REPUBLIC OF KENYA

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

Criminal Appeal 1182, 1183, 1184 & 1185 of 2001

DAVID WEKESA NALIBULA alias MUKONDOKO…..…..APPELLANT

VERSUS

REPUBLIC…….....……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1183 OF 2001

***(From original conviction (s) and Sentence(s) in Criminal case No. 66 of 1998 of the Principal Magistrate's Court at Kiambu (G.M. Njuguna -SRM*)**

DANIEL OPAYI ONYANGO alias ONGANGA…….....……..APPELLANT

VERSUS

REPUBLIC…….....……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1184 OF 2001

***(From original conviction (s) and Sentence(s) in Criminal case No. 66 of 1998 of the Principal Magistrate's Court at Kiambu (G.M. Njuguna -SRM*)**

WYCLIFE NYANGWE OMOKA alias MOI…….....……..APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1185 OF 2001

***(From original conviction (s) and Sentence(s) in Criminal case No. 66 of 1998 of the Principal Magistrate's Court at Kiambu (G.M. Njuguna -SRM*)**

DONALD KULIVA MELI alias BESTE…….....……..APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

J U D G M E N T

The Appellants **DAVID WEKESA HALIBULLA** (hereinafter referred to as the 1st Appellant) **DANIEL OPAYI ONYANGO** (2nd Appellant) **WYCLIFF NYANGWESO OMUKA** (3rd Appellant) and **DONALD KUTWA MELI** (4th Appellant) had all been charged together with six counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The 4th Appellant was also charged alone with three counts **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code**. The capital robberies are alleged to have occurred on the night of 7th and 8th August 1998 at Red Hill area in Kiambu District, within Central Province. The Appellants' appeals were consolidated for convenience having arisen out of the same trial.

When this case came up for hearing before this court on 14th April 2005, **MRS. TOIGAT** learned counsel for the State, notified the Court that she was conceding the appeal. She submitted that the person who prosecuted the entire proceedings before the trial court was unqualified to do so.

We have perused the record of the lower court. We confirmed that one **SGT. WAITHAKA** led the evidence of the Complainant in count 2, and who was PW2 in the case. The rest of the prosecution was conducted by various Inspectors of Police. Does the prosecution of a single witness by **SGT. WAITHAKA** render the proceedings defective?

In the now celebrated case of **ROY ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2002** (Mombasa) **OMOLO**, **TUNOI** and **LAKHA JJA**, held;

*"**This narrative shows that a large portion of the prosecution was conducted either by Corporal Kamotho or by Corporal Gitau. It is however true that an Inspector Wambua also conducted part of the prosecution. But if a Police Corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. the parts conducted by Corporals Kamotho and Gitau) are invalid. There was only one trial one trial and if any part of it was materially defective the whole trial must be invalidated."***

The above case is authority for the legal position, that once any part of a trial is materially defective, that invalidates the whole trial. In this case therefore, the prosecution by **SGT. WAITHAKA,** even though forming a very small part of the prosecution, rendered the whole trial defective and thus null and

void. We have no choice but to declare the whole trial a nullity and consequently we quash the conviction and sent aside the sentence.

The remaining issue is whether we should order a retrial or not. **MRS. TOIGAT** has sought a retrial and the reasons she has advanced are that there was sufficient evidence to sustain a conviction. She also submitted that evidence of recovery of the stolen goods as adduced during the trial, was strong enough to sustain a conviction and that therefore, a retrial should be ordered.

All Appellants opposed a retrial. The 3rd Appellant in strongly opposing a retrial submitted that he had been in remand since his arrest in 1998 and urged the court to release him. The 4th Appellant on his part submitted that the initial trial took three and a half years which was long. He urged the court to release him.

The principles applicable in determining whether an order for retrial should be made are how well settled. One of these principles was well spelt out in the case of **MWANGI vs. REPUBLIC 1983 KLR 522** where **HANCOX JA., CHESONI** and **NYARANGI Ag. JJ**A held:

"***We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result."***

We have re-evaluated the evidence adduced before the lower court. To our minds, the evidence adduced against the 2nd and 4th Appellant was very weak and could not successfully sustain a conviction in case of a retrial. As of the 1st and 3rd Appellants, the evidence against may result in a conviction. However, that is not the only principle applicable in such a case. We must also consider whether witnesses may be available for the retrial if ordered. In **ROY ELIREMA's** case (supra) the Court of Appeal declined to order a retrial *in alia* on grounds that the witnesses may not be availed. In this case, we have considered the submission by **MRS. TOIGAT**. She did not mention anything concerning the availability of witnesses. The State is best placed to determine that issue. We have, on our part, considered the lapse of time between the date the offence was committed and now. There has been a lapse of six years and four months. That is a very long time and it cannot be assumed that the witnesses will readily be availed for the hearing. As the 4th appellant pointed out, the initial trial took three and a half years due to unavailability of witnesses at the times when they were required. That is an indication to us that six years later, they may not be available at all.

We have also considered two other factors. In the Court of Appeal's decision in **PIUS OLIMA & ANOTHER vs. REPUBLIC CA No. 110 of 1991**, **AKIWUMI, JA.,** held, and his two brothers in that court, **COCKAR** and **MULI JJA** agreed as follows;

"***The principles which emerge are that a retrial may be ordered where the original trial, as was found by the High Court, and with which we agree, is defective, the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."***

Having considered all the circumstances of the case, the length of time the Appellants have been in prison custody during the pendency of the trial and of this Appeal, and having considered the facts of the case, we hold that the order for re-trial should not be made. We are satisfied that if made, a retrial will cause prejudice to the Appellants. We are also of the strong view that the interests of justice do not require the order to be made. We, therefore, decline to order a retrial in this case. The Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 10th day of May 2005.

LESIIT, J. **F. A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

LESIIT, J. **F. A. OCHIENG**

JUDGE **JUDGE**