



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**Criminal Appeal 675 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal case No. 16408 of 2001 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi – S.P.M.)**

**JOSEPH NYAMASIO MUSYOKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**Criminal Appeal 676 of 2003 (From original conviction(s) and Sentence(s) in Criminal case No. 16408 of 2001 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi – S.P.M.)**

**MARTIN OBADIAH MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**Criminal Appeal 677 of 2003 (From original conviction(s) and Sentence(s) in Criminal case No. 16408 of 2001 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi – S.P.M.)**

**JACKSON NJAU MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**JOSEPH NYAMASIO MUSYOKA, MARTIN OBADIAH NYANGORO and JACKSON NJAU MAINA** were the 2nd, 1st and 3rd accused in the trial court. They faced one count of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code on which they were convicted and sentenced to death. Being aggrieved by both the conviction and sentence they lodged the appeals. We have consolidated their appeals for ease of hearing having arisen out of the same trial.

**MISS OKUMU**, learned counsel for the State started by conceding to the appeal on the basis that when the Complainant's evidence was taken at page 4 of the proceedings, the trial court did not indicate the name or rank of the prosecutor thereby rendering the proceedings defective.

We have perused the record of the lower court's proceedings. We have confirmed that indeed on 1st November 2001, when the case came up for hearing the Coram of the court was indicated as follows: -

*"1/11/01 Coram as before*

*Accused in custody*

*Ongondo for Ocharo for all 3 accused*

*PW1 ANASTACIA...."*

Prior to this case the same Coram is repeated on 22/10/04, 8/10/04 and 24/9/01. We agree that it is difficult for this court to tell whether the person who conducted the case on behalf of the prosecution was qualified to do so as required under **Section 85(2)** as read with Section 88 of the **Criminal Procedure Code**. In line with the Court of Appeal decision in the case of **EKIMAT vs. REPUBLIC CA No. 57 of 2004 (Eldoret)**, we declare the trial court's proceedings a nullity and quash the conviction and set aside the sentences imposed.

On the issue of a retrial, it was quite apparent to us that two of the Appellants were below 18 years of age in 2001, when the offence was committed, a matter both confirmed and which **MISS OKUMU** also accepted. The 1st Appellant submitted in opposition to an order of retrial that he was 17 years of age at the time he was sentenced to death by the trial court. He urged the court to give him the benefit for the defective trial and set him free. The 3rd Appellant also supported the submission by the 1st Appellant saying that he was 16 years at the time of conviction. The 3rd Appellant submitted that he had already suffered prejudice in the original trial and that an order for retrial would only prejudice him further.

The 2nd Appellant was above 18 years at the time of conviction but is also a young man in his early twenties. He urged the court not to order a retrial basically on grounds that the trial was not properly conducted and that not all witnesses were sworn before giving their evidence.

**MISS OKUMU** for the State submitted that the State was not seeking a retrial. On one side Counsel submitted that due to the ages of the 1st and 3rd Appellant, the sentence applicable was detention at the President's Pleasure. Learned counsel submitted that the Appellants had suffered prejudice and that no order for retrial would be sought for all of them.

We do not wish to restate the law on the issue of ordering retrials. A retrial can be ordered where the original trial was defective or illegal. This court has a duty to the Appellants to determine two important issues. One whether a conviction might result if an order of retrial were made. That principle was enunciated in the Court of Appeal case of **MWANGI vs. REPUBLIC 1983 KLR 522**. The Court held that no order for retrial should be made unless the appellate court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result.

Applying these principles, we have carefully evaluated afresh the evidence adduced against the Appellants. We have noted that even though the actual time of the offence is difficult to tell due to inconsistencies in the evidence of the eye witnesses, PW1, the Complainant, PW2 and PW3, it was nonetheless at night. The other issue of concern is that none of these three witnesses described the nature and intensity of the light that helped them to see and identify their assailants. For PW2 who talked of lights from some houses and PW3 who talked of street light, the distance of those lights from where the attack took place was not disclosed. We also noted that none of the witnesses described any physical features of their attackers that could have enabled them to identify them. Apart from PW3 who tried to describe how the assailants were dressed none of the rest did. Even PW3's description was not the cause of any of the Appellant's arrest. In any event, the 2nd Appellant whose clothing was described by **APC**

**MAGENJI** the arresting officer as a jeans trouser, that description contradicted PW3's evidence that he wore shorts and a red T-shirt. The arrest apparently was carried out on the same day of the offence.

We find that the issue of identification was mishandled by the police and later by the prosecutor in court. That mishandling discredited the identification of the Appellants in that the basis of identification was not delved into at all in evidence.

The circumstances of identification were difficult and not conducive to positive identification whether by one or more witnesses. This is more so because the prosecution witnesses relied on visual identification whose basis was never tested. We are unable to find in those circumstances that a conviction might result if the self same evidence was led in a retrial. The second issue for determination is two fold. That no order of retrial should be made if the interests of justice does not require it and if the Appellants may be caused to suffer injustice. See **PIUS OUMA & ANOTHER vs. REPUBLIC CA No. 110 of 1991.** We have dwelt at length on the value of the evidence of identification on record and the insufficiency of this evidence to convict. For similar reasons we are in agreement that the interests of justice would not require an order for a retrial being made. For similar reasons we find that such an order if made would cause the Appellants injustice. We decline to order a retrial. We order that all three Appellants be set at liberty unless they are otherwise lawfully held.

**Dated at Nairobi this 29th day of November 2005.**

.....

**LESIT, J.**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**