REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 383 of 2003
(From original conviction (s) and Sentence(s) in Criminal Case No. 22 of 2002 of the Chief Magistrate's Court at Thika (Alex Anambo P.M.)

BENARD NGUGI MWANGI..……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..RESPONDENT

J U D G M E N T

BERNARD NGUGI MWANGI, the Appellant herein was charged with four counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The original charge sheet was not found in the original court record. We also observed that there was also no typed copy of the charge sheet. The only record which indicates the charges facing the Appellant could only be found in the courts judgment. Unfortunately the learned trial magistrate did not type out the particulars of the charges and we are therefore unable to know what these particulars were. The Appellant was convicted in all four counts and sentenced to death. It is against the conviction and the sentence that he now appeals.

From the evidence before the trial court it appears to us that there were two separate robbery incidents involved in this case. The first incident was against one **NGETHE,** PW1 and his friend **OBATI** PW5 as they rode in a taxi Reg. No. KAM 128 or KLM 182 driven by one **NDUNGU** PW4. **NDUNGU** was driving the two home from work when a Datsun 1200 pick-up blocked their way. Two people emerged from the pick-up one armed with a panga and one with a gun. They pulled out Ngethe and Obati, attacked them with a panga before robbing them.They were left tied up in a bush. Ndungu managed to escape. He reported the incident to the police and gave the registration number of the vehicle used to rob them as KXM 041.

The second incident was against one **MUTUNGI PW2** and his brother in law **MUTHEE** PW6. They were walking home after alighting at Ruiru Prison Training College when a saloon car stopped ahead of them and two people one carrying an iron bar according to MUTHEE and the other a gun emerged. According to Mutungi one had a gun and the other a panga. Both Mutungi and Muthee were forcefully carried and put inside the saloon car. They were cut on the head, hands and seriously injured with Mutungi grievously harmed as they were robbed before being thrown out of the moving vehicle. Muthee who was still conscious managed to walk to nearby buildings where he sought help from watchmen and members of public. The helpers walked back to the scene where Mutungi was. Before they could move, Police in a police land rover came. PW7 PC Gathua was in that vehicle with his colleagues. They took both Mutungi and Muthee into their vehicle. Before they could move far PC Gathua spotted a vehicle which had been circulated through 999 controller. It was registration No. KXM 051Datsun 1200 pick up. They stopped it but after an exchange of fire and an attempt to drive through a rough road, the pick up was abandoned. PC Gathua said that he managed to get one person in the nearby grass bush who was unable to run. That person was the Appellant. Both Mutungi and Muthee identified the Appellant as the

one who had robbed them the same night.

In terms of time frame, the incident involving Ngethe, Ndungu and Obati took place at 10.00 p.m. The one involving Mutungi and Muthee was at 8.00 p.m. According to PC Gathua they rescued Mutungi and Muthee and arrested the Appellant at around 11.00 p.m. That was the evidence before the trial court. **MISS NYAMOSI** for the state conceded to the appeal on a technicality that the Police Officer who conducted the proceedings, one Police Constable **OMULEPU,** was unqualified to do so. Learned Counsel however asked that an order for retrial was fitting in this case.

We have confirmed from the record that the prosecutor who conducted the entire of the prosecution case was unqualified being below the rank of an Acting Inspector as provided under **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**. That is also in line with the decision of the Court of Appeal in the celebrated case of ROY RICHARD **ELIREMA & ANOTHER vs. REPUBLIC C.A. No. 67 of 2002 (**Mom). Accordingly we declare the proceedings a nullity, set aside the conviction and the sentence.

