REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 205 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 2788 of 2002 of the Chief Magistrate's Court at Mombasa B.N. Thuranira, Senior Resident Magistrate)

JOHN AINEAH OMUTERE …….. APPELLANT

Versus

REPUBLIC …….. RESPONDENT

J U D G M E N T

John Aineah Omutere was charged before the Senior Resident Magistrate at Mombasa with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that during the night of 29th/30th day of October 2002 at unknown time at Bombolulu Estate in Mombasa District within Coast Province, jointly with others not before court, while being armed with dangerous weapons namely, pangas, bows and arrows, iron bars and simis he robbed Jorim Marenya of cash Sh. 18,000/=, personal documents, air fan, children's birth certificates, two mobile phones, make Ericson T29 and Nokia 3330, one video deck make JVC, one music system make Singer CD discs and one litre of honey, all to the total value of Sh. 151,000/= and at or immediately before or immediately after such time of robbery used actual violence to the said Jorim Marenya. The Appellant pleaded not guilty but after trial he was found guilty and sentenced to death. He now appeals to this court against both conviction and sentence.

When the appeal came up for hearing Mr. Monda, learned State Counsel conceded it on the ground that a corporal of police conducted the defence case but asked for a retrial. Section 85(2) of the Criminal Procedure Code requires all public prosecutors to be advocates of the High Court of Kenya or police officers of the rank of Assistant Inspector of Police or above. A corporal not being of or above that rank we declare the trial of the appellant a nullity. Consequently we allow this appeal quash the conviction and set aside the sentence.

As we have stated the State has sought a retrial. When and under what circumstances is a retrial ordered?

The law as to when a retrial should be ordered has long been settled. In the case of **Fatehali Manji Vs Republic [1966] EA 343** the Court of Appeal for Eastern Africa when dealing with the same issue gave the following guideline:-

> **"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when 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 a retrial should only be made where the interests of justice require it".**

In **Sumar Vs Republic [1964] EA 481** the same court had stated that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each case but it should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person. In **Mwangi Vs Republic [1983] KLR 522** the Kenya Court of Appeal following *Braganza Vs Republic (1957) EA 152 (CA) and Pyarala Bassam Vs Republic [1960] EA 854* stated at page 538 that:-

> **"… a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result."**

Applying these principles to this appeal do the interests of justice demand a retrial? Is there evidence admissible or potentially admissible a proper consideration of which might result in a conviction?

Mr. Monda, learned State Counsel said there was ample evidence upon which the trial magistrate based the conviction and that the same, on a proper consideration on a retrial, will found a conviction.

According to him the evidence of P.W.4, Samantha Mangla Marenya, although a child of 10 years, is safe to rely on and that it was corroborated by that of P.W.1. He further submitted that P.W.4 properly identified the Appellant by recognition and that the conditions for a favourable identification were obtaining.

Mr. Kinyanjui, learned counsel for the Appellant, strongly opposed the plea for a retrial. He submitted that there is no evidence which can found a conviction. He said that the only evidence against the Appellant was that of the child Samantha P.W.4. Her father and mother relied on her description of the Appellant.

We have carefully considered the evidence on record. We agree with Mr. Kinyanjui that P.W.1 and P.W.2 relied on the purported description of the Appellant by their daughter P.W.4. In his evidence in chief P.W.1 said that "*At the time of robbery I was not able to identify any of the robbers .*" Later on, while still giving evidence in chief he contradicted himself when he said "*I saw the robber who was the last one to leave our bedroom. He is the accused (identified)*". He continued that he had seen him when he was walking out of the bedroom. This witness and his wife P.W.2 said that the light that was on was in their ensuite bathroom where they had all gone and hidden. They did not say that the Appellant or any of his confederates went into that bathroom. We cannot therefore understand how P.W.2 was able to clearly see the Appellant who was in the bedroom with the light from the bathroom even to the point of seeing the scar of Appellant's face. In cross examination the young girl said:-

> **"I gave my father the description of the Accused. When I gave my father the description of the accused I realized he knew … [who] I was talking about".**

In further cross examination the girl said:-

> **"The accused was arrested by some young men in the estate. I had told my parents about the scar."**

We are satisfied that P.W.1 and P.W.2 were not able to identify the Appellant or any of the robbers. If they had it could have been needless for their daughter to describe the Appellant to them.

Having discounted the evidence of P.W.1 and P.W.2 we are now left with only the unsworn statement of P.W.4, a child of ten years. And it is evidence of visual identification. Evidence of visual identification even when it is that of an adult is treated with caution. In **Roria Vs Republic [1967] EA 583** the Court of

Appeal had this to say regarding such evidence:-

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness … [The] danger is, of course, greater when the only evidence against the accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself in all circumstances, that it is safe to act on such identification."**

In that case the Court of Appeal could not uphold a conviction based on the testimony of a single identifying witness although that witness was an adult who also identified the appellant in a properly conducted identification parade because it was doubtful about the conditions of identification at the scene. In this case we are not only dealing with the unsworn statement of a minor but there was no identification parade conducted. From the description she gave the appellant was arrested by a vigilante group, taken to her home and beaten until he lost consciousness. The police thought that was good identification by recognition and found no need of carrying out an identification parade. We wish to state that the procedure followed in this case was totally wrong. After arrest the Appellant should not have been taken to the complainant's house. He should have been taken to the police station and kept out of the sight of the complainants until an identification parade was arranged so that the complainants could identify him there.

There is one more reason why we cannot accept the statement of the young girl. She said she was in bed with her sister in their bedroom. From there, she claimed to have been able to see the Appellant with the aid of the light from their father's bedroom. Her words were that:-

> **"The bedroom light coming out from under our father's bedroom door."**

enabled her to see the Appellant.

As we have said her father's bedroom light was not on. What was on was the light from the ensuite bathroom. We are left with no doubt in our minds that even this girl in those circumstances could not and was not able to identify anybody. She, like her mother saw a figure walking with a torch pointed to the floor, perhaps of the Appellant's size, and assumed it was him. Thereafter she strongly held that view and went ahead to describe him to her parents. We are not surprised by that assumption because children of her age sometimes form wrong impressions and firmly stick to them.

For these reasons we are far from being satisfied that there is evidence that may found a conviction in a retrial. In the circumstances it will be extremely prejudicial to the appellant to order a retrial. Consequently we decline to accede to the state's plea for a retrial and instead order that the Appellant be set free forthwith unless otherwise lawfully held.

DATED and delivered this 20th day of July 2004.

J. KHAMINWA

JUDGE

D.K. MARAGA

AG. JUDGE