REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 597 of 2002

(From Original Conviction and Sentence in Criminal Case No. 331 of 2001 of the Chief Magistrate's Court at Makadara- Mrs. R.N. Kimingi).

BENARD KASYOKI NUNDA……..…….....……..APPELLANT

VERSUS

REPUBLIC……..…….....……..RESPONDENT

JUDGMENT

This is an appeal from the original conviction and sentence entered against ***BENARD KASYOKI NDUNDA***, the appellant herein by Mrs. R.N. Kimingi the then Principal Magistrate at Makadara Law Courts in which she found the appellant before us guilty of the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code and sentenced him to death that being the mandatory sentence for this offence. It is out of the said conviction and sentence that the appellant has lodged the instant appeal.

When I came up for the hearing before us, the state through Mr. Makura, learned state counsel conceded to the appeal. The reason advanced by the state in conceding to the appeal was that when the case in the lower court was heard on 19th August, 2001 and 12th March, 2002, the coram of the court on those days was merely indicated as "***coram as before".*** In the circumstances it was difficult to tell whether there was a prosecutor and even if he was present, whether he was a qualified prosecutor. The proceedings were thus a nullity. Counsel then referred us to the case of ***BENARD LOLIMO EKIMAT & ANOTHER VS REPUBLIC, CA NO.151 OF 2004*** and urged us to nullify the proceedings on that ground.

As to whether we should order a retrial as a consequence, the learned state counsel felt that the ends of justice would not be met by such an order as the appellant had been in custody since January 2001, a period of over 5 years. He therefore urged us not to order a retrial. For obvious reason the appellant welcomed the state's gesture.

We have carefully perused the record of the proceedings of the lower court and confirmed that the court Coram on the following days when the case was heard merely read "***coram as before".*** The dates were 19th October 2001 and 12th March 2002. In the case of ***BENARD LOLIMO EKIMAT*** (Supra) the Court of Appeal stated that where the coram of the court was not properly indicated during the hearing of the case, the proceedings are rendered a nullity since the court had no way of determining whether in a such situation there was any prosecutor in court and even if there was whether such prosecutor met the requirements set out Section 85(2) as read together with Section 88 of the Criminal procedure Code. That this was not a matter than can be assumed. As we are bound by the decisions of the Court of Appeal, we consequently and for the aforesaid reasons nullify the proceedings and set aside both the conviction and sentence.

In determining whether we should order a retrial or not, we have carefully considered the evidence on record. The appellant was convicted on the basis that he was found in possession of a camera which PW1 claimed was his and had been snatched from him during the robbery. However, there was no prove

documentary or otherwise to show that the camera belonged to the appellant. PW1 did not point out any unique features on the camera that would have proved and or persuaded the court to believe that the camera belonged to the complainant and nobody else. A camera is not a unique item unless evidence is led to that effect. They are all over town nowadays. On the basis of the foregoing we are satisfied that the evidence on record if re-tendered during the retrial would not result in a conviction. See ***MWANGI VS. REPUBLIC (1983) KLR 522.*** Further we note that the appellant was arrested on 26th December 2000 and has been in custody since. This is a period of well over six years. Taking this period of incarceration into account together with our of observation of the tenuous nature of the evidence on record, we agree with the learned state counsel that the interests of justice would not require an order for the retrial to be made. In our judgment, such an order would occasion the appellant prejudice. See ***AHMED ALI DHARAMSHI SUMAR VS. REPUBLIC (1964) EA 481*.**

For all the foregoing reasons, we find that it is not desirable to make an order for retrial. We decline to do so. Instead we order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 6th day of June, 2006

LESIIT

JUDGE

MAKHANDIA

JUDGE