

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 450 OF 2002

**(From Original Conviction and Sentence in Criminal Case No. 374
of 2002 of the Senior Principal Magistrate –Mombasa –J.S.
Mushelle (SPM))**

MICHAEL WAMBUA APPELLANT

-VERSUS

REPUBLIC RESPONDENT

RULING

The Appellant and two other people were charged with robbery with violence contrary to Section 296(2) of the Penal Code. After trial before the Senior Principal Magistrate at Mombasa the other two accused persons were acquitted under Section 210 of the Criminal Procedure Code for lack of evidence. The Appellant was, however convicted and sentenced to death. He has appealed against both conviction and sentence.

During the hearing of the appeal Miss Mwaniki, learned State Counsel, conceded the appeal on the ground that part of the prosecution case was conducted by corporal Mwamburi contrary to Section 85(2) of the Criminal Procedure Code. That Section requires that public prosecutors should be advocates of the High Court of Kenya or police officers of the rank of Assistant Inspector of Police and above. As a corporal is below that rank the Appellant's trial was a nullity. We therefore allow the appeal and set aside the conviction and sentence.

Miss Mwaniki sought a retrial. She submitted that there was evidence against the Appellant and that the state is not seeking a retrial to fill up any gaps in their case. The Appellant opposed a retrial arguing that to grant it will be prejudicial to him. He further argued that the identification parade was not properly conducted as there were only seven people contrary to the police standing rules. We have carefully perused the lower court record. There were eight people in the identification parade and not seven as the Appellant claimed. The parade was properly conducted and the Appellant was properly identified by three prosecution witnesses. We are satisfied that there is evidence which may found a conviction. Accordingly we order that the Appellant be retried before another court of competent jurisdiction. DATED this 8th day of June, 2004.

J. W. MWERA

JUDGE

D.K. MARAGA

AG. JUDGE