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

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 323 of 2001**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 20711 of 1999 of the Chief Magistrate's Court at Makadara (R. N. Kimingi -SRM)**

**BENSON MUTAVA MUINDE……..…..…….……..……APPELLANT**

**VERSUS**

**REPUBLIC…….....…….....RESPONDENT**

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

**BENSON MUTAVA MUINDE** was convicted of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** in count I, **BURGLARY AND STEALING** contrary to **Section 304(2)** and **279(b)** of the **Penal Code** in count 2 and indecent assault contrary to **Section 144(1)** of the **Penal Code** in the alternative charge to count 3. The Appellant was sentenced to death in count 1 and to 3 years imprisonment with 3 strokes of the cane in counts 2 and 3.

The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

When the appeal came up for hearing, **MRS. GAKOBO**, learned counsel for the State submitted that the State was conceding to the appeal because of a technical reason. That on 2nd February 2000 and 7th December 2000 when the case came up for hearing, the Coram of the court was not indicated. That there was no telling whether there was a prosecutor qualified to conduct the proceedings as required in law.

We have perused the record of the proceedings and have confirmed that indeed the learned trial magistrate did not indicate the Coram of the court on the two occasions on 2nd December 2000 when the prosecution case begun and on 7th December 2000 when the defence was heard. The Court of Appeal in the case of **BERNARD LOLIMO EKIMAT vs. REPUBLIC CA No. 151 of 2004** at page 3 and 4 observed: -

"***It is difficult to appreciate what the phrase "coram as before" meant in the records as that entry is followed by specifically stating that the accused and court clerk Makori were present but does not specifically state whether the prosecution was also present… On our own perusal of the record as reflected above, we agree with the learned counsel for the Appellant, that there was nothing in the record to show that the prosecutor was present and prosecuted the case before the trial court."***

That case is in all fours similar to the instant case, as we are unable to tell from the proceedings that there was a prosecutor in court, on those two occasions or whether he was qualified to be such a prosecutor within the provisions of **Section 85(2)** as read with **Section 88** of the **Criminal Procedure**

**Code**. Accordingly we declare the proceedings to have been a nullity, set aside the conviction and the sentence

On the issue of whether or not to order a retrial, **MRS. GAKOBO** urged us to declare a retrial. Counsel submitted that even though the Appellant had been in prison for six years, no prejudice would be suffered by him having regard to the seriousness of the charge, the serious injury caused to the Complainant and the fact that witnesses would be availed for the retrial.

The Appellant has urged the court not to order a retrial. The Appellant submitted that the prosecution and not him, was to blame for the mistake that had occurred and that he should not be made to suffer for it. That he had been in custody for six years. That he was arrested for a different charge and that the charges were framed against him.

We have considered the submissions by both the State and the Appellant in regard to the order for retrial. The principles applicable to such a case are now well settled. An order for retrial cannot be made unless the appellate court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction would result. See **PASCAL BRAGANZA vs. REPUBLIC {1957} EA 152** and **MWANGI vs. REPUBLIC {1983} 522**.

We have considered the evidence on record in this case and are satisfied that a conviction would result if the self same evidence is adduced in a retrial. The charges were serious and even though the Appellant has been in custody for the last six years, we do not think that in the circumstances of this case that any injustice or prejudice would be suffered by him. We therefore order a retrial in this case. We order that the Appellant should be presented before Makadara Senior Principal Magistrate's Court on **12th June 2006** for a plea to the self same original charges read to him on 23/11/99. We order that pending the said plea the Appellant should be held in custody.

Dated at Nairobi this 6th day of June 2006.

…….**…**

**LESIIT, J.**

**JUDGE**

……

**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mrs. Gakobo for State

CC: Tabitha

…….**…**

**LESIIT, J.**

**JUDGE**

……

**M.S.A. MAKHANDIA**

**JUDGE**