



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Criminal Appeal 79 of 2002**

**STEPHEN MUTUA MULEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**STEPHEN MUTUA MULEI** was jointly charged with one **DAVID NDANGILI KINGOTHO** with the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After the trial, the Appellant was convicted of the Capital charge and sentenced to death. His co-accused was convicted of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code** and sentenced to 3 years imprisonment. The Appellant was aggrieved by the conviction and therefore lodged this appeal. The appeal is opposed.

The brief facts of the case are that on the night of 11<sup>th</sup> October 1997 three people broke into the house where PW2 was sleeping. PW2 had heard them and had positioned himself at the door. Upon the three intruders breaking down the door, PW2 set upon one of them and cut him twice with a panga. One cut was on the head and the other on the nose. PW2 then ran out. He saw one of the robbers carrying his employer's (PW1's) water pump. PW2 reported the next day to PW6 **Sgt. Kiendi**. **Sgt. Kiendi** upon receiving some information proceeded to arrest the Appellant due to the deep cuts he had on his head and nose. The appellant implicated his co-accused and from the co-accused the water pump was recovered the same day. Two days later on the 15<sup>th</sup>, **PW5 IP Odhiambo** took a charge and caution statement. In it the Appellant confessed to the robbery and implicated his co-accused as having taken away the water pump. He later retracted the statement in court on the basis that he only knew Kikamba language and that he never made the statement.

In his defence, the Appellant stated that he had been injured and robbed of Kshs.2,500/- and a bicycle. That when the Chief summoned him, he went to the Chief's camp and was arrested. He said he had been give a P3 form when he reported the theft of his bicycle and that he had returned it to one Police Officer by the name **CHIRCHIR**. He denied the offence.

We have carefully re-examined and evaluated the evidence adduced before the lower court afresh so as to determine whether the conclusions arrived at by the trial magistrate are justified. In so doing we have given due allowance for the fact that we did not see the witnesses and consequently we cannot comment on their demeanour. See **OKENO vs. REPUBLIC [1972] EA 32**. The Appellant raises four grounds of appeal namely that the conviction was

unsafe since one, police constable **KARISA** prosecuted the case at one stage during the trial, secondly that the Appellant was not satisfactorily identified at the scene of crime. Thirdly, that the conviction on the basis of the confession statement was unsafe since the same was not made voluntarily and finally that the defence was not given due consideration.

**MR. OMIRERA** for the State did not in his submission address the issue of the incompetence of the prosecution as raised by the Appellant in his supplementary petition of appeal. We have checked the record and confirmed that indeed on the 27<sup>th</sup> October 1998 one Police Constable **KARISA** conducted the case on behalf of the prosecution and led the evidence of the investigation officer Sgt. John Kiendi, PW6 and also was present when the defence of the Appellant and his co-accused was given. That rendered the entire trial a nullity in light of the ruling in **ROY ELIREMA vs. REPUBLIC 2002 eKLR**. This is because it contravened the express mandatory provisions of **section 85(2)** as read with **Section 88** of the **Criminal Procedure Code** which requires that a police prosecutor should be of the rank of a sub-inspector or above. Consequently we quash the conviction and set aside the sentence.

The issue we should next consider is whether or not to order a retrial. We have set out the facts of both the prosecution and defence case in detail. As stated by the Court of Appeal in the case of **MWANGI vs. REPUBLIC [1983] EA 522** no order for retrial should be made unless the appellate court is of the opinion upon consideration of the admissible and potentially admissible evidence that a conviction may result. Going by the evidence on record, PW2, Joseph, who was attacked and robbed of his employer's water pump, he could not identify the people who robbed him. He was categorical that all he could be able to identify were the injuries he had inflicted on one of them going by the position of the injury i.e. on the head and nose. The incident had taken place at night and there was no mention of any light illuminating the scene of the crime. So when PW2 was called to identify the Appellant all he identified were the injuries. That evidence standing on its own is totally insufficient to sustain a conviction since no properly conducted identification parade was mounted. And most importantly, PW2 did not identify the Appellant but identified only the injuries the Appellant had on his head.

The other evidence supporting the conviction was the fact that the Appellant implicated his co-accused to PW6 who went and arrested him. That piece of evidence implicating the co-accused was hearsay and the learned trial magistrate contravened Section 62 and Section 63 of the Evidence Act when he admitted it. The admission of that evidence prejudiced the Appellant adversely in this case.

The other evidence against the Appellant was the confession statement. That statement was taken two days after the arrest of both the Appellant and his co-accused. By that time the exhibit stolen during the robbery had already been recovered from the Appellant's co-accused. It can safely be said that the police had all the information on the case before the statement was taken. The Appellant's complaint that he did not make it may not have been far fetched in the circumstances. Besides if an order for retrial is made, that statement will not be admissible in court as evidence in light of the amendment to the **Evidence Act** made under **Act No. 5 of 2003**.

We find that if an order for retrial were to be made, the admissible evidence in this case would not be sufficient to sustain a conviction against the Appellant. Consequently we decline to order a retrial and direct instead that the Appellant be set free unless he is otherwise lawfully held.

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

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**D. ONYANCHA**

**JUDGE**

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**LESIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

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**D. ONYANCHA**

**JUDGE**

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**LESIT, J.**

**JUDGE**