



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 261 of 2002
CONSOLIDATED WITH**

Criminal Appeal 262, 236 & 264 of 2002

**(From original conviction and sentence in Criminal Case No. 622 of
2000 of the Senior Resident Magistrate's Court at Molo – KIRUI
(SRM))**

PATRICK OKUMBI OCHANJA.....1ST APPELLANT

JOASH TCHANGAI.....2ND APPELLANT

PETER KOGI KINYANJUI.....3RD APPELLANT

PETER MWANGI NJOROGE.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Patrick Okumbi Ochanja, Joash Tchangai, Peter Kogi Kinyanjui and Peter Mwangi Njoroge were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 24th of January 2000 at Tayari Farm, Molo, the appellants jointly robbed Johnson Muniko Marwa of Kshs 20,000/-, one jacket, one torch and one scarf all valued at Kshs 22,160/= and at or immediately before or immediately after the time of such robbery, while armed with *pangas* and *rungus* used actual violence to the said Johnson Muniko Marwa. The appellants pleaded not guilty to the charge when they were arraigned before the trial magistrate's court. After a full trial, the appellants were found guilty as charged and sentenced to death as mandatorily provided by the law. Being aggrieved by their conviction and sentence, the appellants separately filed their appeals against the said conviction and sentence.

At the hearing of the appeal, this court was informed that Patrick Okumbi Ochanja, the appellant in *Nakuru HCCR APPEAL NO. 261 OF 2002* died on the 28th of September 2002. His appeal was therefore marked as abated. The three separate appeals filed by the other three appellants were consolidated and heard as one. Mr Gumo, the Assistant Deputy Public Prosecutor however conceded to the appeal on the sole ground that the police officer who had prosecuted the case before the trial magistrate was not qualified to prosecute criminal cases before such a court within the meaning of **Section 85 of the Criminal Procedure Code**. He however urged this court to order that the appellants be retried in view of

the serious nature of the offence facing them. Mr Gumo submitted that there was sufficient evidence to sustain a conviction if a retrial is ordered. On their part, the appellants, whilst welcoming the conceding of the appeal by the State, did not wish to be retried. The appellants stated that they had been in lawful custody for a period of over five years. One of the appellant stated that the complainant being a Tanzanian citizen, it would be impossible to find him to procure his testimony if a retrial is ordered. They urged the court to discharge them.

We have carefully perused the proceedings of the lower court from which these appeals arose. We noted that the criminal case facing the appellants was substantially prosecuted by Police Constable Njagi. He is a police officer of a rank lower than that of an Assistant Inspector of Police. He was thus not authorised to prosecute criminal cases as provided by **Sections 85(2) and 88 of the Criminal Procedure Code**. The court of appeal held in **Eliremah & Anor –versus- Republic [2003]KLR 537** that where such a police officer prosecutes a criminal case before a magistrate’s court, such proceedings will be a nullity. The proceedings in respect of the trial which this appeal arose from are hereby declared to be a nullity as a consequence of which the appeals are allowed, the convictions quashed and the sentences imposed set aside.

The issue left for the determination by this court is whether or not to make an order that the appellants be retried. Mr Gumo for the State submits that the appellants should be retried in view of the serious nature of the offence that faced them. On their part the appellants do not wish to be subjected to a retrial. The principles to be considered whether or not to order a retrial were restated by the Court of Appeal in

Bernard Lolimo Ekimat –versus- Republic C.A. Cr. App. No. 151 of 2004 (Eldoret) (unreported) where at page 6 it was held that:

“In the case of Ahmed Sumar v. Republic [1964]EA 481 at page 483, the predecessor to this court stated as follows:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.”

The court continued at the same page paragraph H and stated:

“We are also referred to the judgment in Pascal Clement Braganza v. R [1957]EA. 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the 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 an accused person.”

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been accepted to the court is that each case must depend on the particular facts and circumstances of the case but an order for retrial should only be made where the interest of justice require it.”

The State is of the view that the appellants should be retried. Presumably the prosecution is confident that it would be able to re-call witnesses who testified in the vitiated trial to testify again if retrial is ordered. One of the appellants submitted that the complainant in this case is a Tanzanian citizen. From the evidence adduced in the vitiated trial, the complainant described himself as a Kuria from Isebania. It is his evidence, mainly, that led to the conviction of the appellants. In the vitiated trial, the complainant testified that he was able to identify the appellants by the moonlight. He also testified that he had interacted with the appellants prior to the robbery incident and

therefore knew them.

We have carefully re-evaluated the evidence of the complainant. The evidence of the complainant was that of a single identifying witness in circumstances that were not favourable to positive identification. The complainant's evidence on identification therefore ought to have been treated with caution by the trial magistrate's court. Unfortunately the trial magistrate did not warn himself of the inherent dangers of relying on the sole evidence of an identifying witness before making the finding that the appellants had been properly identified. For that reason we do find that the appellant's conviction was therefore unsafe.

It would not serve any useful purpose if a retrial is ordered based on the insufficient evidence adduced by the complainant. In any event, the prosecution has not indicated to this court whether it would be in a position to procure the complainant who was the critical witness in the case against the appellants, now that we have been informed that the said complainant is a Tanzanian citizen.

Further it is our finding that it would be unfair and unjust to subject the appellant to a retrial after spending five years in lawful custody. The scales of justice do not tilt towards the side of the prosecution only. In this case the said scales has tilted towards the appellant's direction. On the evidence on record and by the fact that the appellants have been in lawful custody for five years, we will not order a retrial. The appellants are therefore ordered discharged. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 13th day of July 2005.

DANIEL MUSINGA

JUDGE

L. KIMARU

JUDGE