REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 182 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 5254 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Siganga – S.R.M.)

ERNEST MUKUNZI OKWOMI……..……..…..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 183 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 5254 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Siganga – S.R.M.)

GODFREY OMODING WEKESA……..……..…..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 184 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 5254 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Siganga – S.R.M.)

KENNEDY MARETE MUPALA……....APPELLANT

VERSUS

REPUBLIC……..…… ……....RESPONDENT

J U D G M E N T

The Appellants herein **ERNEST MUKUNZI OKWOMI**, (1ST Appellant), **GODFREY**

OMODING WEKESA, (2nd Appellant) and **KENNEDY MARETE MUPALA** (3rd Appellant) were convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to Section 296 (2) of the Penal Code in counts 1 and 2, and **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 251** of the **Penal Code**. They were sentenced to death on first two counts and to a suspended sentence of one year imprisonment in count 3. They were all aggrieved by the convictions and therefore lodged these appeals.

When the appeal came up for hearing, **MRS. KAGIRI,** learned counsel for the State conceded to the appeal on grounds that the prosecution of the case before the lower court was conducted by an unqualified public prosecutor.

We have perused the record of the proceedings and we have confirmed that one **CORPORAL OSIEMO** and one **POLICE CONSTABLE KENDUIYWO** led two prosecution witnesses each in the case. That rendered the entire proceedings a nullity in light of the Court of Appeal case of **ROY ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2000.** We declare the proceedings a nullity quash the conviction and set aside the sentence.

MRS. KAGIRI has urged this court to order a retrial of the case on three grounds. One, that the evidence against the Appellants proved the charges against them. Two, that the witnesses are available and three that no prejudice will be suffered by the Appellants if a retrial were ordered.

All the Appellants opposed an order for retrial. The 1st Appellant submitted that he had suffered while in custody for the last 3 years. He urged the court to give him the benefit of doubt. The 2nd Appellant submitted that the trial magistrate knew the law and that allowing **CPL. OSIEMO** to conduct the prosecution case was deliberate and should not be visited on him.

Further, that the witnesses fabricated the case against them and that it may be repeated.

The 3rd Appellant urged us to consider his interest in the sense that out of the ten prosecution witnesses, only PW5 identified him and that he had a grudge with him.

It is trite law that an order for retrial can be made where the original trial was, like this one defective. See **MANJI vs. REPUBLIC 1966 EA 343.**

However, the order should not be made where the interests of justice do not require it and where the accused person(s) may be prejudiced by it. **See SUMAR vs. REPUBLIC 1964 EA 481.** The other principle applicable is that no order for retrial should be made where the appellate court is of the opinion that on a proper consideration of admissible or potentially admissible evidence, a conviction may not result. **See MWANGI vs. REPUBLIC 1983 EA 522.**

We have considered the evidence on record and it is our view that it was not credible or reliable. There was one independent witness who was PW5. He was a watchman at **KAURUKU MUTI NI DAWA CLUB** at Kawangware stage 2. His evidence clearly shows that the Complainant in this case, PW1, PW2 and PW3 were customers at the club while the Appellants were patrons at the same club. The Appellants complained to PW5 against the Complainants herein and urged him to remove them from the club which he refused. Eventually PW1, PW2 and PW4 walked out of the club followed by the Appellants and outside on the road, a fight ensued between them. Only PW3 talked of himself, PW1 and PW2 having gone to a bar for a drink before proceeding to escort him (PW4) to his house.

PW1 and PW2 did not say anything about a bar or a drink or a fight. In light of the inconsistency in the evidence of the prosecution, it is doubtful that the charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of the **Penal Code,** which the Appellants faced, could be sustained. If anything the evidence before the court could only sustain a conviction for **ASSAULT** contrary to **Section 251** of the **Penal Code.**

We have considered that the Appellants have been in prison custody for the last 3 years.

For the offence of assault 3 years imprisonment would be sufficient punishment. In the circumstances an order for retrial would prejudice the Appellants unfairly and we are not convinced that the interests of justice would require it. We decline to order a retrial and order that all three appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 26th day of July 2005.

……..

LESIIT, J.

JUDGE

……..

M.S.A. MAKHANDIA,

JUDGE