REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1341 & 1342 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 719 of 2002 of the Chief Magistrate's Court at Nairobi (A. El-Kindy – PM)

MAINA WARUI MURIUKI.…….....…….……..……APPELLANT

VERSUS

REPUBLIC…….....…….....……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1342 OF 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 719 of 2002 of the Chief Magistrate's Court at Nairobi (A. El-Kindy – PM)

JOSEPH NDUNGU KINYANJUI…….....…….……..……APPELLANT

VERSUS

REPUBLIC…….....…… ……...RESPONDENT

J U D G M E N T

MAINA WARUI MURIUKI and **JOSEPH NDUNGU KINYANJUI** had jointly with two others been charged with two counts. In count 1 they were charged with R**OBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**, in count 2 with **BEING IN POSSESSION OF SUSPECTED STOLEN PROPERTY** contrary to **Section 323** of the **Penal Code**. The Appellants were found guilty of the 1st count. It is not clear what the trial court found in respect of count 2. The Appellants were subsequently sentenced to death.

When the appeal came up for hearing, **MRS. GAKOBO**, learned counsel for the State conceded to the same. It was the counsel's submissions that on1 5th November 2002 when the case came up for the hearing of the defence case, the learned trial magistrate failed to indicate the Coram of the court. Consequently the proceedings were a nullity.

We have confirmed from the record of the trial court's proceedings that what the learned counsel submitted was correct. Due to that omission on the learned trial magistrate's part, it was difficult to

determine whether the prosecutor who conducted the case on behalf of the prosecution on that day was qualified as required under **Section 85(2)** as read with **Section 88** of the Criminal Procedure Code. As the Court of Appeal held in the celebrated case of **BERNARD LOLIMO EKIMAT vs. REPUBLIC CA No. 151 of 2004**, the proceedings were rendered a nullity.

We quash the conviction and set aside the sentence.

MRS. GAKOBO has urged us to order a retrial on grounds that the evidence before court was sufficient to sustain a conviction, that witnesses would be availed for the retrial and that the Appellants would not suffer any prejudice since they had been in custody for only four years since arrest.

We have perused the record of the proceedings to satisfy ourselves as to the tenability of the prosecution evidence. We are of the opinion that the evidence was strong enough to sustain a conviction for the main count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. There was corroboration in the evidence of identification given by more than two witnesses. Further the incident took place in broad daylight. We say no more in order not to prejudice the retrial.

We are satisfied that the principles applicable in determining whether or not to order a retrial have been met.

The evidence could result in a conviction. See **MWANGI vs. REPUBLIC 1983 KLR 527**. The Appellants would suffer no prejudice at all if retrial is ordered. See **SUMAR vs. REPUBLIC 1964 EA 451** and **MERALI & OTHERS vs. REPUBLIC 1971 EA 221**.

We order that a retrial be conducted in this case. Both Appellants should be presented before the Senior Principal Magistrate's Court Kiambu for a plea to self same offence as charged in count 1 only on the **2nd day of June 2006**.

In the meantime, the Appellants should be held in prison custody.

Dated at Nairobi this 25th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for State

CC: Erick/Ann

…….**…**

LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE