

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APPELLATE SIDE

Criminal Appeal 19 of 2003

AS CONSOLIDATED WITH

Criminal Appeal 20 21 22 & 23 of 2003

RICHARD OTIENO OMOLO)

JAMES MBUGUA KURI)

JOHN OTIENO)
APPELLANTS

JOSEPH OYORO WAMBAI)

JOHN KARIUKI MWANGI)

AND

REPUBLIC
RESPONDENT

Being Appeals from the Judgment in Eldoret C. M.'s Court Criminal Case No. 149 of 1999 delivered on 20/02/2003 by L. W. Gitari (Ms.) P.M.)

JUDGMENT

The appeals before us, which were consolidated for hearing and final determination arise from the judgment in a matter where these five appellants were convicted of twelve counts of robbery with violence, and for which they were sentenced to suffer death.

Mr. Omutelema learned State Counsel concedes to the appeal and we are inclined to agree with him, for despite the requirements of section 85 of the Criminal Procedure Code that only police officers of the rank of Assistant Inspector of Police and above shall be public prosecutors, it appears from the trial records that the case against these five was partly prosecuted by one Police Constable Mwangi on various dates, when he led the evidence of PW4, PW16 and PW19, which renders the trial a nullity. We therefore set aside the convictions and quash the resultant sentences.

Mr. Omutelema however prays for a retrial.

We are well alive to the principle that in general, a retrial will be ordered only when the original trial was illegal or defective. *“It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances, and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused (Ezekiel Nangale Akoyo v. Republic Cr. A. (Kisumu) No. 239/2002)”*.

Though the appellants were sentenced two years ago, they have been in custody for the last six years. We feel that to order a retrial at this stage would be unjust, and having allowed the appeal, and set aside the convictions and quashed the sentences, we do order that the five be set at liberty forthwith unless otherwise held in lawful custody.

Dated and delivered at Eldoret this 30th day of June 2005.

JEANNE GACHECHE

GEORGE DUKU

Jugde

Ag.judge

Delivered in the presence of:

Mr. Omutelema for the state The five (5) appellants