REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NOS. 152, 153 & 154 OF 2000

MOSES MURATHI NJERU ……...1ST APPELLANT

GODFREY KIMANI NGANGA…….....……2ND APPELLANT

ABUNELI MURUMBA……..….....……..3RD APPELLANT

VERSUS

REPUBLIC……..…..……..RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1224 of 1999 of the Principal Magistrate's Court at Nyahururu) –W. N. Nyarima

JUDGMENT

The Appellants, Moses Murathi Njeru, Godfrey Kimani Nganga and Abuneli Murumba were charged with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars in support of the said charges brought against the Appellants were that on the night of 4th and 5th of April 1999 and further on the 4th of May 1999 at various parts of Nyandarua District the Appellants jointly with others not before Court while armed with rungus, pangas and iron bars robbed various Complainants of their properties and in the course of the said robberies used actual violence to the said Complainants. One of the Complainants Stephen Njenga Kariuki was killed in the course of the said robbery. The Appellants were convictedon two of the counts after a full trial. They were sentenced to death as mandatorily provided by the law. The Appellants were aggrieved by the said conviction and sentence.They have appealed to this Court against the said conviction and sentence.

During the hearing of the Appeals, the Appellants Appeals having arisen from the same trial before the Lower Court were heard as one. Mr. Mutuku, learned Counsel for the State at the commencement of the hearing conceded to the Appeals filed by the Appellants on the ground that the proceedings before the trial Magistrate were prosecuted by a police officer who was incompetent. Mr. Mutuku was however of the view that the Appellants should be retried in view of the overwhelming evidence that was adduced against them by the Prosecution in support of the charge. He further submitted that one person died as in the course of the robbery that the Appellants were charged. On their part, the Appellants while welcoming the conceding of the Appeals by the State were however opposed to being retried.

We have perused the proceedings before the trail magistrate. We have noted that part of the proceedings thereto were prosecuted by Sergeant Wakonyo. He is a Police Officer of a rank lower than that of an Assistant Inspector of Police. This was contrary to the provisions of Sections 85(2) and 88 of the Criminal Procedure Code. The Court of Appeal in **RoyRichard Elirema & Anor. –versus- Republic Cr. App. No. 67/2002 (Mombasa) (unreported)** and **Slyvester Keli Kakumi Cr. App. No. 142/2002 (Mombasa) (unreported**) was of the opinion that where such a Police Officer prosecutes a case before a

Magistrate's Court, the proceedings thereto will be a nullity. We are bound by the decision of the Court of Appeal. We hereby declare the proceedings before the trial Magistrate to be a nullity as a consequence of which the Appeals filed by the Appeals are hereby allowed, their convictions quashed and the sentences imposed set aside.

Mr. Mutuku, Learned State Counsel is of the view that the Appellants should be retried in view of the overwhelming evidence that was adduced against the Appellants in the vitiated trial before the Senior Resident Magistrate. The Appellants on their part do not wish to be subjected to retrial. The principles upon which this Court should consider before ordering for a retrial were restated in **Fatehali Manji – versus- Republic [1966] E. A. 343 Sir Clement de Lestang stated at page 344,**

> ***"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 the 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***
>
> ***particular facts and circumstances and an order of retrial should only***
>
> ***be made where the Interests of Justice require it and should not be***
>
> ***ordered where it is likely to cause injustice to the accused person"***

In **M'Kanake –versus- Republic [1973] E. A. 67** it was held that a retrial should not be ordered to enable the Prosecution fill gaps in the evidence or rectify faults it had committed during the initial trial. In **Mwangi –versus- Republic [1983] K.L.R. 522 at page 538 Hancox J. A.** stated:

> ***"We are aware that a retrial should not be***
>
> ***ordered unless the Appellate Cour t is of the***
>
> ***opinion that on a proper consideration of the***
>
> ***admissible or potentially admissible evidence,***
>
> ***a conviction might result; Braganza –versus -***
>
> ***Republic [1957] E. A. 152 (C. A), Pyarala Bassan***
>
> ***–versus - Republic [1960] E. A. 845. In our view,***
>
> ***there was sufficient evidence on record which***
>
> ***might support the conviction of the Appellants."***

Applying the principles enunciated above in this case, it is clear that the robberies which the Appellants were charged with were committed at night by a group of more than ten robbers.Most of the witnesses who gave evidence could not identify the robbers who robbed them. The witnesses who testified that they

were able to identify the Appellants, identified the Appellants in circumstances where positive identification would be difficult. The Prosecutions evidence was basically premised on the sole evidence of identification and not other evidence. In **Maitanyi –versus- Republic [1986] K.L.R. 198** it was held by the Court of Appeal that the greatest care ought to be taken by the Court when relying on the sole evidence of identifying witnesses especially when it is known that the conditions favouring correct identification were difficult. It was further held that when testing the evidence of identification when identification was made by a witness, the nature of the light and the available conditions ought to be put into consideration. The robberies which the Appellants were charged took place at night. Most of the witnesses who gave evidence identifying the Appellants stated that they were able to identify the Appellants from the light emitted by the moonlight. We find the circumstances which the said identification were made were not conducive for positive identification. From our assessment of the evidence on record, it is evident that were a retrial to be ordered the evidence would not sustain a conviction. We have also considered the fact that the Appellants have been in lawful custody for a period of more than five years. The Appellants have repaid their debt to the society. We do find that it will not serve any useful purpose to make an order for retrial.

In the circumstances therefore the Appellants are hereby ordered discharged. They shall be set at liberty unless otherwise lawfully held.

DATED at NAKURU this 4th day of May, 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE