed an order of retrial saying that he had served 3½ years imprisonment out of 7 years imposed. That an order for retrial was going to prejudice him.

I have carefully considered this appeal and re-evaluated the evidence adduced before the lower court. The principles applicable in determining whether or not to order for a retrial are now well settled and I need not go over them. An order for retrial can be made where the original trial, like in this case, was defective. The court has to consider the interests of justice, whether the Appellant is likely to suffer prejudice and whether a conviction may result before ordering a retrial.

Having taken all these factors into consideration, I am satisfied that the evidence adduced by the

prosecution was positive and strong to result in a conviction if an order for retrial were made. The Appellant has been in prison serving the sentence only for two years now. I do not see what prejudice he will suffer if a retrial were ordered.

I order that a retrial be held in this case. Consequently the appellant should be held in custody until 10<sup>th</sup> April 2006 when he should be taken to Senior Principal Magistrate's Court Kiambu for plea to the selfsame charges he faced in the original trial.

Dated at Nairobi this 5<sup>th</sup> day of April, 2006.

**LESIT**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant - present

Mrs. Kagiri for State

Huka: Court clerk

**LESIT, J.**

**JUDGE**