

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
H.C.CR. APPEAL NO.80 OF 2003

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case
No.872 of 2003 of the Chief Magistrate's Court at Mombasa – J.S. Mushele, SPM)

SALIM OKIRORI APPELLANT

VERSUS

REPUBLIC RESPONDENT

**Coram: Before Hon. J. Mwera,
Hon. Justice Maraga
Ms. Mwaniki for the State
Court clerk – Mitoto**

J U D G E M E N T

The learned State Counsel conceded the appeal herein, and in our view correctly so, on the basis that on 12/6/02 Cpl. Mwamburi did prosecute the case in the lower court by leading witnesses in evidence, all contrary to section 85(2) Criminal Procedure Code. He was not an officer holding the rank of assistant inspector of police and above and so he could not be a competent public prosecutor appointed by the Attorney General under the said section (see **Roy Elirema & Anr. Vs. R. Cr. A. No.67/2002 (C.A.) unreported**). Accordingly we had no difficulty in holding that the proceedings in the lower court were a nullity and so this appeal ought to and is hereby allowed.

The learned State Counsel however posited that the accused person do stand another trial because the evidence on the lower court record could possibly ensure a conviction. The motor vehicle used in the robbery offence, allegedly committed by the accused, hence being charged under S.296(2) Penal Code, was followed immediately after the offence by the police officers using the information of its registration number and make that they were given by eye witnesses. That the accused was found still in that motor vehicle and he was apprehended. That the offence took place in Mombasa and witnesses would be availed at the intended retrial. That the accused would suffer no prejudice.

The accused strongly resisted the prospects of being retried. He said that a retrial was not viable because there was no admissible or potentially admissible evidence upon which a conviction would likely hinge. He passed to us the case of **AHMEDI SUMAR VS. R (1964) E.A. 481**, stressing that PW.1's evidence (principal witness) was thrown out by the lower court. That indeed the charge sheet was defective in the light of **SULEIMAN JUMA alias TOM VS. R. CR. A 181 (C.A.) (unreported)** because although laid under S. 296(2) Penal Code it did not state that the attackers in the lower court were armed with offensive weapons.

Having considered the evidence in the lower court there is admissible evidence upon which a conviction may result on a retrial. It is all about the appellant being found in the robbery motor vehicle whose registration number eye witnesses took and gave to the police officers. On the very evening of the robbery the accused was caught still in the same vehicle. Accordingly there will be a retrial of the accused but under S.296 (1) Penal Code, because the original charge under S.296(2) Penal Code was defective in that it did not state that the accused with his mate were armed with dangerous or offensive weapons. This particular must always feature in a charge under S.296(2) Penal Code to distinguish it with ordinary robbery (see Sleiman's case above)

In sum this appeal is allowed but the accused should stand trial under
S.296(1) Penal Code.

Judgement accordingly.

Delivered on 15th June 2004.

J.W. MWERA

JUDGE

D. MARANGA

AG. JUDGE