



REPUBLIC OF KENYA

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

Criminal Appeal 501 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 2564 of 2003 of the Chief Magistrate's Court at Nairobi (Ms. Siganga – S.R.M.)

JOSEPH NGANGA NGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JOSEPH NGANGA NGURE was convicted in two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and detained under the Presidents pleasure as he was a minor at the time of the commission of the offence. He lodged this appeal to this court having been dissatisfied with the conviction and by implication the sentence

When this appeal came up for hearing, **MRS. OBUO**, learned counsel for the State conceded to the appeal. The learned counsel submitted that he trial before the lower court was defective since the prosecutor who conducted the prosecution was unqualified to do so under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**.

We have perused the record of the proceedings and have confirmed that one **CPL. Osiemo** who was the prosecutor was not qualified to do so. Consequently this rendered the entire proceedings a nullity. See **ELIREMA & ANOTHER vs. REPUBLIC (2003) KLR 537**. Accordingly we quash the conviction and set aside the sentence.

MRS. OBUO did not ask us to order a retrial. Counsel submitted that there was only one eye witness, PW1, who said he identified the Appellant. Counsel submitted that the circumstances of identification were not good. Further more, learned counsel continued, the arrest was effected after a chase and PW1 did not state whether or not he had lost sight of the attackers before the Appellant was apprehended.

We have considered the evidence adduced in the lower court in order to form an opinion whether it could result in a conviction if we ordered a retrial. See **MWANGI vs. REPUBLIC 1983 KLR 522**. It is true that the Appellant was identified only by PW1. PW1 was the second victim of the attack on the night in question. He had left a colleague outside their plot at 11.00 p.m. to get a jacket. He went back to find his colleague, PW3 lying on ground being robbed. He too was robbed. Their neighbour PW2 heard the commotion and on going out the robbers ran away in different directions but not before injuring him and leaving behind a toy pistol. There is inconsistency concerning the Appellant's arrest; whether he was arrested soon after the robbery after a chase as PW1 and PW2 said, or whether he was apprehended an hour later when PW1, PW2 and other neighbours suspected him as PW3 said. It seems PW3's version

may be true because, after he and PW1 were robbed, it was decided that he, PW3, using his motorbike, should take the toy pistol to the Police Station which he did. By the time PW3 left for the Police Station the robbers had ran away and no one had been apprehended. Hence it is our view that the evidence adduced before the Court, if it was adduced again in a retrial, will not result in a conviction. It would cause the Appellant prejudice to order a retrial in the circumstances. We are satisfied that the interests of justice do not require a retrial. We decline to order a retrial in this case and instead order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 18th day of July 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant(s) present

Mrs. Obuo for the State

Erick/Tabitha – Court clerks

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE