



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO. 162 OF 2002

**(From Original Conviction and Sentence in Criminal Case No.3668 of 2000 of
the Chief Magistrate's Court at Mombasa – J. Oseko, Mrs. – S.R.M.)**

ISAAC WAFULA DAMASCUS.....1ST APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

A N D

CRIMINAL APPEAL NO.115 OF 2002

JUMA JOSEPH WAMALWA.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

In this appeal the Deputy Principal State Counsel Mrs. Mwangi has pointed out that the prosecution of the trial in the subordinate court (Hon. Senior Resident Magistrate J. Oseko) was conducted by an unauthorized person contrary to Section 85(2) Criminal Procedure Code.

On 21.11.2000, 5.12.2000, 20.2.2001, 1.3.2001 Pc Walucho appeared as the prosecutor for the ordered mentions only. On 14.3.2001 the day the trial commenced and evidence of PW.1, PW.2 was taken the prosecutor was Pc Walucho.

On 4/6/2001 again when trial continued Pc Walucho appeared for State and presented evidence of PW.3 when trial was adjourned.

However, on 27/6/2001 Pc Walucho had disappeared from the record and the trial proceeded with Inspector Musili for State. Evidence of PW.4 was taken and the trial adjourned.

The evidence of PW.5 was presented by Inspector Auma who conducted the prosecution to the end.

In the circumstances the learned State Counsel states that the trial was vitiated by the participation of Pc Walucho and asks that it be declared a nullity. At the same time she asks for a retrial saying there is

sufficient evidence to support conviction and that Judgment was made only on 13.3.2002. The witnesses are known to the police and that the offence occurred in the central part of this city at Polana Hotel.

The two Appellants object to the request for a re-trial and would like the appeal to be allowed.

We have examined the record. It is clear that a Police Constable (unauthorized person) conducted part of the prosecution. He presented the evidence of 3 witnesses. This cannot be said to be taking part in formal mentions only he examined the three witnesses and re-examined them as he chose.

It is therefore true that the trial was prosecuted partly by an unauthorized person and partly by authorized person (Inspectors Akumu Onyango, Ouma, C.I. Kilonzo, Caleb and IP Musili). The situation here is similar to that existing in Roy Richard Elinema & Another vs Republic being Appeal No.67/2002 where the Court of Appeal Judges found that the record of lower court showed that unauthorized persons had conducted the trial by calling witnesses, leading them and putting forth exhibits. The Judges said and we quote:-

“The narrative shows that a large portion of the prosecution was conducted either by Corporal Kamotho or by Corporal Gitau. It is however true that Inspector Wambua also conducted part of the prosecution We cannot see that we can separate one part of the trial and hold it valid (i.e. part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. parts conducted by Corporals Kamotho and Gitau) to be invalid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.”

In that case the Court of Appeal invalidated the trial.

Similarly in this case we find the active participation in the prosecution at the trial level by Pc Walucho to vitiate the whole trial and we declare the same a nullity.

The Appellants oppose the order requested for re-trial. They rely on the Criminal Appeal No.75 of [1964] E.A. 481 where the East African Court of Appeal held that whether an order for re-trial should be made depends on particular facts and circumstances of each case but should only be made where the interest of justice require and where it is not likely to cause an injustice to an Accused person.

The powers granted to court to order re-trial under Section 354(3)(a)(i) is discretionary and must be exercised in a judicial manner. The court reiterated the principles to be applied in considering a re-trial namely:- that re-trial will not be ordered where conviction is set aside because there was no sufficient evidence to establish the charges or for the purpose of enabling the prosecution to fill up gaps left in their evidence in the first trial. A re-trial should be ordered only where the original trial was illegal or defective.

In the present case the Appellants were charged with attempted robbery contrary to section 297(2) in that:

“on 31/10/2000 they jointly while armed with a toy pistol (ommitted dangerous or offensive weapon or instrument) attempted to rob Mrs. Amira of her cash and at or immediately after the time of such an attempted robbery used actual violence to the said Amira.”

The evidence supporting the charge is clear and is sufficient to convict the Accused who was *“in company of one or more other person or persons and who at, immediately, before or after the time of assault, he wounds, beats or strikes or uses any personal violence to any person.”* The complainant.

The issue of identification is not a problem since some of the Accused were employees of the complainant.

The court notes that there was sufficient evidence to convict and the Appellants have not suffered punishment.

It is our view that this is a proper case for re-trial.

We therefore quash conviction and sentence and order that the Appellants will remain in custody until
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when the case will be mentioned before Chief Magistrate's Court at Mombasa for Plea and arrangements for re-trial before another Magistrate.

Dated at Mombasa this 31st day of May, 2004.

J. MWERA

J U D G E

JOYCE KHAMINWA

J U D G E