



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL 416 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 69 of 2003 of the Chief Magistrate's Court at Kibera (J. Siganga- S.R.M.)

ALEXANDER KIOKO MATHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ALEXANDER KIOKO MATHAKA was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 27th December 2002 at Kangemi Village Nairobi he violently robbed the Complainant **JUSTUS MUTINDA MUTETI** of cash Kshs.800/- and identity cards. He was sentenced to death and now appeals against both the conviction and sentence.

The Complainant, **MUTINDA**, was walking home from the bus stop at midnight when two men surrounded him, one in front and the other behind. He was stabbed with a knife on the head and robbed of personal identification cards and cash.

As the men ran away, watchmen in nearby buildings apprehended one of them who is the Appellant in the case. On the Appellant's part he denied committing the offence and said that he was at the bus stage when he was arrested on suspicion he had robbed the Complainant.

The State through **MISS NYAMOSI** conceded to the appeal on technicality that the case was prosecuted by an unqualified police prosecutor. The learned counsel however asked for an order of retrial on two grounds. One that the Appellant had only been in prison for two years and would therefore not be prejudiced. Secondly, that the evidence of identification against the Appellant was overwhelming.

We have perused the proceedings of the trial court. We agree that one **CORPORAL OSIEMO** who conducted the entire proceedings on behalf of the prosecution was unqualified in terms of Section 85(2) as read with Section 88 of the **Criminal Procedure Code**. As held in **ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2002 (Mom)** the entire proceedings were rendered a nullity due to the prosecution by an unqualified prosecutor and ought to be nullified. In light of the Court of Appeal ruling in the cited case, we declare the proceedings null and void, quash the conviction and set aside the sentence.

One issue remains for determination which is whether or not to order a retrial. Even though an order for retrial can be made where the original trial was defective as held in the case of **MANJI vs. REPUBLIC**

1966 EA 343, no such order should be made if the accused person will be unduly prejudiced by it and if the interests of justice do not require it as held in **MERALI & OTHERS vs. REPUBLIC 1971 EA 221**. Such an order should be made only if the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result as held in **MWANGI vs. REPUBLIC 1983 KLR 522**.

_ We have considered and re-evaluated the evidence adduced in this case. The incident took place at 4.00 p.m. The Complainant was the sole identifying witness. **MUTINDA** said that he alighted from a taxi and walked 200 metres before being surrounded. Mutinda's evidence is however inconsistent in itself. He starts by saying that two people surrounded him.

As he advanced in his evidence, he changed and said that they were in fact three men who surrounded him. He then claimed to have apprehended the Appellant as his accomplices fled but changed and said that as the robbers fled, he started screaming as a result of which watchmen nearby sprang into action and apprehended the Appellant. The watchmen who arrested the Appellant or assisted in his arrest were not called as witnesses. The most important matter was however that of lighting. Even though the Appellant claims he saw the Appellant's facial appearance during the robbery, he did not mention whether there was any kind of lighting at the scene. It was very important for the Complainant to describe the lighting at the scene of robbery. They would assist the court to determine whether there was sufficient lighting to justify a finding of positive identification. The Complainant did not disclose whether there were other people near where the incident took place. That too was important to enable the court determine whether the Appellant's defence was plausible and probable. In absence of these details we find that the evidence adduced against the Appellant in this case was inadequate to require a retrial in this case. In the circumstances we decline to order a retrial and direct that the Appellant should be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 20th day of September 2005.

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LESIIT, J.

JUDGE

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M.S.A.MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

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LESIIT, J.

JUDGE

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M.S.A.MAKHANDIA

JUDGE