



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Criminal Appeal 76 of 2004**

*(From original criminal case no. 1021 of 2003 of Resident Magistrate's court at Yatta)*

**PETER KIIO KYULI .....**APPELLANT

**VERSUS**

**REPUBLIC.....**RESPONDENT

**JUDGEMENT**

PETER KIIO KYULI was charged together with another LAZARUS WAMBUA NGANDA for the offence of Robbery Contrary to Section 296 (1) of the Penal Code and Burglary Contrary to Section 304 (2) of the Penal Code. After a full trial, the appellant and his co-accused were found guilty, convicted and sentenced to 4 years imprisonment in count 1 and 3 years imprisonment in count 2. The appellant herein lodged his appeal. I am informed by the registry that the co-accused LAZARUS WAMBUA NGANDA did not file any appeal.

When the appeal came up for hearing, the appellant was not produced. I have confirmed from his filed petition of appeal that the appellant did not wish to be present during his appeal.

Mr. O'mirera in his submission in reply to the filed petition conceded to the appeal on behalf of the state. Counsel submitted that the trial before the lower court was a nullity on the grounds that Sgt Kanyonda who conducted the prosecution case was unqualified to do so.

I have confirmed from the record of the proceedings that the entire prosecution was conducted by Sgt Kanyonda. The said Sgt was unqualified to conduct the prosecution on behalf of the prosecution. The purported prosecution rendered the entire proceedings a nullity. See **ELIREMA & ANOTHER VRS REPUBLIC eKLR 2002.**

I quash the conviction and set aside the sentence in respect of both the appellant and his co-accused.

On the retrial, Mr. O'mirera sought a retrial in respect of count 1 only. Counsel submitted that no evidence had been adduced to support count 2.

I have carefully considered the evidence which was tendered before the trial court in order to determine whether there was sufficient evidence to result in a conviction if this court made an order for retrial.

In support of count 1 the prosecution relied on circumstantial evidence that the appellant and his co-accused were found with the jacket stolen from PW1 the night before. The evidence of possession was by PW2 and PW3. While PW2 said it was the 1<sup>st</sup> accused in the case who was wearing the jacket at the time of arrest, PW3 contradicted herself by saying it was the second accused, the appellant herein who had it. There was no other evidence adduced. The evidence was inconsistent and standing as it did can not result in a conviction if an order for retrial were made. As for the second count contrary to what Mr. O'mirera submitted PW2 was the complainant in that count. Her evidence is that the appellant and his co-accused pushed the door to her house and entered. She said the door was unlocked and was held in place by a stone. PW2 did not complain of any theft from her, only an intrusion. That intrusion could not have sustained a charge of Burglary. The conviction in count 2 on that evidence was wholly unsafe. If self-same evidence is adduced in a retrial, no conviction would result. Consequently I decline to order any retrial in this case.

I order that the appellant and his co-accused should be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Machakos this **22nd** day of **May, 2006.**

J. Lesiit

JUDGE

22/5/2006