REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 448 of 2003
(From original conviction(s) and Sentence(s) in Criminal Case No. 21579 of 2001 of the Chief Magistrate's Court at Makadara (Mrs. Kimingi – PM)

MOSES MELSOI MOGOI……...……………………..……….APPELLANT

VERSUS

REPUBLIC………………… …………………..…………......RESPONDENT

J U D G M E N T

MOSES MELSOI MOGOI was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was sentenced to death. It was alleged that; -

> ***"On the 12th day of October 2001 at Umoja II Estate Nairobi jointly with others not before court, while armed with dangerous weapons namely pangas and Somali swords, robbed SIMON AMANI Kshs.15,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SIMON AMANI."***

Being aggrieved by the conviction and sentence the Appellant lodged this appeal.

When this appeal came up for hearing, **MR. MAKURA**, learned counsel for the State conceded the appeal. It was the learned state counsel's submission that since **PC WANJOHI** led PW1 in giving his evidence, the entire trial was rendered defective since the police constable was not qualified to conduct the case under **Section 85(2)** as read with Section 88 of the provision.

We gave perused the record of the proceedings. We have confirmed that indeed **PC WANJOHI** led PW1 in giving his evidence. **PC WANJOHI** was not qualified to lead the prosecution case and acted in contravention of Section 85(2) as read with Section 88 of the Criminal Procedure Code. We agree that the trial proceedings were a nullity as a result of the prosecution by PC WANJOHI. Consequently we set aside the conviction and the sentence. MR. MAKURA has urged us to order a retrial which fact the Appellant has vehemently opposed. MR. MAKURA submitted that the Appellant had clearly been seen at the scene of crime by PW1, PW2 and PW3 all who knew him before as a watchman in the area. Learned counsel invited us to find that despite the incident having taken place at 4.00 a.m., the identification by the three witnesses was safe and that a retrial should be ordered. The Appellant submitted that the circumstances of identification were not safe. That the witnesses were inconsistent in their evidence. He urged us not to order a retrial.

We have carefully analyzed and re-evaluated the evidence adduced in this case. The principles applicable in determining whether or not to order a retrial are now well settled. The Appellate court must be of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction may result. See **MWANGI vs. REPUBLIC 1983 KLR 522.** In this case there is evidence

which if placed before the court in a retrial will result in a conviction being entered against the Appellant. The order for retrial should not be ordered unless the interests of justice require it and if no injustice will be caused to an accused person. See **SUMAR vs. REPUBLIC 1964 EA 481.** That case must be determined in its own set of facts and circumstances. See **MANJI vs. REPUBLIC 1966 EA 343.**

The Appellant is not to blame for the mistake which resulted in the conviction being set aside. The Appellant has only served 2½ years in custody since the sentence was passed. We find that no prejudice will be suffered by him if an order for retrial were made. Besides, we are convinced that the interest of justice require that an order for retrial should be made. Accordingly we order that a retrial be held in this case. The Appellant should be produced before Senior Principal Magistrate's Court Makadara for a plea in this case on the 23rd November 2005. In the meantime the Appellant should be held in custody.

Dated at Nairobi this 17th day of November 2005.

………………….

LESIIT, J.

JUDGE

………………….

MAKHANDIA

JUDGE