



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

Criminal Appeal 728 of 2001

(From original conviction (s) and Sentence(s) in Criminal Case No. 945 of 1999 of the Chief Magistrate's Court at Makadara (Mr. Rinjeu - PM)

CHARLES MATHEKA MULONZA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

CHARLES MATHEKA MULONZA was the only accused person convicted on count 1 of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code** and after a full trial. He was the 1st accused among 7 other accused persons. He was sentenced to death as prescribed in the law. Being aggrieved by the conviction and sentence the Appellant lodged this appeal.

When the appeal came up for hearing, the State through her counsel **MISS GATERU** conceded to the same on a technicality that six prosecution witnesses were led in their evidence by an unqualified police prosecutor. We have perused the record of the proceedings and have found that one Police Constable **SIMIYU** conducted part of the prosecution when he led PW4, PW5, PW6, PW7, PW8 and PW9 in their evidence. Indeed the said constable was not qualified to conduct the prosecution of the case as he was of the rank below that of an Acting Inspector of Police. We are led in that finding by the Court of Appeal case of **ROY ELIREMA & ANOTHER vs. REPUBLIC (2003) KLR 537**. That was not the only defect that rendered the proceedings a nullity. There were two magistrates who conducted the trial. One **O. OTUNYA CM** as he then was, heard the whole of the prosecution case. Mr. **RINJEU PM** then took over and heard the defence. The succeeding magistrate did not comply with the mandatory provisions of **Section 200 (3)** of the **Criminal Procedure Code**. See **NDEGWA vs. REPUBLIC 1985 KLR 534**. Consequently, the trial was also a nullity for this second reason. Accordingly, we quash the conviction and set aside the sentence.

On whether or not to order a retrial, **MISS GATERU** urged us to order one on grounds that there was strong circumstantial evidence to sustain a conviction. Counsel submitted further that witnesses would be availed for a retrial.

The Appellant on his part opposed a retrial being ordered. The Appellant submitted that since he was not to blame for the error which occurred during the trial, he ought not to be punished for it. The Appellant also urged us to consider that inordinate delays do occur when retrials are ordered and he urged the court to consider his interests as well.

We have taken into account all the principles applicable when a court considers a retrial. The cardinal rule is that no retrial should be ordered if the accused person will suffer prejudice and if the appellate court is of the view that no conviction may result. See **MWANGI vs. REPUBLIC 1983 KLR 522**.

In this case the reason the learned trial magistrate gave for convicting the Appellant was that he confessed to the offence. The evidence against him was circumstantial in that the Appellant was captured on closed circuit video footage walking in and out of the banking hall and staff area several times before the robbery. He was however not identified by any of the eyewitnesses to the robbery.

Having considered the evidence adduced, we are not satisfied that a conviction may result if a retrial was ordered. The confession statement which may have otherwise strengthened the circumstantial evidence against the Appellant would no longer be admissible in evidence since **Section 28** of the **Evidence Act** which enabled such admission has since 2003 been repealed.

We find the Appellant has also been in custody since April 1999, which is six years and 7 months today. We are of the view that a retrial will occasion prejudice and suffering to the Appellant. We decline to order a retrial. We order that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi 2nd day of November 2006

.....

LESIIT, J.

JUDGE

.....

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for State

Tabitha/Erick – CC

.....

LESIIT, J.

JUDGE

.....

MAKHANDIA

JUDGE