REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
H.C.CR. APPEAL NO. 277 OF 2002

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.270 of 2002 of the Senior Resident Magistrate's Court at Voi – E.N. Maina)

SHADRACK MWARABU AKIDA……. APPELLANT

VERSUS

REPUBLIC…….. RESPONDENT

Coram: Before Hon. Justice Mwera

Hon. Justice Maraga

Mrs. Mwangi for the State

Appellant present

Court clerk – Sango & Mitoto

J U D G E M E N T

When this appeal came before us for hearing the learned State Counsel conceded it and rightfully so, in that on 20.5.2002 a police officer Cpl Gitau prosecuted the case in the lower court. By leading witnesses in evidence, when the appellant faced a charge of robbery with violence c/s 296(2) Penal Code. Cpl Gitau being of lower rank than that of Assistant Police Inspector, he was not competent to prosecute as he did (see S. 85(2) CPC and ROY ELIREMA & ANOTHER VS R. CR. APPEAL NO. 67/2002 C.A.) Accordingly the proceedings in the lower court were termed a nullity. We agree that that is so. So straight away the conviction is quashed and the sentence set aside. The Learned State counsel however prayed for a retria,l quite likely in accord with Section 354(3)(a)(i) CPC.

We were told that a retrial will be based on the evidence as was laid before the lower court. That the offence took place in Taita Taveta and witnesses would be traced and presented. That the identification of the (now) accused was based on strong evidence and that the offence was a serious one. That the main was threatened and was traumatized, while the victim was fatally assaulted..

The accused opposed a retrial claiming that the lower court evidence could not establish that he participated in the robbery. That no exhibits were tendered and all in all, even as the Learned State Counsel pressed for a retrial out of a sense of duty, not much would come from it save to breach the

accused's constitutional right (quite probably of a fair trial.) He put forth the case of SULEIMAN JUMA alias TOM VS R. CR. APPEAL 18/2002) and likened his own charge in the lower court to the charge in the said Suleiman case. That the charge although laid under Section 296(2) Penal code was defective because it did not describe the weapons allegedly used as dangerous.

In this matter, and holding the view that a retrial was sought under Section 304(3) (a)(i) CPC (powers of the High Court and Appeal), that provision of law reads:

> **"354. (1) …… (2) …….**
>
> **(3) The court may then, if it considers that there is no sufficient ground of interfering, dismiss the appeal or may –**
>
> **(a) in an appeal from a conviction –**
>
> **(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction or "**

The terms confer on the High Court sitting in its appellate jurisdiction unlimited discretion as to ordering a retrial a discretion that no doubt must be exercised judicially.

Each case has to depend on its particular facts and circumstances with the focus that the accused is not forced into another trial where it can be avoided. In our present case a retrial is urged on the basis that the appeal has been conceded on a legal technicality. Indeed when considering a retrial there is this principle stated in AHMED SUMAR VS R. [1964] EA 481,483)

> ***"…….that retrial should not be ordered unless the court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction mi ght result……."***

It is not enough that witnesses not be traced and presented or that the offence in question was serious. These are nonetheless important factors of this particular case. So before this court considers to order a retrial, it goes over the potential evidence as per the lower court record and if it is satisfied that on that evidence a conviction might result, a due order is made.

In this case the evidence in the lower court was purely circumstantial and it was so recorded. But no doubt the accused had been at the house where the robbery took place resulting in one resident being fatally assaulted by a stick one witness insisted that she (PW1 Rhoda Wasome) had seen the accused with. In our view this is rather a matter that should not go for a retrial. The trial magistrate's belief and trust in the evidence of PW1 about the stick may not be another competent magistrate's belief in a retrial. The offence took place at night.

The other aspect lay in the way the charge sheet was drafted. It was in respect of robbery with violence contrary to section 296(2) Penal Code. The particulars read:

> **"SHADRACK MWARABU AKINDA on the night of 23rd and 24th day of February 2002 at unknown time at Njoro WaterSupply quarters in Taita Taveta District within the Coast Province jointly with another not before court armed with pangas robeed of DEFENCE WAMBUGA WASOME one National Television set, two radio cassette (sic) make National and Elector, a panga all valued Ksh 19,150/= and at or immediately before or immediately after the time of such robbery killed the said Defence Wambuga Wasome."**

It can be noticed right away that the charge sheet does not state that the offenders were armed with dangerous or offensive weapons.

In the Suleiman case the Court of Appeal said:

"We have considered the particulars of the charge and it cannot be denied that the charge refers to the appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under se ction 296(2) of the Penal Code, the charge must state that the accused was armed with a dangerous weapon or instrument ……..,"

and for that the charge was found defective. Similarly the charge that the accused faced was defective same that probably if found quality the conviction would be for simple robbery under Section 296(1) Penal Code. Seemingly the Learned State Counsel did not notice this discrepancy which the accused did draw our attention to.

So all in all a retrial is refused. Having allowed the appeal we now order that the accused be set at liberty forthwith unless otherwise lawfully held.

Judgement accordingly.

Delivered on 15th June 2004.

J W MWERA **D. MARAGA** **AG. JUDGE**

JUDGE