



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1236 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 998 of 2001 of the Chief Magistrate’s Court at Nairobi (J.N. Wanjala – SRM))

DAVID MWOLOLO WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

DAVID MWOLOLO WAMBUA was charged with four counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was found guilty and convicted in counts 1 and 3 but acquitted in counts 2 and 4. The Appellant was then sentenced to death as prescribed in the law. Being dissatisfied with the conviction the Appellant lodged this appeal. When the appeal came up for hearing, the learned state counsel, **MISS GATERU** conceded to the appeal on grounds that on two occasions the Coram of the Court did not indicate whether there was any prosecutor in court and that the appellate court was not in a position to determine whether the prosecutor was competent in terms of **Section 85(2)** as read with **Section 88 of Criminal Procedure Code**. Learned counsel therefore urged us to declare the proceedings a nullity.

We have perused the record of the proceedings. on the 13th November 2001 when the trial of the case commenced before **MR. ABURILI, SPM**, the Coram of the Court was indicated as follows:-

“13/11/01

Coram: As above

Accused persons

Karuji for 1st and 3rd accused

Odhiambo for 2nd accused.”

On that day the evidence of PW1 and PW2 was taken. The same Coram was on the 17th January 2002 repeated. During the latter date, the cross-examination of PW2 by counsel for

the 1st and 3rd accused was undertaken while the evidence of PW3 was heard fully. The trial magistrate was then transferred to a different station and the case was taken over by **Mrs. J. N. Wanjala, SRM** on 24th June 2002. The Appellant and his co-accused the 3rd accused in the case elected through their counsel to have the matter continue from where it was left off by **MR. ABURILI**. The events of 13th November 2001 and 17th January 2002 therefore do affect the proceedings. Since upon taking over the case from the preceding trial magistrate, **MRS. WANJALA** continued with the remaining witnesses without re-calling PW1, PW2 and PW3, the proceedings were rendered defective by the learned preceding magistrate's failure to record the full Coram of the court. Consequently and in line with the Court of Appeal decision on a similar matter in the case of **LOLIMO EKIMAT vs. REPUBLIC CA No. 151 of 2004**, we declare the proceedings a nullity, quash the convictions and set aside the sentences.

Learned counsel for the State urged us to order a retrial on the basis of ensuring that the ends of justice are met. Counsel submitted that the appellant was identified at the scene by PW1, PW2 and PW3. That consequently the evidence against him was strong. Counsel submitted further that the witnesses could easily be availed for a retrial if it was ordered. That, counsel submitted the Appellant would suffer no prejudice having been sentenced only on 15th November 2002.

The Appellant has opposed an order for retrial. He submitted that he had been in custody since March 2001 which he submitted was too long. The Appellant also submitted that no one identified him at the scene of crime because had they identified him, they would have given his name to the police in their first report. That the only important witness was PW4 but that his evidence was insufficient to sustain a conviction. PW4 was the investigating officer.

We have carefully considered the appeal and carefully analyzed afresh the evidence adduced before the lower court in order to determine whether, applying the necessary principles, an order for a retrial ought to be made in this case.

The Appellant was one of the three persons charged jointly with the four offences as indicated earlier. The others were acquitted of all four counts while the Appellant was convicted in two counts. The Appellant was identified by PW1 who was the Complainant in count 1 after he saw newspaper reports showing his (Appellant's) photograph and talking about his arrest three weeks after the incident in question. PW1 took the photographs to PW2 who also identified him. Both PW1 and PW2 were able to identify the Appellant later in an identification parade. PW3 did not talk about any newspaper report. What comes out clearly from the evidence of all three witnesses is that they are all not clear in their evidence as to the role the Appellant played in the robbery and what was about him that they were able to identify him. PW1 claimed that the Appellant shot him once on the mouth yet he had entered later than another gunman who also shot him. However, having seen PW1 before the parade in newspaper reports, and him not declaring the actual role of the Appellant, PW1's evidence needed to be taken cautiously. PW2 and PW3 are the ones who spoke generally of the robbery but did not say clearly what role the Appellant played in Court. One is not clear whether the two really saw the Appellant at the time of robbery.

Given the evidence before the Court, we are of the view that if the self same evidence were to be adduced in a retrial, a conviction is unlikely to result. See **MWANGI vs. REPUBLIC 1983 KLR 522**. In the circumstances, it would prejudice the Appellant if we ordered a retrial as we are convinced that the interest of justice does not require it. See **SUMAR vs. REPUBLIC 1964 EA 481** and **MANJI vs. REPUBLIC 1966 EA 343**. We decline to order a retrial. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 13th day of June 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for State

CC: Tabitha/Erick

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LESIIT, J.

JUDGE

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MAKHANDIA _

JUDGE