

REPUBLIC OF KENYA

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

CRIMINAL APPEAL NO. 765 of 2002

BARNABAS EVANS NYATINDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant BARNABAS EVANS NYATINDO was convicted for the offence of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code and sentenced to suffer death.

MISS NYAMOSI, learned counsel for the State, conceded the Appeal on a technicality. MISS NYAMOSI submitted that the trial was partly conducted by an unqualified police prosecutor and was therefore, a nullity. We have perused the record of the proceedings. The said proceedings were conducted by one MRS. C. MEOLI, Principal Magistrate but before she could make a ruling, the case was taken over by one MRS. S. NDAMBUKI, Senior Resident Magistrate. Under Section 200 of the Criminal procedure Code, MRS. NDAMBUKI proceeded to re-call some witnesses on request by the accused persons, who included the Appellant. Those witnesses were led in evidence by one CORPORAL OSIEMO. CPL. OSIEMO was unqualified to conduct the prosecution under Section 85(2) as read with Section 88 of the Criminal Procedure Code. The purported prosecution of the case by CPL. OSIEMO rendered the entire case a nullity. We have no choice but to declare the proceedings before the trial court a nullity and to quash the conviction and set aside the sentence.

On the issue of retrial, MISS NYAMOSI urged the Court to order a retrial. However, when the Appellant drew the Court's attention to page 60 lines 8 to 16 of the proceedings, MISS NYAMOSI dropped her idea to seek a retrial. Page 60 lines 8 to 16 of the proceedings read as follows: -

“Prosecutor I have no objection to the Application by the defence for the witnesses other than the one who has been short dead and the ones who have left the country to be re-called.

Court:

The case is not to be heard de-novo but the Application by the defence for PW3, PW9 and PW13 to be recalled is granted.” To be able to understand the sentiments expressed by the prosecution before the Court, it is important for us to include the statement made earlier by the same prosecutor found at Page 59 from line 6 thus: -

“Prosecutor

I have talked to the Investigating Officer, IP Odinga yesterday and he informed me that most of the key witnesses in this case cannot be traced. The Complainants were Missionaries from the U.S.A. and their term expired and they left for the US in 2001. The other important witness one CIP MUKABI who caused the first accused to be arrested was short dead by gangsters just a few months after he had testified in this case. Most of the other witnesses who were working with the Complainants in the Ministry who were also key witnesses have left for the US and it is very difficult or impossible to trace them. It will not be in the interest of justice for the case where the accused have been placed on their defence to be heard de-novo.” From the above sentiments, it is quite clear that the key witnesses in this case cannot be available for a retrial, because of either having left the country or having died. In the case of ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2002, the Court of Appeal declined to order a retrial inter alia on the

grounds that the prosecution could not give any assurance that witnesses in the case could be traced. In this case, we have on record a clear indication that the Complainants left the country for their homeland. It was the prosecution view, during the trial that they could not be traced. We do not think that the position could have changed since then. In the circumstances, we are forced to decline to order a retrial in this case as that will not only cause prejudice to the Appellant, it will not be in the interest of justice to do so. We therefore order that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 31st day of May 2005.

LESIT, J.

JUDGE

F.A. OCHIENG'

JUDGE