



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (Milimani Law Courts)**  
**Criminal Appeal 781 of 2002**

**DISMUS MUSYOKI WASUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction(s) and Sentence(s) in Criminal case No. 13491 of 2001 of the Chief Magistrate’s Court at Makadara (Mrs. Kimingi – P.M.)**

**J U D G M E N T**

**DISMUS MUSYOKI WASUA** was convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death as by law prescribed. Being aggrieved by the conviction the Appellant lodged this appeal.

**MRS. KAGIRI**, learned counsel for the State has conceded to the appeal. Counsel submitted that the trial before the lower court was defective on the grounds that on 3<sup>rd</sup> June 2002 when the case came up for hearing of PW4, the Coram of the Court was not indicated.

We have perused the record of the proceedings and have confirmed that indeed, the Coram of the Court was not indicated on 3<sup>rd</sup> June 2002, when the arresting Officer of the Appellant testified. In fact we have confirmed that the learned trial magistrate did not give the Coram of the Court on 22<sup>nd</sup> May 2002, a date preceding the one in issue. Neither was the Coram given again even at the time the Court heard the Appellant’s defence and on the day the judgment was read, one **PC WANJOHI** conducted the proceedings on behalf of the proceedings.

All these rendered the proceedings a nullity for the first two occasions because the rank of the prosecutor was not given, making it difficult to tell whether he was qualified and subsequently for reason that the **PC WANJOHI** was unqualified to conduct the prosecution case within the meeting of **Section 85(2)** as read with Section 88 of the **Criminal Procedure Code**.

Learned counsel relied on **BENARD LOLIMO EKIMAT vs. REPUBLIC CA No. 151 of 2004**. That authority is in all fours with the instant case and besides it is binding on us. The Court of Appeal in the **EKIMAT Case**, Supra, ruled that in instances where the Coram of the Court is not indicated then the proceedings are rendered defective. We declare the proceedings in the instant case defective. We accordingly quash the conviction and set aside the sentence.

**MRS. KAGIRI** submitted that the State would not require a retrial on the grounds that the conviction was based on the evidence of identification of a single witness made under difficult circumstances.

We have re-evaluated the evidence before the lower court and have confirmed that the Appellant was convicted on the basis of the evidence of identification by the Complainant. The most striking fact however is the failure by the learned trial magistrate to inquire as to the conditions of light if any at the place that the robbery took place. The Complainant did not discuss the issue of the condition of light at the scene nor did he divulge what it was that enabled him to see and recognize the Appellant.,

The radio recovered from the Appellant alleged to be part of the things stolen from the Complainant was not identified at all in Court. The Complainant did not state on what basis he claimed it was his. That evidence is therefore not conclusive. As an appellate court cannot order a retrial unless on a consideration of the admissible or potentially admissible evidence it is of the view that a conviction may result, we decline to order it. See **MWANGI vs. REPUBLIC 1983 KLR 522**. We are of the view that the interests of justice do not require a retrial and that ordering one will prejudice the Appellant. We decline to order a retrial and direct instead that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 13<sup>th</sup> day of June 2006.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA M.S.A.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for the State

Tabitha/Erick: CC

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA M.S.A.**

**JUDGE**