

SIMON WACHU KOMORA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was in Mombasa Chief Magistrate’s Court Criminal Case No. 1339 of 2002 charged with two offences. The first one was robbery with violence contrary to section 296(2) of the Penal Code in that on the 22nd day of May 2002 at about 10.00 a.m. at [particulars withheld] in Mombasa District within Coast Province jointly with another not before court while armed with a dangerous weapon namely a knife robbed G.C of Sh. 50/= and at or immediately before or immediately after the time of such robbery used actual violence on the said G.C. The second offence is that of defilement of a girl contrary to Section 145(1) of the Penal Code in that on the 22nd day of May 2002 at about 10.00 a.m. at [particulars withheld] in Mombasa District within Coast Province jointly with another not before court he had unlawful carnal knowledge of G.C a girl under the age of 14 years. After a full trial before the Principal Magistrate at Mombasa the Appellant was convicted on both offences and sentenced to death on count one and to serve 8 years imprisonment with two strokes of the cane on count two. He appealed against both conviction and sentence on the two counts. When the appeal came before us for hearing Mrs. Mwangi, the Assistant Deputy Public Prosecutor, conceded that the appeal should be allowed on the ground that part of the prosecution case was conducted by a police constable contrary to section 85(2) of the Criminal Procedure Code.

She, however, asked for a retrial arguing that the offences are serious and there was ample evidence against the appellant. She further stated that the prosecution witnesses are available in Mombasa so there will be no prejudice caused to the Appellant if a retrial is ordered.

Mr. Gaya for the Appellant while admitting that there was a mistrial opposed a retrial on the ground that that will give the prosecution a chance to fill up the gaps in its case. He, however, did not point out the gaps.

After a perusal of the record we agree with the Assistant Deputy Public Prosecutor that the trial of the Appellant was a nullity as part of the prosecution case was conducted by P.C. Charo who was a police constable.

Section 85(2) of the Criminal Procedure Code requires prosecutors to be lawyers or police officers of or above the rank of Assistant Inspector of Police. A police constable is below that rank. Consequently we declare that the trial of the Appellant before the Principal Magistrate was a nullity. We therefore quash the convictions on both counts and set aside the sentences imposed upon the Appellant.

As we have already stated, the Assistant Deputy Public Prosecutor has asked us to order a retrial. Retrial is ordered where, after considering the whole case, the appellate court is satisfied that there was sufficient evidence against the appellant, that the interest of justice demand a retrial and that a retrial will not cause prejudice to the appellant. Prejudice will be caused to the Appellant if there are gaps in the prosecution case which a retrial will give the prosecution a chance to fill.

We have considered the evidence that was adduced before the trial court. Immediately after committing the offences the Appellant and his companion were pointed out by the complainant to P.W.3, who chased them and with the help of P.W.2 managed to arrest the Appellant. The other suspect, who threatened the two witnesses with a knife, managed to escape. The two witnesses never lost sight of the Appellant. We are satisfied that there is ample evidence against the Appellant that may found a conviction and there is therefore no prejudice that will be caused to the Appellant. The offences committed were serious and justice demands that we should order a retrial.

Accordingly we order that the Appellant be retried before another magistrate.

DATED this 31st day of March 2004.

J. Khaminwa

JUDGE

D.K. Maraga

Ag. JUDGE