REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Criminal Appeal No. 890 & 891 of 2003

STEPHEN NGUGI MAINA..…….....…….....……..……..…..APPELLANT

VERSUS

REPUBLIC…….…….....……..…....RESPONDENT

J U D G M E N T

JOHN NJEMA KAMAU and **STEPHEN NGUGI MAINA** were convicted in one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and both sentenced to death. Being dissatisfied with the said conviction they lodged their appeals which we have consolidated having arisen out of the same trial.

When these appeals came up for hearing, **MISS GATERU**, learned counsel for the State submitted that the State was conceding to the appeal on a technicality.

Learned Counsel submitted that the trial before the lower court was a nullity because one Police Constable **Baraza** conducted part of the prosecution case and that he was unqualified to do so under **Section 85(2)** of the **Criminal Procedure Code**.

We have perused the record of the proceedings of the lower court. On 26th May 2003, when PW5, **MUSILA**, whom with others arrested the 1st Appellant, was called as a witness, the court prosecutor was Police Constable **Baraza.** We agree that the said Police Constable was not qualified to be appointed a Public Prosecutor and that in prosecuting the case, **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code** was contravened. This contravention rendered the entire proceedings a nullity in line with the Court of Appeal case of **RICHARD ELIREMA & ANOTHER vs. REPUBLIC eKLR 2002**. We declare the proceedings to have been a nullity, quash the convictions and set aside the sentences.

The learned State Counsel submitted that for the ends of justice to be met, the State was seeking a retrial. Learned Counsel submitted that there was strong evidence to sustain a conviction and that the witness who testified in the lower court would be availed for the retrial.

Learned Counsel submitted that no prejudice would be suffered by the Appellants since they were convicted only on 22nd September 2002.

The 1st Appellant opposed an order for retrial. He relied on his written submissions. In those written submissions, the 1st Appellant said that he was a victim of the crime and not a perpetrator and that he ought not to have been convicted. The 1st Appellant also submitted that he had suffered in custody and that he would suffer prejudice if an order for retrial were made.

The 2nd Appellant was represented by **MR. MURIUKI**. **MR. MURIUKI** opposed an order for retrial on

the basis that the prosecution had failed to establish a nexus between the Appellants herein and the people who carjacked them. Counsel submitted that the Appellants were a matatu crew and were carjacked as they ferried customers on the date in question. The learned counsel submitted that the conduct of the Appellants throughout was consistent with victims of a crime not participants of the same. Learned counsel submitted that no conviction would result if an order for retrial were made.

The Appellants, the learned counsel for the 2nd Appellant submitted, were not shown by the prosecution to have acted in concert with the carjackers and that therefore, the circumstantial evidence against them would not sustain a conviction.

We have carefully considered the evidence on record vis-à-vis the request for a retrial by the State. The principles to be considered when determining whether or not to order a retrial are now settled.

The key consideration are two-fold; one whether the interests of justice require an order for retrial being made and whether the order may cause an accused person to suffer prejudice, and two, whether the admissible or potentially admissible evidence may result in a conviction. See **MANJI vs. REPUBLIC 1966 EA 343, MWANGI vs. REPUBLIC 1983 KLR 522**

Having considered the admissible and potentially admissible evidence in this case including that already adduced before the lower court, we are fully persuaded that the interests of justice requires that an order for retrial be made. The Appellants were charged in the original trial in August 2002 and have been in custody since then. We are however satisfied that they will not suffer any prejudice if a retrial is ordered. The evidence on record is strong enough to sustain a conviction if the same were adduced on a retrial.

Consequently we order that a retrial be held in this case. The Appellants should be taken before Chief Magistrate's Court Nairobi for a plea to the selfsame charges on the 7th April 2006. The case should then be tried by a magistrate of competent jurisdiction other than **MRS. P. GICHOHI** who tried them in the original trial. In the meantime the Appellants to remain in prison custody.

Dated at Nairobi this 4th day of April 2006.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants – present

Miss Gateru for State

Mr. Muriuki for 2nd Appellant

Huka - CC

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE