

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 358B of 2003

CHARLES KIAMA

MUNYIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from both original conviction and sentence of the Chief Magistrate's Court at

Nyeri in Criminal Case Number 1195 of 2003

by J. B. A. Olukoye – R.M.)

J U D G M E N T

Charles Kiama Munyiri hereinafter referred to as the Appellant was tried and convicted by the Resident Magistrate Nyeri for the offence of Robbery contrary to Section 296(1) of the Penal Code. He was sentenced to serve 5 years imprisonment and thereafter police supervision for another 5 years.

Being dissatisfied the Appellant has now brought this appeal contending *inter alia* that his prosecution was done contrary to Section 85 of the Criminal Procedure Code, and that the evidence of identification was not adequate, and that the trial magistrate erred in shifting the burden of proof upon the Appellant.

Learned Principal State Counsel Mr. Orinda has conceded the appeal recognizing the fact that the prosecution in the Lower Court was conducted by an incompetent prosecutor. Mr. Orinda has further indicated that he is not pursuing an order for a retrial.

I have perused the record of the Lower Court and it is evident that the case against the Appellant was prosecuted by one Sgt. Njagi in contravention of Section 85 (2) of the Criminal Procedure Code. The trial against the Appellant was therefore a nullity.

It is also evident that the Appellant's conviction was hinged on the identification of a single witness i.e. the Complainant. The witness did not however give any description of his assailant. This would have been useful in verifying her identification of the Appellant. The identification coming over a month after the incident, the possibility of a mistaken identification could not be ruled out. I do concur with learned Principal Counsel that this would not be an appropriate case for a retrial.

In the circumstances I do allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be forthwith set free.

Dated, signed and delivered this 29th day of May 2006.

H. M. OKWENGU

JUDGE