



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 273 of 2003

(From Original Conviction and Sentence in Criminal Case No.4392 of 2002 of the Chief Magistrate's Court at Kibera).

JOHN ODHIAMBO KAPTENAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **JOHN ODHIAMBO KAPTEN** was convicted on two counts of robbery with violence contrary to Section 296 (2) of the penal Code. He was accordingly sentenced to death as prescribed by the Law. Being aggrieved by the conviction and sentence, he lodged the instant Appeal.

When the Appeal came up for hearing before us, Ms. Nyamosi Learned State Counsel conceded to the same. The reason advanced for the concession was that the trial in the Court below was conducted by a Prosecutor who did not meet the requirements set out in Sections 85 (2) and 88 of the Criminal Procedure Code. Accordingly, the proceedings in the Lower Court were a nullity and the Learned State Counsel invited us to so hold.

The Learned State Counsel further submitted that in the event that we agreed with her and allowed the Appeal for the aforesaid reason she was seeking an order for retrial. In support of that position, Counsel submitted that the trial in the Lower Court was concluded on 27th October, 2003 and that therefore the Appellant had not been in prison for a long time. That the evidence on record was overwhelming. That the Appellant would not be prejudiced if an order of retrial is made and finally that the witnesses were readily available to testify again.

The Appellant as expected welcomed the state's gesture. However he was opposed to an order for retrial. He submitted that he was not a party to the prosecution of the case by an unqualified Prosecutor. The order of retrial would be prejudicial to him as the exhibits had been released to the Complainants. He further submitted that he has been in custody for too long i.e. a period of 2 $\frac{1}{2}$ years which period may not be taken into account to his benefit in the event of a retrial. He concluded his submissions by asking us to decline to make an order of retrial.

We have verified from the record of the proceedings of the Lower Court that the case was alternately prosecuted by Sergeant Mathenge and Corporal Osiemo. In the light of the mandatory provisions of Sections 85 (2) and 88 of the Criminal Procedure Code in which the Attorney general is only authorised

to appoint Public Prosecutors either from amongst Advocates of the High Court of Kenya, or from amongst persons employed in the public service, provided that the said persons if police officers must not be below the rank of an Assistant Inspector of Police. By virtue of their ranks, Sergeant Mathenge and Corporal Osiemo were unqualified to be appointed public prosecutors; as their respective ranks are well below that of an Assistant Inspector of Police.

The Court of Appeal has had occasion to deal with an Appeal arising out of circumstances similar to the instant case. When handling an Appeal in which an unqualified person had acted as Public Prosecutor, the Court of Appeal held that such conduct rendered the entire proceedings a nullity. We are of course referring to the case of **ROY RICHARD ELIREMA & ANOR VS REPUBLIC (2004) KLR 564**. That decision is binding on us. In the result we hold and determine that the trial of the Appellant was a nullity. Accordingly his conviction is quashed and the sentence imposed set aside.

We were urged by the Learned State Counsel to order a retrial. Under what circumstances should a retrial be ordered? We think that the principles are well settled. See **AHMED SUMAR VS REPUBLIC (1964) EA 481, MERALI & ANOR VS REPUBLIC (1971) EA 221 AND MWANGI VS REPUBLIC (1983) KLR 522**. The Principles that seem to run through all these authorities is that each case must be considered on its peculiar facts and circumstances but an order for retrial should only be made where the interest of justice require it.

Having carefully analysed, re-assessed and re-evaluated the evidence tendered in the trial Court as expected of us as a first Appellate Court (see **OKENO VS REPUBLIC (1972) EA 32**), we are persuaded that if the same evidence is tendered a conviction is likely to result, particularly having regard to identification and mode of arrest of the Appellant. However there is one snag that militates against the making of an order of retrial. On the 27th October, 2003 the Learned trial Magistrate made the following order:-

“....No Appeal has to date been filed herein, the exhibits herein be released to the investigating officer who will in turn release the said exhibits to the rightful owners....”

From the foregoing the exhibits have been released. The exhibits were major component of the charge sheet that faced the Appellant. Now if they have been released, can they be retrieved for purposes of retrial? We expected the Learned State Counsel to address this issue in her submissions once it was raised by the Appellant. Unfortunately no such response was forthcoming. However whether the exhibits will be retrieved for purposes of the retrial is not up to this Court to determine, similarly this Court cannot assume that the exhibits may not be retrieved.

We note that the order releasing the exhibits on the basis that no Appeal had been preferred was made on 27th October, 2003 yet the Appeal had already been filed on 3rd April, 2003. We think that had the Learned Magistrate exercised some restraint and made some enquiries, she could not have made such an Order with far reaching consequences.

However all said and done, we are of the view that it will be in the interest of justice to order a retrial. Accordingly we order that a retrial be held in this case. The Appellant should be presented before the Senior Principal Magistrates Court, Kibera on 5. 8. 2005 for a plea to be taken on the same charges. In the meantime and pending his appearance in Court as aforesaid the Appellant shall remain in custody.

Dated at Nairobi this 29th day of July, 2005.

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LESSIT J.

JUDGE

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M. S. A. MAKHANDIA

JUDGE