



REPUBLIC OF KENYA

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

Criminal Appeal 541 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 873 of 2000 of the Chief Magistrate's Court at Makadara (Mr. Rienjeu -PM)

BONIFACE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

BONIFACE MWANGI was convicted of one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death as prescribed in the law. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

When this appeal came up for hearing, **MRS. GAKOBO**, learned counsel for the State submitted that the State was conceding the appeal on the ground that the prosecution of the case was conducted by an unqualified police prosecutor. That in that regard the proceedings were a nullity and the conviction could not stand.

We have perused the proceedings of the trial court and have confirmed that one police constable **RADACK** conducted part of the prosecution of the case before the trial court. The trial was therefore defective and we quash the conviction and set aside the sentence.

On the issue of a retrial, **MRS. GAKOBO** submitted that the State was not seeking a retrial. The Appellant urged us to find that the evidence of arrest was not conclusive proof that the Appellant was one of those who committed the offence.

We have considered this appeal and the principles applicable to the issue at hand. It is trite law that no order for retrial can be made unless the appellate court is of the opinion that on consideration of the admissible or potentially admissible evidence, a conviction might result. See **BRAGANZA vs. REPUBLIC {1957} EA 152** and **MWANGI vs. REPUBLIC {1983} KLR 522**.

In the instant case, the Complainant's house was broken into by people who ordered him to sleep. As the Complainant covered himself in bed, the burglars carried away his goods. The Complainant said that he followed the group when they left his house and held one. That person stabbed him but he held onto him until PW2, an immediate neighbour came to his help. The man, the Appellant in this case, led them to a place he said stolen things were usually taken and part of the Complainant's goods were recovered. The Appellant denied the charge throughout the case even in his mitigation. We find that the evidence of identification was made in difficult conditions that were not free from possibility of mistake or error. The incident was at night, in a slum area. There was no evidence of lighting. The evidence that the

Complainant did not loose sight of those who robbed him was not good enough as there was no evidence of the lighting which enabled him to see the assailants. Further more given the Complainant's evidence, we find that there was a break in the chain of the prosecution case between time the burglars left the Complainant's house and the time he woke up from his bed to follow them. It is not certain that the Appellant he later held was in fact part of the group. The fact that he led to the recovery of the stolen battery cannot be conclusive proof he participated in the theft. PW2's evidence concerning that was that the Appellant said he would take them where such stolen things were normally taken and in the process a battery was found.

Having considered the principles applicable to determine whether or not to order a retrial, we find that the interests of justice would not require such an order being made and that the order would cause the Appellant to suffer injustice. We decline to order a retrial. We order that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 6th 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;

Appellant

Mrs. Gakobo for State

CC: Tabitha

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE