

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 373 of 2004

(From Original Conviction and Sentence in Criminal Case No.25406 of 2002 of the Chief Magistrate's Court at Nairobi).

PAUL NJUNGE MUBEAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

PAUL NJUNGE MUBEA was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was after trial found guilty, convicted and sentenced to three years imprisonment. He was aggrieved by the conviction and sentence and hence lodged the instant Appeal.

When the Appeal came up for hearing, Mrs. Kagiri, Learned State Counsel conceded to the same. It was the Counsel's submissions that on 25th June, 2004 when the case came up for hearing for the first time, the Leaned trial Magistrate failed to indicate the coram of the Court for that day. The coram merely read "***Coram as before***" In those circumstances it was not possible to tell who constituted the Court and who the Prosecutor was. Relying on the Court of Appeal decision in **BENARD LOLIMO EKIMAT VS REPUBLIC, CRIMINAL APPEAL NO. 151 OF 2004 (ELDORET) (UNREPORT)**, Counsel submitted that the proceedings were thereby rendered a nullity. Counsel invited me to so hold.

Thereafter Counsel then invited me to consider ordering a retrial. Counsel submitted in support of her position that the evidence on record against the Appellant was overwhelming. That the Appellant deliberately and unlawfully attacked and stabbed the Complainant with a knife leading to the collapse of one of his lungs. The evidence was well corroborated, that the conduct of the Appellant before and after the attack showed that he had no remorse at all regarding the incident. Counsel pointed out that, the Appellant will not be prejudiced if a retrial is ordered. Indeed such an order will serve to advance the cause of justice. On his part the Appellant merely stated that he was seeking reduction of the sentence.

I have carefully perused the original and typed record of the proceedings of the subordinate Court and confirmed that indeed what the Learned State Counsel ahs pointed out as her ground for conceding to the Appeal is borne out by the record. Due to that omission on the part of the Learned trial Magistrate, it is difficult to determine whether there was s Prosecutor who conducted the case on behalf of the prosecution on that day and if so, whether he was qualified as required under Section 85 (2) as read together with Section 88 of the criminal Procedure code. As the Court of Appeal held in the celebrated case of **BENARD LOLIMO EKIMAT (supra)** such an omission renders the proceedings rendered a nullity. Accordingly I annul the proceedings and set aside both the conviction and sentence.

I have carefully perused the evidence recorded to satisfy myself as to the tenability of the Prosecution case. No doubt the evidence against the Appellant was overwhelming. The evidence of identification was given by more than two witnesses and was adequately corroborated. Further the incident took place in broad day light. Such evidence if re-tendered during the re-trial will no doubt result into a conviction. (See **MWANGI VS REPUBLIC 1983 KLR 527**).

However, I note that the Appellant was sentenced to 3 years imprisonment on 21sst July, 2004. To

date he has therefore served close to 2 years of his jail term. With remission, the Appellant should be out of prison any time now. If a retrial is ordered in the circumstances, it will prejudice and indeed occasion injustice to the Appellant. The possibility that the Appellant may be exposed to double jeopardy cannot be gain said. (See **SUMAR VS REPUBLIC 1964 EA 451** and **MERALI & OTHERS VS REPUBLIC 1971 EA 221**).

For the foregoing reasons, I decline to make an order for retrial. Instead I order that the Appellant be set at liberty forthwith unless held for other lawful cause.

Dated at Nairobi this 14th day of June, 2006.

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MAKHANDIA

JUDGE