



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**CRIMINAL APPEAL NO. 1140 OF 2002**

**JOSEPH MUTURI.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

**JOSEPH MUTURI**, the appellant herein was charged alongside two other accused persons. The said other persons were **NELSON M. MUCHIRI** and **JOSEPH NDUNGU**.

The charges preferred against the three accused were for **ROBBERY WITH VIOLENCE** contrary to section 296 (2) of the Penal Code. The accused persons also faced an Alternative charge of **HANDLING STOLEN PROPERTY** contrary to section 322 of the Penal Code.

Following a full trial, the court acquitted the 3rd accused, Joseph Ndungu. However, the appellant and the 1st accused, Nelson M. Muchiri were convicted of Robbery with violence, and sentenced to death. The two of them then lodged appeals before this court. However, before his appeal could be heard, Nelson M. Muchiri passed away.

At the hearing of this appeal, the learned state counsel, Mrs. Gakobo notified the court that she was conceding the appeal. Her reason for the said concession was that apart of the trial was prosecuted by one CPL Osiemo, an unqualified prosecutor.

We have perused the record of the proceedings before the trial court and verified that on 14th October 2002, the prosecutor was CPL OSIEMO. He prosecuted the case during the time when PW5 testified. He then sought an adjournment, so as to enable IP Warutere be present in court as a witness. Having heard objections from the three accused persons, the learned trial magistrate rejected the application for adjournment.

At that point **CPL OSIEMO** decided to close the prosecution case. The court then ruled that the prosecution had established a prima facie case against the accused persons, and put them on their defence.

Two of the accused persons gave unsworn statements, in the respective defences, and called no other witnesses. But the 3rd accused gave a sworn defence, and was then cross-examined by CPL OSIEMO.

From the foregoing, it is clear that CPL OSIEMO did perform the role of a prosecutor. Yet, by virtue of the provisions of section 85 (2) of the Criminal Procedure Code, he was not qualified to be appointed as a public prosecutor.

The effect of his conducting himself as a public prosecutor, when not qualified to be so appointed is to render the whole trial a nullity, as was held by the court of appeal in ROY RICHARD ELIREMA & ANOTHER, CRIMINAL APPEAL NO. 67 OF 2002 (At Mombasa). We therefore accordingly quash the conviction and set aside the sentence against the appellant.

However, the learned state counsel has asked this court to order a retrial. She said that all the witnesses in the case were Kenyans, who should therefore be available, if a retrial was ordered. She also pointed out that the appellant had been in custody for less than 3 years, and that he therefore would not be prejudiced by an order for a retrial.

In answer to the application for a retrial, the appellant raised a strong objection. As far he is concerned, he had already been in custody for too long. He said that prior to his arrest, he had been involved in a traffic accident, as a result of which he had been going for treatment at the Aga Khan Hospital. The said treatment was said to be incomplete.

The appellant also said that a retrial would be prejudicial to him as the prosecution would be afforded an opportunity to introduce further evidence.

We have carefully weighed those competing submissions. To our minds, the most important goal which the court ought to try and achieve is justice. Clearly, Justice is for both the appellant as well as the victim of the offence.

In this case, PW1 said that he identified the appellant during the robbery. He reported the incident to the police, a few minutes later, and says that he described the appellant. PW3, PC Samuel Ndirangu, confirmed that PW1 did give, to the police, the description of the suspects.

PW5 said that he recovered a stolen jack from the place where the appellant had hidden it. PW5 was led to the said place by the appellant.

On the basis of the brief evidence above, it would appear to us that the prosecution would not need to adduce much more evidence against the appellant. Therefore, there is no merit in the appellant's contention that a retrial would accord the prosecution an opportunity to canvas further evidence.

We have also taken into account the fact that PW1 lost the sum of Kshs.121,000/=, which had been raised at a pre-wedding. The implications of that robbery were therefore serious, as they would certainly have impacted negatively on the wedding plans.

In conclusion, we find that the interests of justice demands that the appellant be retried. We therefore order that there shall be a retrial of the appellant. His said retrial will be conducted by any magistrate's court of competent jurisdiction, save for Ms Siganga,

who had presided over the first trial. We further direct that the retrial be accorded priority.

Finally, as the charges facing the appellant are of a capital nature, the appellant shall remain in custody, while awaiting his retrial.

It is so ordered.

Dated at Nairobi this 3rd day of May, 2005

**O.K. MUTUNGI**

**JUDGE**

**FRED A. OCHIENG**

**JUDGE**

Delivered in the presence of:

For State

Appellant in person

Mr. Odero/Ndungu court clerks