



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 636 of 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 4713 of 2001

of the Chief Magistrate’s Court at Thika (Betty Rashid- P.M.)

JOSEPH MWANIKI WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 641 of 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 4713 of 2001

of the Chief Magistrate’s Court at Thika (Betty Rashid- P.M

DAVID WAINAINA NGUKU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

JOSEPH MWANIKI WAWERU and **DAVID WAINAINA NGUKU**, the 1st and 2nd Appellants respectively were found guilty of robbing **PETER MAINA NJOROGE** of his personal belongings and cash including a motor vehicle registration No. KYT 455. They were sentenced to death. They have challenged both the conviction and sentences.

MR. MAKURA, learned counsel for the Respondent conceded to the Appeal on grounds that the prosecutor in the case, when the wife of the Complainant, PW3 gave evidence was unqualified. He was Police Constable **OMULEPU**. **MR. MAKURA** submitted that the prosecution by **PC OMULEPU** rendered the entire proceedings a nullity. We agree that that is the correct position of the law particularly in light of the case of **ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2002.**

We have on our part perused the record of the proceedings. It is true that **PC OMULEPU** conducted the prosecution of the case at the time the Complainant’s wife, PW3 gave evidence. That rendered the entire

proceedings a nullity. Accordingly, we invalidate the same, quash the convictions and set aside the sentences.

MR. MAKURA submitted further that the State was not desirous of a re-trial. He submitted that there was one identifying witness and that in his humble view, it was going to be an uphill task to secure a conviction. The Appellants did not oppose that preposition.

An order for retrial may be made where, like in this case, the original trial was a nullity. Such an order should, however, only be made upon certain considerations. Part of the considerations are whether on the admissible or potentially admissible evidence a conviction may result. We have evaluated the evidence that was adduced before the Court and find that a conviction may not result if a retrial were ordered. Not only was the evidence of identification by a single witness but also the circumstances of identification were extremely difficult. That kind of evidence in our view cannot sustain a conviction. Accordingly we decline to order a retrial. We order instead that both Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 2nd day of June 2005.

LESIT, J.

F.A. OCHIENG'

JUDGE

JUDGE

Read, signed and delivered in the presence of;

LESIT, J.

F.A. OCHIENG'

JUDGE

JUDGE