



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 850 of 2002**

PAUL MUTAI TOWETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PAUL MUTAI TOWETT was convicted by the Kibera Senior Principal Magistrate’s Court of one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and **RAPE** contrary to **Section 140** of the **Penal Code**. He now appeals against both the conviction and the sentence.

When the appeal came up for hearing, **MRS. OBUO**, learned counsel for the State submitted that the State was not supporting the conviction. The learned counsel submitted that the trial before the lower court was defective as it contravened **Section 85(2)** of the **Criminal Procedure Code**. Learned counsel explained that one, **CPL.KATIGITHO** had prosecuted part of the case on behalf of the prosecution and that he was not qualified to do so.

We have perused the record of the proceedings. **CPL. KARIGITHO** led the evidence of the two Complainants in the case and of two other key witnesses. The prosecutor was not qualified to prosecute the case and this rendered the entire proceedings defective. We declare the proceedings a nullity and consequently set aside both the conviction and sentence.

The learned State Counsel urged the court to order a retrial of the case on grounds that the Appellant was found in possession of the carpets that had recently been stolen from the Complainants’ house soon after the robbery. Counsel submitted that the witnesses would be availed for the retrial and that the interests of justice require that a retrial be ordered.

The Appellant opposed an order for retrial. The Appellant submitted that the evidence could not support a conviction.

We have re-evaluated and carefully considered the evidence adduced before the trial court. The principles applicable in determining whether or not to order a retrial are now well settled and we need not repeat them here.

The key considerations 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**

We have considered the issue of a retrial against these two considerations. We are satisfied that the evidence adduced before the lower court would result in a conviction if a retrial were ordered. We are

also satisfied that due to the seriousness of the charge, the fact the Appellant has not been in custody for unduly long time and the fact that the evidence for the prosecution was strong, that the interest of justice would require an order for retrial being made. We are satisfied that the Appellant will not suffer any prejudice if the order is made.

Consequently we order that a retrial be held in this case. The Appellant should be presented to the Senior Principal Magistrate's Court Kibera and charged with the self-same offences as in the initial trial. The Appellant will remain in custody until 7th April 2006 when he will be taken to court for plea. The case should be presided over by another magistrate of competent jurisdiction except **MISS. C. MWANGI** who initially heard the case.

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;

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE