REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL 491 OF 2003
(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 1512 of 2002 – K. Ngomo (P. M.)

PATRICK MBUGUA NDUNGU……...……..……APPELLANT

VERSUS

REPUBLIC……...……..…….RESPONDENT

JUDGMENT

The appellant, Patrick Mbugua Ndung'u, was 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 10th of March 2002 at Ol Kalou Site and Services in Nyandarua District, the appellant robbed Joseph Karari Njenga of Kshs 38,000/= and at or immediately before or immediately after the time of such robbery wounded the said Joseph Karari Njenga. The appellant pleaded not guilty to the charge. After a full trial the appellant was found guilty as charged for the lesser but cognate offence of robbery contrary to **Section 296(1) of the Penal Code**. He was sentenced to serve five years imprisonment. He was aggrieved by his conviction and sentence and duly filed an appeal to this court.

At the hearing of the appeal, Mr Koech, Learned State Counsel conceded to the appeal on the sole ground that the appellant had been prosecuted by a police officer who was not authorized to prosecute criminal cases before a magistrate's court. He however submitted that the appellant should be retried. He argued that there was strong admissible evidence that the appellant committed the offence charge. In his view, the appellant ought to have been convicted of the more serious offence of robbery with violence contrary to **Section 296(2) of the Penal Code i**nstead of the lesser offence of robbery contrary to **Section 296(1) of the Penal Code**. Learned State Counsel submitted that even though the appellant had served two years imprisonment in the vitiated trial, it was his view that the appellant was not going to be prejudiced if he were to be retried. On his part, the appellant submitted that he was satisfied with the custodial sentence imposed on him.

I have read the proceedings of the trial magistrate's court from which this appeal arose. The criminal case against the appellant was prosecuted by Sergeant Migwi who is a police officer of a rank less than that of an Assistant Inspector of Police. He was thus not authorized to prosecute criminal cases before a magistrate's court as provided by **Sections 85(2) and 88 of the Criminal Procedure Code.** The court of appeal in **Eliremah & Anor –vs- Republic [2003]EA 537** held that where such a police officer prosecutes a criminal case before a magistrate's court, such proceedings will be a nullity. I hereby therefore declare the proceedings of the trial magistrate to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

Mr Koech had made a powerful argument in support of his submission that the appellant be retried. The appellant on his part has submitted that he would rather serve the sentence imposed by the trial magistrate in the vitiated trial than be subjected to a retrial. The principles to be considered by this court when making a decision whether or not to order a retrial are well settled. This court has to consider, inter alia, whether there was overwhelming evidence adduced in the vitiated trial that most likely would result in the conviction of the appellant should this court order that the appellant be retried. A retrial will not be ordered to enable the prosecution fill gaps in its evidence against an accused person. A retrial would also not be ordered if it would be against the interest of justice.

In the present case, I have perused the charge that the appellant pleaded to. The said charge is defective. It was not drawn in accordance with the provisions of **Section 296(2) of the Penal Code**. The

particulars of the offence did not s*tate that the appellant robbed the complainant while armed with dangerous or offensive weapons. The exclusion of the words "while armed with dangerous or offensive weapons, namely a panga, a sword, a gun etc*" makes the charge against the appellant to be defective. **Section 296(2) of the Penal Code** specifies the ingredients that constitutes the offence of robbery with violence. The charge must state that the offender was armed with a dangerous or offensive weapon or instrument or was in company of one or more person and used or threatened to use violence against the complainant. In the charge facing the appellant an essential ingredient that constitutes the charge of robbery with violence was omitted. It rendered the charge to be defective. If this court were to order a retrial, it would amount to this court giving the prosecution an opportunity to fill up gaps in its case against the appellant.

The appellant has already served two years imprisonment imposed by the trial magistrate in the vitiated trial. It would be a miscarriage of justice to subject the appellant to a retrial, where most probably, he would face a harsher sentence than the one imposed by the trial magistrate in the vitiated trial.

The appellant is therefore ordered discharged. He is set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 12th day of October 2005.

L. KIMARU

JUDGE