



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**Criminal Appeal 162 of 2003**

**(From original conviction (s) and Sentence(s) in Criminal case No. 3960 of 2002 of the  
Chief Magistrate's Court at Kibera (Mr. Githinji – S.R.M.)**

**DAVID OWINO OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant **DAVID OWINO OTIENO** was convicted on one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as mandatorily provided in the law. Being dissatisfied with the conviction and sentence, he lodged this appeal.

**MRS. KAGIRI** learned counsel for the State has conceded the appeal on grounds that one **SGT. MATHENGE**, who prosecuted the case before the trial Court, was unqualified to do so. She urged us to declare the proceedings defective.

We have confirmed from the record of the proceedings that the prosecutor of the case before the trial court, and who led prosecution witnesses numbers one to eight was one **SGT. MATHENGE**. He was unqualified to be appointed a public prosecutor and the prosecution of the case by him was in contravention of **Section 85(2)** and **Section 88** of the **Criminal Procedure Code**. Accordingly the entire proceedings of the trial court were rendered defective. We declare them invalid, quash the conviction and set aside the sentence.

**MRS. KAGIRI** learned counsel for the State urged the Court to order a retrial on the grounds that the offence is very serious. Learned counsel submitted that the evidence on record was strong and straightforward. The counsel submitted that the evidence adduced proved beyond doubt that the Appellant and others robbed the Complainant and caused the death of another.

The counsel submitted that the witnesses would be availed for a retrial and no prejudice will be suffered by the Appellant.

The Appellant submitted that he was sick, had been in custody for three years and consequently he would suffer prejudice if a retrial were ordered.

We have analyzed and re-evaluated the evidence on the record of the proceedings.

The evidence on record is strong enough to sustain a conviction in our view. An order for retrial can be

made where an appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See MWANGI vs. REPUBLIC 1983 EA 522. We are satisfied that a conviction may result in this case if a retrial were ordered.

We are aware that an order for retrial should only be made where the interests of justice require it and where the accused will suffer no prejudice – See MANJI vs. REPUBLIC 1966 EA 343. We are satisfied that the interests of justice require that an order for retrial should be ordered. We have also taken the Appellant’s interests into consideration. He has been in prison custody since February 2003, just over 2 years ago. No prejudice will be suffered by the Appellant if a retrial were ordered. We order that a retrial should be heard in this case.

The Appellant is to remain in custody until 1st August 2005 when he should be produced before Kibera Senior Principal Magistrate’s Court for a plea in this case. Since the Appellant has been in custody for some time we direct that the retrial be heard expeditiously and before a competent magistrate except **MR. GITHINJI** who heard the original trial.

Dated at Nairobi this 26th day of July 2005.

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**LESIT, J.**

**JUDGE**

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**M.S.A. MAKHANDIA,**

**JUDGE**