REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 632 of 2003
(From original conviction(s) and Sentence(s) in Criminal case No. 2150 of 2002 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi – S.P.M.)

KENNEDY CHOGO…… ……..……...……..…..APPELLANT

VERSUS

REPUBLIC…… ……..…..…....RESPONDENT

J U D G M E N T

KENNEDY CHOGO was found guilty of two counts of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the Penal Code. He was convicted and sentenced to death. It is against the conviction and sentence that he now appeals to this Court.

When the appeal came up for hearing, **MR. MAKURA** learned counsel for the State conceded this appeal and did not seek a retrial. Learned counsel conceded the appeal for reasons that at page 2 of the proceedings, when the trial for the case commenced before the trial Court, no Coram was indicated. We have perused the record of the lower court and have confirmed that on 6th March 2002, the trial court indicated the Coram thus;

> **"6.3.02**
>
> **Coram as before**
>
> **Accused in custody**
>
> **PW1 No. 214025 C.I. …."**

We agree with the learned counsel that it is impossible from this record to decipher who prosecuted the case on behalf of the prosecution and to tell whether he was qualified to do so as required under Section 85(2) as read with Section 88 of the Criminal Procedure Code. We also agree that the Court of Appeal case of **EKIMAT vs. REPUBLIC CA No. 57 of 2004 (Eldoret)** applies to this case. In addition the original trial magistrate seems to have ceased exercising jurisdiction in this case after 28/2/03. Mr. Kanyangi, Esq. SPM then took over the case. However, he failed to comply with the provision of Section 200(3) of **Criminal Procedure Code. Section 200(3) of the Criminal Procedure Code** states:

> ***"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

See also the case of **KARIUKI vs. REPUBLIC [1985] KLR 504.**

This is a mandatory requirement and failure to comply with it renders the trial defective. We declare the proceedings are a nullity and quash the conviction and set aside the sentence.

MR. MAKURA submitted that the court was not seeking a retrial on the basis that the evidence on record was scanty. The Appellant on his part relied on his written submission to oppose a retrial. In those submissions he stated that there was no evidence to support the charge in that the Complainant, who were both police officers on patrol, said they saw two people emerge from a bush but the two ran back and disappeared. It was at night. Much later that night they arrested the Appellant on grounds that he was one of the two and that their intention was to steal. The Appellant further challenged the weight of the evidence to sustain a conviction. We have carefully perused the record of the trial court's proceedings and re-evaluated the evidence.

The issue of a retrial is quite simple. No order for retrial should be made unless the appellate court is of the opinion that on proper consideration of the admissible evidence a conviction might result. **See MWANGI vs. REPUBLIC 1983 KLR 522.** Having re-evaluated the evidence on record, we find that there was no iota of evidence connecting the Appellant with the two charges. The Complainants in the charges, PW3 and PW4, did not at any time say that the Appellant made any attempts to rob them. The reason of the Appellant's arrest is clearly explained by the entire police team who were on special assignment to rid the area along Roasters Restaurant and GSU roundabout of robbers and muggers. In the course of that duty that night some men ran into a bush. A search ensued. The Appellant was found much later helping himself in the bush and arrested. To say the least, the reason for the Appellant's arrest had nothing to do with any attempt to rob. It was motivated by suspicion. To order a retrial would in our view be compounding travesty of justice.

Even without going into any further details, it is sufficient for us to state that for reasons we have stated herein above, we find that the interests of justice will not require an order for a retrial and that making such an order will cause the Appellant injustice. We decline to order a retrial and order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 29th day of November 2005.

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LESIIT, J.

JUDGE

……..……..

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

……

LESIIT, J.

JUDGE

……..……..

MAKHANDIA

JUDGE