



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

Criminal Appeal 395 of 2003

**(From original conviction (s) and Sentence(s) in Criminal Case No. 1891 of 2003 of the
Chief Magistrate's Court at Kibera (Ms. Siganga –S.R.M.)**
JAMES CHACHA MOGORI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

CONSOLIDATED WITH
Criminal Appeal 396 of 2003
**(From original conviction (s) and Sentence(s) in Criminal Case No. 1891 of 2003 of the
Chief Magistrate's Court at Kibera (Ms. Siganga –S.R.M.)**

HENRY ORINA NYABUTO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

JAMES CHACHA MOGORI and **HENRY ORINA NYABUTO** (the 1st and 2nd Appellants, respectively) were found guilty and convicted on one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. It was alleged that on 16th February 2003 at Gataka Village, in Ongata Rongai, jointly with others not before court, being armed with dangerous weapons namely a crowbar, robbed the Complainant KIRU of Kshs.7,175/-, one jacket, a pair of shoes, a belt and a wallet and in the course of the robbery used actual violence on the Complainant. Both were sentenced to death and it is against the conviction and the sentence that they have lodged their appeals.

The appeal was conceded. **MR. MAKURA**, learned counsel for the State submitted that since the prosecutor who conducted the whole of the prosecution of the case was unqualified within the provisions of **Section 85(2)** as read with **Section 88 of the Criminal Procedure Code**, the State was not opposing the appeal.

We have perused the record of the proceedings of the trial court. The prosecution of the case was conducted by one **CPL. OSIEMO** who was unqualified to do so as submitted by learned counsel. Consequently, as held by the Court of Appeal in **ELIREMA & ANOR vs. REPUBLIC CA No. 67 of 2002**, and which judgment is binding on us, such prosecution rendered the entire proceedings a nullity and the court has no choice but to set aside the conviction and sentence. We declare the trial a nullity and set aside both the conviction and sentence entered therein.

MR. MAKURA urged us to order a retrial in this case. It was his contention that the evidence adduced by the prosecution was overwhelming and could support a conviction if an order for retrial were made. The counsel also submitted that the Appellants had been in prison for only two years which he contended was not too long.

Both Appellants gave written submission in which they challenged the evidence of identification by the Complainant who was the sole identifying witness. They also challenged the admissibility of the evidence of recovery of certain exhibits.

We have re-evaluated the entire evidence adduced before the trial court. The principles applicable in determining whether or not to order a retrial are well settled. A retrial can be ordered where the original trial was defective. **MANJI vs. REPUBLIC 1966 EA 343**, the Court of Appeal for East African held that a retrial could be ordered only when the original trial was illegal or defective. This case meets that criteria. In **MWANGI vs. REPUBLIC 1983 EA 522**, it was held that an order for a retrial should not be made unless the appellate court is of the view that on a proper consideration of the admissible evidence a conviction may result.

We have re-evaluated and re-analyzed the evidence. The Appellants were arrested soon after the offence was committed and having in their possession the Complainant's stolen property. We are fully satisfied that a conviction may result if a retrial were ordered in the case.

We have also considered that the Appellants were not to blame for the mistakes that have resulted in the setting aside of the proceedings. We are satisfied that having been in prison custody for only two years, considering the evidence available in the case, the interests of justice and the Appellant's own rights no prejudice will be suffered by the Appellants if the order for retrial was to be made. Considering the circumstances and facts of the case, we are satisfied that an order for retrial is quite fitting to this case. Accordingly we order a retrial. The Appellants should be produced before the Kibera Chief **Magistrate's** Court on **28th September 2005** for plea in this case. In the meantime the Appellants shall be held in custody pending the appearance before that court. We further direct that this case be heard expeditiously by the trial court.

Dated at Nairobi this 22nd of September 2005.

.....

LESIIT, J.

JUDGE

.....

M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

.....

LESIT, J.

JUDGE

.....

M.S.A. MAKHANDIA

JUDGE