



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 387 OF 2001

**(From Original Conviction and Sentence in Criminal Case No. 2001 of 2000
of the Chief Magistrate's Court at Mombasa F.M.O. Kadima Esq., SRM)**

RAMA SHABAN KAPOMBE APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was with another charged with the offence of robbery with violence contrary to Section 296(2) of the penal Code. After trial before the Senior Resident Magistrate's Court at Mombasa, the co-accused was acquitted but the Appellant was convicted and sentenced to death. He has appealed against both the conviction and sentence.

When the appeal came before us for hearing Mrs. Mwangi, the Assistant Deputy Public Prosecutor, conceded that the appeal should be allowed as the prosecution case in the trial giving rise to this case was conducted by a police constable contrary to Section 85(2) of the Criminal Procedure Code. She however stated that the state is asking for a retrial given the seriousness of the offence. She further submitted that there was ample evidence against the Appellant having been arrested with a pistol by members of the public who chased him and the other robbers.

Appellant on his part was opposed to a retrial. He said he had been in custody and prison for a long time.

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. He says he has been in custody and jail for a long period. 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 and also considered what the Assistant Deputy Public Prosecutor and the Appellant have said.

We agree with the Assistant Deputy Public Prosecutor that there was ample evidence against the Appellant.

During the robbery a woman who was nearby and saw what was going on raised an alarm. Members of the public chased the robbers. The Appellant who had a pistol tried to shoot but it jammed. So the robbers ran away. They were chased and two of them were killed by members of the public. The Appellant was beaten unconscious. The robbery victims arrived and identified the Appellant as one of the robbers and as the one who had actually pointed a gun at them and was given Sh. 6,330/= by P.W.1. He was found with the gun.

In the circumstances there is no prejudice that will be caused to the Appellant if a retrial is ordered. That the Appellant has been in custody and prison for a long time does not change the position as the offence Appellant was charged with carries a death sentence.

Having considered all the circumstances and the facts placed before us we are satisfied that the interest of justice demand that we order a retrial.

We therefore order a retrial of the Appellant before another court

DATED this 22nd day of March 2004.

J. Khaminwa

JUDGE

D.K. Maraga

Ag. JUDGE