

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

Criminal Appeal 223 of 2003

(From original conviction and sentence in Criminal Case No.9128 of 2002 of the Chief Magistrate's Court at Kibera)

SIMON OKOTH ODHIAMBOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant **SIMON OKOTH ODHIAMBO** (hereinafter referred to as "the Appellant") was found guilty and convicted on three counts of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death on each Count as is mandatorily required by the Law. He was aggrieved by the conviction and therefore lodged this Appeal.

Mrs. Kagiri, Learned Counsel for the State conceded to the Appeal on the sole ground that the whole of the prosecution case was conducted by an unqualified public prosecutor to wit, Corporal Osiemo. We have perused the record of the trial Court and confirmed that indeed Corporal Osiemo conducted the whole of the prosecution case. He was unqualified to be appointed a Public Prosecutor by virtue of Section 85 (2) as read with Section 88 of the Criminal Procedure Code. Accordingly, and in line with the Court of Appeal decision in the case of **ROY RICHARD ELIREMA & ANOTHER VS REPUBLIC CA NO. 67 OF 2002** which is binding on us, the entire Court proceedings were rendered defective and therefore a nullity. We therefore declare the proceedings a nullity, quash the conviction and set aside the sentence.

Mrs. Kagiri has sought from us an order for retrial on grounds that the Prosecution led evidence that implicated the Appellant and another in a spree of robberies. That the Appellant was arrested at the scene of crime and in possession of some of the items that he had robbed from the some of the complainants. It was the submission of Learned State Counsel that in those circumstances, if a retrial was ordered and the same evidence is tendered, she was confident that a conviction may result. She submitted further that the state will have no problems at all in availing the witnesses. That the offence was serious and finally that the Appellant will suffer no prejudice as he had only served 2 years in jail.

The Appellant welcomed the state's gesture. However he was opposed to an order for retrial. He submitted that such an order would not serve the ends of justice as the exhibits had been released to the Complainants.

We have considered the evidence adduced before the Lower Court and find that if retendered, it would sustain a conviction. As regards the release of exhibits, this was most unfortunate. The Prosecutor applied for the release of the exhibits long before Judgment was delivered. The Court for unexplained reasons granted the Application. As we understand it exhibits should never be released by Court until it is satisfied that in the case of conviction, no Appeal has been preferred and if the Appeal has been filed, such exhibits should only be released once the Appeal has been heard and determined. It was therefore wrong on the part of the magistrate to have made rather pre-maturely an order releasing the exhibits. However, we take comfort in the fact that the exhibits which were released only related to count III. So that even if this count falls by the way side on account of lack of exhibits during the retrial, there will still be sufficient evidence to sustain a conviction against the Appellant in respect of the other two counts.

Bearing in mind the principles enunciated in the case of **MWANGI VS REPUBLIC (1983) KLR 522**, we are satisfied that if a retrial is ordered a conviction is likely to result. We therefore order a retrial be held in this case. For this purpose the Appellant shall be presented before the Senior Principal Magistrate's Court at Kibera, for plea to be taken on the same charges on 29th September 2005. Pending his appearance in Court as aforesaid, the Appellant shall remain in prison custody.

Dated at Nairobi this 30th day of September 2005.

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LESIIT J

JUDGE

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M. S. A. MAKHANDIA

JUDGE