



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 293 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 1108 of 1999  
of the Principal Magistrate's Court at Malindi J. Manyasi SPM)

MAKDONALD KAHINDI WINJI ..... APPELLANT

- Versus -

REPUBLIC ..... RESPONDENT

**J U D G M E N T**

The appellant was charged with three counts of robbery with violence contrary to Section 296(2) of the penal Code. After trial before the Senior Principal Magistrate at Malindi, he was convicted on all the three counts and sentenced to death. He has appealed against both the conviction and sentence.

When this appeal came before us for hearing on the 9th March 2004 Mrs. Mwangi, the Assistant Deputy Public Prosecutor, conceded that the appeal should be allowed as part of the prosecution case before the trial court was conducted by a police constable contrary to Section 85(2) of the Criminal Procedure Code. She however sought a retrial given the seriousness of the offence and the fact that one of the witnesses was shot and almost died. She further stated that there was ample evidence against the Appellant and that the state is not seeking a retrial to fill up the prosecution case. Although the Appellant has been in prison for about 4 years the offence carries a death sentence.

The appellant on his part was opposed to a retrial arguing that he has been in custody and prison since 1999.

Section 85(2) of the Criminal Procedure Code provides:-

**“(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case”**

A police constable is a police officer below the rank of Assistant Inspector of police, the conduct of the prosecution case, in the trial giving rise to this appeal, by a police constable therefore renders the trial a nullity. We are reinforced in this holding by the court of Appeal decision in **Roy Richard Eliremia & Another -Vs- Republic Criminal Appeal No. 67 of 2002** (unreported). We therefore quash the conviction of the Appellant and set aside the death sentence.

The State has asked for a retrial. The Appellant is opposed to a retrial. Even if the Appellant did not oppose a retrial we are still duty bound to consider whether or not this is a proper case in which a retrial should be ordered. The Law as to when a retrial should be ordered is clear. In the case of Fatehali Manji -

Vs- Republic [1966] E.A. 343 the Court of Appeal for Eastern Africa stated thus:-

**“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;**

See also **Mwangi -Vs- Republic [1983] KLR 522** in which the Court of Appeal stated:-

**“... that a retrial should not be ordered unless the appellant court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence, a conviction might result: *Braganza Vs Republic [1957] E.A. 152 (CA) 469 Pyarwa Bussam Vs Republic [1960] E.A. 854***

Several factors have therefore to be considered. These include:-.

1. When the original trial was illegal or defective a retrial will be ordered.
2. A retrial will not be ordered if the conviction was set aside because of insufficient of evidence.
3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.
4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.
5. A retrial should be ordered where the interest of justice so demand.
6. Each case should be decided on its own merits.
7. Whether there is evidence to support the conviction.

In the said case of **Roy Richard Eliremia** the court of Appeal refused to order a retrial because the main witnesses were citizens of Somalia who had left the country. There was also the issue of jurisdiction as it was not clear whether the crime had been committed in Kenya or in Tanzania. Considering those circumstances the Court of Appeal held that it would be unfair to the Appellant to order a retrial.

We have carefully examined the lower court record. We agree with Mrs. Mwangi that there was ample evidence against the Appellant. The Appellant himself said he was at the scene of robbery with the robbers but claimed he had been hijacked. The prosecution witnesses however differed with him on that. They said he talked with the robbers in a friendly manner and that they handed over to him the stolen goods which he took out of the shop. If he had been hijacked as he alleged, he could have escaped. The witnesses who knew him before gave his name to the others and the police soon after the robbery.

We are satisfied that there was ample evidence against the appellant. There is no prejudice that will be caused to the appellant by a retrial. It has to be borne in mind that one of the witnesses, P.W.1 was shot and almost died.

In the circumstances justice demands that the Appellant be retried and we accordingly order a retrial before another magistrate.

**DATED this 22nd day of March 2004.**

**J. Khaminwa**

**JUDGE**

**D.K. Maraga**

**Ag. JUDGE**