

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 367 & 368 of 2001

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 363 of 2001 – J. Kiarie [S.R.M.]

PIUS MUTUA WAMBUA.....1ST APPELLANT

PETER KARIUKI NGUGI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

The appellants, Pius Mutua Wambua and Peter Kariuki Ngugi were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal code**. The particulars of the offence were that on the 9th of February 2000 at Milimani Estate Elburgon in Nakuru District, the appellants jointly with others not before court robbed Daniel Muniu Chege of Kshs 5,000/=, a water pump valued at Kshs 35,400/=, one panga, one mattress and two torches all valued at Kshs 41,750/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Daniel Muniu Chege. The appellants pleaded not guilty to the charge and after a full trial they were convicted as charged. They were sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and each appellant filed a separate appeal to this court against his conviction and sentence.

At the hearing of the appeal, the two separate appeals that were filed by the appellants were consolidated and heard as one. Mr. Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the police officer who had prosecuted the case was an incompetent prosecutor. He therefore submitted that the proceedings before the subordinate court were a nullity. In view of the time that it had taken for this appeal to be heard and determined, the State was not insisting that the appellants be retried. In view of this development, the appellants did not have anything to add to the submissions made by the State.

We have perused the proceedings of the subordinate court. We note that the criminal case facing the appellants was prosecuted by Police Constable Njagi. He is a police officer of a rank lower than that of an Assistant Inspector of police. He was thus not authorized to prosecute a criminal case before a magistrate's court as provided for by **Section 85(2) and 88 of the Criminal Procedure Code**. As was held by the Court of Appeal in the case of **Eliremah & Anor –vs- Republic [2003] KLR 537** where such a police officer prosecutes a case before a magistrate's court, the proceedings thereto will be a nullity. We therefore declare the proceedings in respect of which the appellants were convicted by the subordinate court to be a nullity as a consequence of which the conviction of the appellants is quashed and the sentences imposed set aside.

The issue that is left for determination by this court is whether the appellants should be retried. Mr. Gumo has submitted that the State is not insisting that the appellants be retried in view of the fact that the prosecution may not be able to trace the witnesses who testified in the vitiated trial. The principles to be

considered by this court in determining whether or not to order a retrial are well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004 (Eldoret)** that:

“In the case of Ahmed Sumar v Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered”.

The court continued at the same page paragraph H and stated:

“We are also referred to the judgment in Pascal Clement Braganza v. R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person”.

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

In the present case, Mr. Gumo has submitted that the witnesses may not be procured by the prosecution to be available to testify if a retrial is ordered. In view of the sentiments expressed by Mr. Gumo, we are of the view that the interest of justice would be served if the appellants are discharged.

We consequently order that the appellant be discharged. They are ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 30th day of June 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE