



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 192 OF 2002

MARTIN MUMO KISWELE.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 193 OF 2002

MUTUA MUTINDA KIUMO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

These two appeals, by **MUTUA MUTINDA KIUMO** and **MARTIN MUMO KISWELE** were consolidated, so as to facilitate hearing and determination, as they arose out of the same trial.

Although the appellants had cited numerous grounds of appeal in their respective Petitions of Appeal, when the appeals came up for hearing, they both relied on one common ground; that the trial was partially conducted by an unqualified prosecutor.

A perusal of the record of the proceedings before the trial court reveals that one **PC Mbonge** did prosecute the case on 14th August 2002, when PW7 testified. The said PC Mbonge is the person who then closed the prosecution case.

In the light of the foregoing facts, Mr. Omirera, learned State Counsel, was constrained to concede the appeal. He was right to do so because **PC Mbonge** did not hold the requisite qualifications for appointment as a prosecutor. Applying the principle laid down in the case of **Roy Richard Elirema & Another V Republic Criminal Appeal No. (MSA) 154 of 2002**, we hold that the appellants trial, which was partly prosecuted by a public prosecutor who was below the rank of Assistant Inspector of Police, was a nullity, on the grounds that a corporal was not qualified to be appointed a public prosecutor.

Accordingly, in line with the decision by the Court of Appeal in the aforesaid Elirema Case, we now declare the entire proceedings a nullity, quash the convictions and set aside the sentences imposed by the trial court.

After we had thus set aside the convictions and quashed the sentences, the learned Stated Counsel, Mr. Omirera asked us to order that the appellants be retried, whereas the appellants asked us to set them at liberty.

It was submitted by the state that it was in the interests of justice that the appellants be retried, so as to bring to book the perpetrators of the offences with which the appellants had been charged. The respondent submitted that the appellants would not be prejudiced by a retrial as they had only been arrested on 17th November 2001, in relation to an offence committed during that same month. In the said circumstances, the respondent expressed the view that the period during which the appellants had been in custody was not too long, if viewed against the gravity of the offences they were charged with.

The respondent also notified us that the witnesses would be readily available to attend court and testify, if a retrial was ordered.

Finally, the respondent submitted that the evidence on record would be sufficient to sustain a conviction.

As we understand it, the principles to be considered by an appellate court before it can decide whether or not to order a retrial are well set out in the decision by the 3 Judge bench in **Criminal Appeals numbers 415, 416 & 146 of 2002 John Kariuki Kamau & Another versus Republic**. The court, in that case summarized the principles as follows;

- “1. A retrial may be ordered only when the original trial was illegal or defective,
2. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but an order for retrial 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.
3. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result.”

Applying those principles to these appeals, we hold that the original trial was defective, as part of it was conducted by an unqualified prosecutor.

We have also given due consideration to the evidence or potentially admissible evidence which was adduced before court, at the first trial, (which has now been annulled), and do find the same to be sufficient to sustain a conviction. The appellants appear to have been positively identified by more than one witness. They (appellants) were more than one, in number, and were armed with dangerous weapons when they robbed the three complainants of various items.

The state did confirm to us that all the witnesses would be readily available to attend court and testify.

We have also taken into account the fact that the appellants faced three charges of robbery with violence, contrary to section 296(2) of the Penal Code. Those offences, if proved, attract a mandatory death sentence. Therefore, in every respect, the charges facing the appellants are very serious indeed. After weighing the charges against the length of time which appellants have already spent in custody, we form the considered opinion that the interests of justice do require a retrial. In our opinion, a retrial of the appellants would not occasion prejudice or injustice to the appellants.

Accordingly, we do now direct that the appellants should be tried before any Magistrate’s court of competent jurisdiction, other than Betty Maloba, who presided over the first trial. We further direct that the appellants shall remain in custody until 28th September 2004, when the case will be mentioned before the presiding Magistrate at Kangundo Law Courts, for the purposes of fixing hearing dates.

Finally, we direct that the hearing of this case shall be accorded priority.

It is so ordered.

Dated at Machakos this day of 2004

R. WENDO

JUDGE

FRED A. OCHIENG

AG. JUDGE