REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 324 of 2004

(From Original Conviction and Sentence in Criminal Case No.3994 of 2001 of the Chief Magistrate Magistrate's Court at Makadara R. Nyakundi)

SILVESTER MBATHA ……..…….……...……..APPELLANT

VERSUS

REPUBLIC……..……..….RESPONDENT

JUDGMENT

The Appellant was charged with 2 others on one count of robbery contrary to Section 296 (1) of the Penal Code. After a full trial, the Appellant and one of the co-accused were found guilty and convicted. The third co-accused was however acquitted. The Appellant was then sentenced to 16 months imprisonment, whereas the co-accused were sentenced to 3 years probation.

The Appellant was aggrieved by the conviction and sentence, hence this Appeal. When the Appeal came up for hearing, the Appellant was represented by Miss Khamoni, Learned Counsel, whereas the state was represented by Mrs. Gakobo, Learned State Counsel. The state conceded to the Appeal on the sole ground that the case was not properly prosecuted in the Lower Court.

The record of the lower Court with regard to coram throughout the proceedings read ***"Coram as before"***. Learned State Counsel submitted that it was therefore difficult in those circumstances to tell whether the case was prosecuted by a Police Prosecutor and If such Prosecutor met the strict requirements set out in section 85 (2) as read together with Section 88 of the Criminal Procedure Code. For that reason the proceedings were a nullity. The Appeal ought to be allowed, Learned State Counsel submitted.

As for retrial, Counsel submitted that the State was not seeking a retrial because the Appellant had been in custody for a long time before he was released on bail pending Appeal. Counsel further submitted that the Appellant's co-accused in the Court below was upon conviction placed on probation. If a retrial was to be ordered, it would be prejudicial to him.

Miss Khamoni associated herself with the submission of the Learned State Counsel.

I have carefully gone through the record of the trial Court and noted that apart from the date when the plea was taken when the coram of the Court was properly recorded, in all subsequent proceedings, the coram of the Court merely read "***Coram as before."***

I find it difficult to appreciate what the phrase "coram as before" means in the record of the proceedings. In the recent case of ***BERNARD LOLIMO EKIMAT VS REPUBLIC, CR. APP. NO. 151 OF 2004 (UNREPORTED)***, the Court of Appeal had this to say in a matter similar to the instant one.

"……..On our own perusal of the record as reflected above we agree with Learned Counsel for the Appellant that there was nothing in the record to show a Prosecutor was present and prosecuted the case before the trial Court. As there was no coram entered in the record, it is not possible to know whether, if there was a Prosecutor on the hearing day i.e. on12th February, 2002 as indicated towards the close of the Prosecution case the same Prosecutor was of the rank specified in Section 85 (2) of the Criminal Procedure Code and was thus a qualified Prosecutor.

We cannot assume, as urged by Miss Oundo that I. P. Irungu must have been the Prosecutor on 12th February, 2002 when the Prosecution case was presented…. Having considered it we were unable to conclude that the case was properly prosecuted as required by law. The proceedings of 12th February, 2002 were a nullity. The result is that the conviction recorded against the Appellant must be and is hereby quashed and sentence set aside…."

In this case, the Learned trial Magistrate did not enter the coram of the Court on all the days the hearing of the case was conducted. Even if the record of the proceedings shows that there was a Prosecutor before Court during the plea and when the case was being mentioned on subsequent dates who was qualified to conduct the proceedings on behalf of the state, that does not cure the omission since I cannot separate the part of the proceeding that were defective from those that were not, the entire case was therefore a nullity. On the principle, set out in ***ELIREMA & ANOTHER VS REPUBLIC (2003) KLR 537*** I must nullify the said proceedings. The result is that the conviction recorded against the Appellant must be and is hereby quashed and the sentence imposed set aside.

On the issue of retrial the State Counsel has rightly opted not to pursue the same. The Appellant before being released on bail pending Appeal had already served 4 out of the 16 months imprisonment. Similarly, the Appellant's co-accused in the Court below was sentenced to 3 years probation. It is obvious in the circumstances that if a retrial was to be ordered it may cause injustice and prejudice to both the Appellant and the co-accused who did not deem it necessary to lodge an Appeal. All said and done, I am of the considered view that it would not be in the interest of justice to order a retrial. I decline to order one and order instead that he Appellant be set at liberty forthwith.

Dated at Nairobi this 24th day of November 2005.

MAKHANDIA
JUDGE