REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1254 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 6266 of 2001 of the

Chief Magistrate's Court at Makadara (Mrs. Kimingi – PM.)

CALEB OTIENO alias MUSTAFA OTIENO KARIM…..APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

J U D G M E N T

CALEB OTIENO alias **MUSTAFA OTIENO KARIM** was charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(1)** of the **Penal Code**. It was alleged that in company with another not before court he robbed the Complainant of his cash and mobile phone and that they used actual violence on him. The Appellant was found guilty, convicted and sentenced to death. It is out of the said conviction that he now appeals before this court.

When this appeal came up for hearing, **MISS GATERU** learned counsel for the State conceded to it citing a technicality that on 9th May 2002, when the case was first heard, the Coram of the court was not indicated as required. Learned counsel submitted that consequently the appeal court had no way of determining whether **Section 85(1)** as read with **Section 89** of the **Criminal Procedure Code** had been complied with.

We have perused the record of the proceedings and we have confirmed that the Court Coram was not indicated during the first hearing of this case. The court of appeal, while dealing with a similar issue in the case of **BERNARD LOLIMA EKIMAT & ANOTHER vs. REPUBLIC CA No. 151 of 2004**, found that where the Coram of the court was not indicated during the hearing of the case then the proceedings were rendered defective since the Appellate Court had no way of determining whether there was any prosecutor in court and if there was any, whether he was qualified as required under the Criminal Procedure Code. We are bound by the said decision. Consequently we find the proceedings were a nullity, quash the conviction and set aside the sentence.

MISS GATERU urged us to order a retrial in order to meet the ends of justice due to the seriousness of the charge. That was opposed by the Appellant who urged the Court to find that the five years he had been in custody since his arrest in this matter was sufficient punishment and further that he was not to blame for the mistake which occurred.

We have carefully considered the evidence on record in this case. We find that the evidence against

the Appellant clearly established an offence had been committed by the Appellant against the Complainant. However, the offence committed was not the one charged of **ROBBERY WITH VIOLENCE**. The offence was committed by unnamed persons who merely held the Complainant and took his mobile phone and cash from his pockets. That evidence does clearly support a charge of **THEFT FROM PERSON** contrary to **Section 279(b)** of the **Penal Code.** We find that even if we were to order a retrial, it would not be for the offence the Appellant faced before the lower court. We are satisfied that the evidence on record in this case would not result in a conviction for the offence charged were we to order a retrial on that ground alone. The order for retrial cannot be made in the circumstances. See **MWANGI vs. REPUBLIC 1983 KLR 522**.

The Appellant has been in prison custody since his arrest in March 2001. That is a period of five years and two months now. Taking the period of his incarceration into account, together with our observation concerning the offence committed, we find that the interests of justice would not require an order for retrial being made. We find that such an order would cause the Appellant to suffer prejudice. See **MANJI vs. REPUBLIC**, **SUMAR vs. REPUBLIC** 1964 EA 481.

We decline to order a retrial. We direct that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 9th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Miss Gateru for the State

Ann Wambui - CC

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LESIIT, J.

JUDGE

…….

MAKHANDIA, M.

JUDGE