



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 489 of 2002

JOHN KIHU MACHARIA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

Criminal Appeal 8 of 2003

ELIUD KAMAU alias CHAMELEON alias MAYOR.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeals from the judgment of Abdul El

*Kindly, Principal Magistrate, dated 3rd October
2002, in the senior Principal Magistrate's Court at
Muranga, Criminal Case N. 1531 of 2001)*

JUDGMENT

These two appeals were consolidated for hearing, John Kihu Macharia being referred to in the proceedings as the First Appellant and Eliud Kamau as the Second Appellant.

The two appellants, together with the other two not appellants herein, were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code particulars alleging that on the 23rd day of May 2001 at Kandegenye Village in Muranga District, they jointly with others not before the court robbed Eunice Njeri Kimani of the items mentioned in the charge sheet using violence while armed with dangerous weapons namely, axes, pangas and runigus.

The two appellants appealed because they were convicted and each sentenced to death.

When their appeals came before us for hearing, the learned State Counsel M/S Ngalyuka told us she conceded the appeals because the trial of the appellants was sometimes conducted by a prosecutor who was not qualified to prosecute in terms of *Section 85(2)* of the Criminal Procedure Code. This can be seen from page 11 to page 16 of the typed proceedings. The prosecutor was Police Constable Machuki and he conducted a substantial part of the prosecution.

The learned State Counsel said she was not asking for a re-trial because it may be difficult to get witnesses.

While the First Appellant did not understand what the State Counsel was saying, the Second Appellant's re-action was that he welcomed what the State Counsel had said.

On our part, we find no good reason to disagree with what the learned State Counsel said. It is a fact that Police Constable Machuki conducted a substantial part of the prosecution in the trial court. Three good years have passed from the time the appellants were convicted and sentenced and indeed it may be difficult to trace the witnesses to give evidence in a re-trial which may be ordered and that difficulty in getting the witnesses is likely to work to the prejudice of the appellants as they will be made to stay in prison remand for a long time before their case is decided, and that for no mistake of theirs. Add to that the period they have so far been behind the bars, conservatively, counting it from the date they were first taken to court on the 15th October 2001 to-date.

That is already four years. In our view, all that will work injustice to the appellants who may, in the end be acquitted for lack of sufficient evidence.

The above being the position, we need not look for more reasons to decide the issue of re-trial as clearly this is a fit case where there ought to be no re-trial.

Accordingly, we do hereby declare the trial of the appellants in this matter a nullity. We do allow the appeal of each appellant. Quash each appellant's conviction and set aside the sentence imposed on each appellant.

We do order that each appellant be set at liberty forthwith if he is not lawfully detained in some other cause.

Dated this 15th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE