



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 156 of 2002**

**OSMAN HASSAN WARIO.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 157 of 2002**

**OSMAN DIMA DUBA .....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 158 of 2002**

**HUSSEIN GOLO SAMO.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 159 of 2002**

**MOHAMMED WARIO MURA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 180 of 2002**

**MOHAMMED AFTAM DIMA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 181 of 2002**

**NELSON MUNYI NJENGA.....APPELLANT**

Versus

REPUBLIC.....RESPONDENT

(Being appeals from the judgment of C.D.

Nyamweya, Senior Resident Magistrate, dated 27th

January 2000 in the Chief Magistrate's Court at

Nyeri, Criminal Case No. 698 of 2001)

**JUDGMENT**

We consolidated these six appeals for hearing all having come from Criminal Case No. 698 of 2001 in the Chief Magistrate's Court, Nyeri. In this judgment we may be referring to the appellants as the First to Sixth Appellant respectively in the order in which they are listed on the first page to the second page of the judgment.

They were charged with robbery with violence contrary to *Section 296(2)* of the Penal Code particulars alleging that on the 4th day of March 2001 at Gatumba Village in Nyeri District the six appellants jointly with others not before court, while armed with dangerous weapons, namely, pangas, rungas and iron bars robbed Joshua Kilelool Moko of 21 bed sheets, 2 radio speakers, 1 pair of shoes, 1 camera, 1 pair of binoculars, 1 pair of monoculares, 1 video cassette player, 1 mult-choice decoder, 1 kanga, 1 piece of cloth, 1 canvas bag, 4 bracelets, 1 Motorola charger, 1 Motorola circuit breaker and 4 plastic bags all to the total value of Kshs.125,000/= threatening to use violence to the said Joshua Kilelool Moko.

That is the main charge which is followed by six alternative charges each alleging handling of stolen goods contrary to *Section 322(2)* of the Penal Code. Each appellant faced one such alternative charge.

At the conclusion of the trial, the learned trial magistrate found each appellant guilty of the main charge of robbery with violence, convicted each appellant and sentenced each appellant to death. Each appellant appealed as aforesaid thereby leading to this judgment.

During the hearing of the appeals before us, M/S Lucy Mwai Advocate, represented the Second Appellant, Osman Dima Duba, while the rest of the appellants appeared in persons. Mr. Orinda, the Provincial State Counsel, appeared for the Republic. He rightly, in our view, conceded the appeal of each appellant on the ground that the Prosecutor, Sgt. Njagi, was not qualified to prosecute within the terms of *Section 85(2)* of the Criminal Procedure Code. Although Inspector Kagambi came in to conduct the last part of the prosecution, Sgt. Njagi had already conducted a substantial part of the prosecution, including the evidence of the first three prosecution witnesses.

Further, Mr. Orinda did not ask for re-trial pointing out that since the time of the trial, too much water has passed under the bridge as confessions are now not available to the Police in the form they were at the time of the trial. He concluded that a retrial would be an exercise in futility adding that some of the important things that were said at that time cannot be said now.

M/S Mwai agreed with what Mr. Orinda said and went ahead to cite the case of Joseph Lekulaya Lelantile and another – vs – Republic **being** Court of Appeal Criminal Appeal No. 33 of 2000 at Nyeri; also Njeru – vs – The Republic (1980) KLR 108; and Roy Richard Elirema and Another – vs – Republic, Court of Appeal, Criminal No. 67 of 2002 at Mombasa, all to the effect that as it was said in the case of ***Fatehali Manji – vs – The Republic(1966) E.A. 343:***

***“In general, a retrial should be ordered only when the original trial was illegal or***

***defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case.”***

In other words an order for retrial is not to be made if it will provide the prosecution with an opportunity to improve their case or, to correct their mistake in the original trial or to fill up gaps in their evidence.

The First, Third, Fourth, Fifth and Sixth Appellants each supported what had been said by Mr. Orinda so that it can be said that during the hearing of these six appeals, views were unanimous that the appeals be allowed without an order for retrial. We have no good reason to disagree.

Accordingly, we do hereby declare the trial of the appellants in Criminal case No. 698 of 2001, Chief Magistrate’s Court Nyeri a nullity. Allow the appeal of each appellant. Do quash the conviction of each appellant and we set aside the sentence imposed on each appellant.

Each appellant be set at liberty forthwith unless lawfully detained in some other cause.

**Dated this 15th day of December 2005.**

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**

**Present:**

All The Appellants

Mr. Mugo for M/S Mwai for 2nd Appellant

Mr. Gikaria Court Clerk