

REPUBLIC OF KENYA

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

Criminal Appeal 56 of 2003

(From Original Conviction and Sentence in Criminal Case No.2876 of 2001 of the Chief Magistrate's Court at Nairobi S. Ndambuki, SRM).

JOSHUA MAINA OLE KICHEPAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant ***JOSHUA MAINA OLE KICHEP*** was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal code. He was also convicted on two other counts of being in possession of firearm and ammunitions without the relevant certificates under the Firearm Act respectively. He was however due to his age sentenced on the first count to be detained during the President's pleasure under Section 25 (2) of the Penal Code. With regard to the 2 counts under the Firearm Act, the Appellant was sentenced to serve 5 years imprisonment respectively. The sentences were ordered to run concurrently.

When the Appeal came up for hearing, Mrs. Gakobo, Learned State Counsel conceded to the Appeal on the ground that the Prosecution of the case in the subordinate Court was conducted by one Corporal Osiemo who was an unqualified Prosecutor in terms of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. Accordingly the conviction of the Appellant was a nullity. Counsel therefore invited us to annul the proceedings and set aside both the conviction and sentence. On whether a retrial should be ordered, the Learned State Counsel submitted that the state was seeking a retrial on the basis that the evidence on record was strong to return a conviction if a retrial is ordered. That although the Appellant had been in custody since his arrest on 7. 12. 2001 taking into account the seriousness of the offence and the likely sentence that may be imposed; the appellant would not suffer any prejudice if a retrial is ordered. Counsel further confirmed that the witnesses will be readily available to give evidence if a retrial is ordered. Finally Counsel submitted that it would be in the interest of justice that a retrial be ordered.

The Appellant for obvious reasons was elated by the turn of events. However he was not happy with the request for an order for retrial. In opposing the demand for retrial he tendered written submissions that we have considered at length. He also orally submitted that the sentence imposed on him was unfair, that a retrial will not be in the interest of justice, and that he had been sufficiently punished for the time that he had been in custody. Finally the appellant stated that he was a university student and wished to be released so as to resume and complete his University education.

We have perused the record of the proceedings. It emerges that indeed CPL Osiemo indeed led the evidence of PW1 to PW9.

The said Prosecutor was not qualified to prosecute the case in terms of the aforesaid Sections of the Criminal Procedure Code as well as in terms of the celebrated case of ***ELIREMA & ANOR VS RPUBLIC (2003) KLR 537.***

His participation in the case therefore rendered the proceedings defective and or a nullity. Accordingly and as invited by the Learned State Counsel, we declare the proceedings to have been a nullity and consequently set aside both the conviction and sentence.

We have re-evaluated and carefully considered the evidence adduced before the trial Court in determining whether we should order a retrial as urged by the State Counsel. The principles applicable in determining whether or not to order a retrial are now well settled and we do not have to repeat them here. Suffice to say that there are basically two broad considerations, one whether the interest of justice require such an order being made and whether the order if made would occasion prejudice to an accused person, and secondly whether the admissible and potentially admissible evidence if tendered may result in a conviction. See generally VASHANJEE *LILADHAR DOSSANI VS REPUBLIC (1946) 13 EACA 150*, *MANJI VS REPUBLIC (1960) EA 343* and *MWANGI VS REPUBLIC (1983) KLR 522*.

Having considered the issue of retrial at length against these two broad principles, we are satisfied that a retrial would be the proper order to make in the circumstances of this case. The evidence against him was overwhelming. The offence was committed in broad day light against a person who knew the Appellant very well as they both worked next door. The Appellant was convicted and sentenced to be detained during the President's pleasure and a further 5 years imprisonment for the other offences under the Firearms Act. This was on 9th December, 2003. To date therefore the Appellant has only served 3 years of his jail term. Considering the seriousness of the offence we do not think that to order a retrial in the circumstances would be prejudicial to the Appellant or occasion him injustice. The Appellant talks of being a University student. There is nothing on record to back up this claim. He never said so in his defence or mitigation. Even in his written submissions, he does not allude to this fact. We think that the whole idea about the Appellant being a University student is a hoax, calculated to mislead the Court so as to go easy on him. We are not that easily gullible. Indeed the evidence on record and the appellant's own statement of defence suggest that he had been employed as a barber in a hair salon next door.

For the aforesaid reasons we are satisfied that the proper order that commends itself to us is an order for retrial. The Appellant shall thus be retried on the self-same charges before another Magistrate of competent jurisdiction other than S. Ndambuki who presided over the initial case. Towards this end the Appellant shall appear in the chief magistrate's court, Nairobi on 7th June, 2006 for the retrial to commence. Until then the Appellant shall continue to be held in prison custody.

Dated at Nairobi this 13th day of June, 2006.

.....

LESIIT

JUDGE

.....

MAKHANDIA

JUDGE