No order for retrial should be made where the original trial was a nullity unless the Appellate court is of the considered opinion that on a proper consideration of the admissible evidence a conviction may result. We have already set out the evidence adduced before the trial court. We have re-evaluated the evidence afresh. On the issue of identification it is quite clear that no identification parades were conducted in this case. The learned trial magistrate was in his own assessment of the view that these were not necessary in respect of Mutungi and Muthee because, in his finding, the Appellant was arrested soon after the robbery and was identified at the scene of the incident. The question is whether the Appellant could have been the one who robbed the two Complainants. We are not satisfied that the evidence adduced proves beyond a reasonable doubt that the Appellant could have robbed the two Complainants that night. The first reason we find so, is the clear evidence of both Mutungi and Muthee that the people who robbed them were in a saloon vehicle. They were sure of the type of vehicle it was because they were carried in it for a distance before being thrown out of it. So if it was a saloon vehicle, it does not fit the description of the vehicle in which the Appellant was being carried before his arrest. It is doubtful he was in any vehicle in the first place. But even assuming that we agree with PC Gathua that the Appellant came out of the vehicle they were chasing, according to PC Gathua it was a Datsun 1200 pick up 'open'. It could not be mistaken for a saloon vehicle described by Mutungi and Muthee. Even going by Mutungi and Muthee's evidence, they were robbed around 8.00 p.m. or so. There was a lapse of time between the robbery and the Appellant's arrest at 11.00 p.m. That lapse is not accounted for. However, it is clear that the Appellant was arrested at the same scene of robbery at least 3 hours after the incident. Due to the fact that the vehicle he is alleged to have been in at time of arrest does not tally with one in which he was when the offence was committed, an identification parade was imperative. It cannot be said even by the wildest stretch of imagination that the Appellant was arrested soon after the robbery and in same robbery vehicle. Mutungi had an eye injury and he confessed that he could not see well and so did not identify the Appellant after his arrest. Muthee was uninjured. He claims to have seen the Appellant under strong moonlight at time of robbery.Considering he was forcefully picked and carried into the vehicle and later dumped, the only time Muthee could have seen the one who robbed him was the time he was carried to the car. He did not say how long that was. However, from the description given that the vehicle stopped in front of them, it cannot be a far distance. It is therefore correct to say that Muthee had a fleeting glance at the robber. In those circumstances his evidence needed corroboration. The issue is whether there was any. In our considered view, we find no evidence to corroborate that of Muthee.

On the second incident, we have found that people who robbed Muthee and Mutungi were not in a pick up but a saloon vehicle. Those who robbed Ngethe, Obati and Ndungu were in a Datsun 1200 pick-up. Ndungu even gave the registration number of the robbers' vehicle as KXM 041. All three Complainants in this second incident identified the Appellant in Court as one of the five to six men who robbed them. They even identified a panga found in the pick-up the police recovered after gun fight exchange and which was exhibit 3 in the case, as the one he used in the attack. In the second incident the evidence against the Appellant was both that of identification and also circumstantial. We have already stated that Ngethe, Ndungu and Obati identified the Appellant in Court. There was no identification parade. The three Complainants claimed that they saw the Appellant under street lights at scene of

robbery and later that night at the Police Station after his arrest. The witnesses did not say how far the street lights were from them when they saw their attackers.

The most important aspect of this incident is the glaring inconsistency in the evidence of Ndungu and PC Gathua. Ndungu, the taxi man, gave the registration number of the vehicle carrying those who robbed him of the pick-up and also robbed his passengers as KXM 041. PC Gathua on the other hand said he was looking for a circulated Datsun pick-up 1200 registration No. KXM 051. PC Gathua said he recovered it that night and arrested the Appellant near it KXM 041 and KXM 051 are definitely not one and the same vehicle. Besides even though PC Gathua recovered a vehicle that night, it was not an exhibit in this case. That means we can only go by the evidence of these two witnesses and clearly therefore the vehicle that was used during the robbery of Ngethe, Ndungu and Obati is clearly not the one later recovered by PC Gathua.That puts to question the identification of the Appellant as one of the robbers based on his arrest near the vehicle recovered by PC Gathua. The shoes alleged to have been stolen from Ngethe and found in the vehicle recovered by PC Gathua were not identified in court by either Ngethe or Obati. It was not enough for Ngethe and Obati to say Ngethe's shoes were found inside that vehicle. Without identifying it, it cannot be assumed it was the pair of shoes that PC Gathua produced in court as exhibit 4. The panga also produced by PC Gathua as exhibit 3 had no special identification mark on it. The identification of the panga by Obati in Court was neither here nor there.

We find that there were serious unresolved inconsistencies in the prosecution case which went to the very substance of this case. Those unresolved inconsistencies are of material importance and go to the very core of the evidence of identification. We find that with such evidence, no conviction is likely to result. It would be highly prejudicial to the Appellant if we ordered a retrial. We are convinced that the interest of justice of this case would not require such an order to be made.

Having considered this appeal and the evidence adduced before the trial court, it is our opinion that an order for retrial would cause the Appellant injustice. We therefore decline to order a retrial. We order 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