REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 756 & 757 of 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 2605 of 2002 of the

Chief Magistrate's Court at Nairobi (A. El-Kindy - PM)

CHARLES IRUNGU WAITITU…..…….
APPELLANT

VERSUS

REPUBLIC …….……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 757 OF 2003

(From original conviction (s) and Sentence(s) in Criminal Case No. 2605 of 2002 of the

Chief Magistrate's Court at Nairobi (A. El-Kindy - PM)

PIUS MUTHOKA KAITHA.....… …….…….
APPELLANT

VERSUS

REPUBLIC …….…….
…..RESPONDENT

J U D G M E N T

CHARLES IRUNGU WAITUTU and **PIUS MUTHOKA KAITHA** were the first and second accused persons in the trial before the lower court in which they were charged jointly with another with four counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and one count of **refusing to permit finger prints and palm prints to be taken** contrary to **Section 21(1)** of the Police Act. The 1st and 2nd Appellants were convicted in counts 2, 3 and 4 and sentenced to death.

When the appeal came up for hearing **Mr. Makura** learned Counsel for the State conceded to the appeals on a technicality. Learned counsel submitted that on the 18th June 2003, and the 30th June 2003 when the hearing of the case proceeded, one Police Constable **Radak** prosecuted the case on behalf of the

prosecution. Counsel submitted that this rendered the proceedings a nullity.

We have perused the record of the proceedings and have confirmed the learned counsel's submission. Indeed the case proceeded to further hearing on both occasions and consequently Police Constable **Radak** who was present as the Public Prosecutor of the case, being unqualified to do so under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code** rendered the proceedings a nullity. Accordingly we quash the convictions and set aside the sentence.

The other issue to determine is whether or not to order a retrial. **Mr. Makura** has urged us to order one on the basis that the interests of justice can only be met if a retrial were ordered. Learned counsel submitted that both Appellants were identified by PW2 and PW3 in respect of the robberies in counts 2, 3 and 4 and that the evidence was strong enough to result in a conviction.

Mr. Mbugua represented the 1st Appellant in this Appeal. Counsel opposed an order for retrial on the grounds that the evidence of the Investigating Officer adduced by the prosecution was unreliable and was not supported by identification parades because the 1st Appellant declined to participate in any. Counsel also submitted that the 1st Appellant had been convicted in count 2 for stealing a motor vehicle registration number KAN 065N as per the Charge Sheet yet the evidence adduced by its owner, PW2 and the vehicle itself was registration No. KAM 065H.

The 2nd Appellant also opposed a retrial and urged the court to consider his written submission which we have done in detail.

An order for a retrial may be made where the original trial, like in this case, was defective. See **MERALI vs. REPUBLIC 1971 EA 221**. Each case is however determined on its own particular facts and circumstances. See **MANJI vs. REPUBLIC 1966 EA 343**. It is however trite law that a retrial should not be ordered unless the Appellate Court is of the opinion that on a proper consideration of the admissible evidence and or the potentially admissible evidence a conviction may result. See **MWANGI vs. REPUBLIC 1983 KLR 522**.

In the instant case there were five different Complainants. PW1, PW2, PW3 and PW5 were in the same vehicle when people emerged from a vehicle parked behind theirs and ordered all of them back to their seats before robbing them of their valuables and later dumping them. They were the Complainants in counts 2, 3 and 4 for which the Appellants were convicted. The Complainant in count 1 was PW7 and even though he claimed to identify the 2nd Appellant and the 3rd accused in the case, his evidence was found to be unreliable.

The learned trial magistrate convicted the Appellants on the basis of identification by PW2 and PW3. There was a serious misdirection in the learned trial magistrate's finding. The learned trial magistrate found that PW2 and PW3 identified both Appellants. In the record of proceedings however, PW2 identified only the 2nd Appellant on the basis of visual identification inside the vehicle after the robbers had carjacked them. PW2 stated that she was able to identify the 2nd Appellant by his ears. PW2 did not claim at any stage of the proceedings that she was able to identify the 1st Appellant. It is difficult to tell how the learned trial magistrate came to such a conclusion in his judgment.

PW3 on the other hand identified the third accused in the case before the trial magistrate. PW3 however indicated that she could identify the 1st Appellant as one she heard the robbers refer to as **Irungu**. However, she identified him only in the dock whilst in court on the day she gave evidence. The evidence of identification of the 1st Appellant by PW3 was of no probative value for two reasons. One PW3 had not given any description of any of the robbers that she could identify to the police during the period of investigations. Two, there was no identification parade conducted for the identification of the 1st Appellant because he declined to participate in any identification parade.

We agree with counsel for the 1st Appellant that the evidence of identification that formed the basis of

the convictions in this case was unreliable. Besides the learned trial magistrate misdirected himself when he found that PW2 and PW3 identified the 1st and 2nd Appellants' while in fact PW2 identified only the 2nd Appellant and while the 1st Appellant was identified in court by PW3.

As for count 2, the Appellants were convicted of robbing PW1 of his motor vehicle KAN 065N. In court a vehicle KAM 065H was produced as exhibit 1 and identified by PW1 as the vehicle stolen from him. The learned trial magistrate did not address his mind to the glaring contradiction in the registration numbers of the vehicles mentioned in the charge sheet and the one produced as an exhibit in court. That contradiction was materials and went to the substance of the charge. That contradiction cannot be resolved in a retrial. In the circumstances it would cause the Appellants to suffer prejudice if we ordered that they be retried for the robbery committed in count 2.

Having considered the evidence as a whole and submissions by all parties, we are of the opinion that a conviction may not result if a retrial were ordered in this case. We do not believe that the interest of justice requires that a retrial be ordered. We decline to order a retrial. We direct that the Appellants be set free unless they are otherwise lawfully held.

Dated at Nairobi 19th day of September 2006

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant (s)

Mr. Mbugua for the 1st Appellant

Mr. Makura for State

Tabitha/Erick – CC

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE