



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 717 OF 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 2494 of 2001 of the Chief Magistrate's Court at Nairobi (S. Ndambuki (Miss) – S.R.M.)

JAMES MUNENE NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **JAMES MUNENE NJOROGE** was charged and convicted of one count of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. He was sentenced to suffer death as mandatorily prescribed in the law. Being aggrieved with the conviction and sentence he filed this Appeal.

When the Appeal came up for hearing before us, **MISS MWENJE**, learned state counsel for the State, informed the court that she was conceding to the Appeal on account of the prosecution of the case by an unqualified Prosecutor. She submitted that one **CPL. OSIEMO** who conducted most of the Prosecution of the case before the trial court was unqualified to do so.

We have perused the trial court proceedings. We have confirmed that indeed one **CPL. OSIEMO** conducted most of the Prosecution of the case. That contravened the Provisions of **Subsection 85(2)** and **88** of the Criminal Procedure Code. In **ROY RICHARD ELIREMA & ANOTHER C.A. No. 67 of 2002** (Mom) the Court of Appeal held that where any part of the prosecution of a Criminal Case was conducted by a Police Officer below the rank of an Acting Inspector, such conduct rendered the entire proceedings defective and the same should be invalidated. We are bound by that decision of the Higher Court. We find that the trial before the lower court was defective and rendered invalid. Accordingly we quash the conviction and set aside the sentence.

The issue that remains is whether or not to order a retrial. It is trite law that a retrial may be ordered where the original trial was defective or illegal. See **MANJI vs. REPUBLIC 1966 E.A. 343**. However, certain principles apply and should be considered to enable the court determine whether or not to order a retrial. In the **MANJI CASE Supra, SIR, DE LESTANG, Ag. P. SPRY Ag. V-P and LAW JA**, held: -

“In general a retrial will be ordered only when the original trial was illegal or defective; 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 retrial should only be made where the interest of justice require it.”

Each case must be determined on its own merits. In addition to determining whether the justice of the case requires that a retrial be ordered, in **MERALI & OTHERS vs. REPUBLIC E.A. 221, SIR DUFFUS P., LAW & MUSTAFFA JJA.** held: -

“A retrial may be ordered if the interest of justice require it and if no prejudice is caused to the accused.”

In addition to considering whether the interest of justice requires such order to be made, it should not be made if in fact the order may cause prejudice and therefore injustice to the accused person.

Finally the other principle applicable was discussed in the case of **MWANGI vs. REPUBLIC 1983 KLR 522, at 538 where HANCOX JA., CHESONI and NYARANGI Ag. JJA.**, held: -

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible and potentially admissible evidence, a conviction might result.”

We shall apply all these principles to assist us arrive at a just and fair decision in this matter. In this case the Complainant was robbed of a travelling bag, cash and other belongings, by six men at 10.30 p.m., on the night of 27th October 2001. He was able to trail one of the men whom he saw carrying his travelling bag. He boarded a matatu with him and had him apprehended inside the vehicle, which was then driven to Central Police Station where police arrested him. The Complainant was able to identify the bag and belongings inside it, as amongst the items stolen from him. The Appellant was then charged.

We hold the considered view that a conviction would result if a retrial were ordered, going by the admissible and potentially admissible evidence of the case, if that evidence was properly considered by the court.

We have considered **MISS MWENJE’s** submission concerning the Prosecution witnesses. It was submitted that the witnesses in the case were from Nairobi and could be availed for the retrial. We have also considered that the Appellant has been in custody since 2001, a period of 3 years. We also considered the seriousness of the offence committed. We are satisfied that no prejudice will be occasioned to the Appellant if a retrial were ordered.

Having considered this Appeal, we are of the view that it is a proper case to make an order for a retrial. Accordingly we order that the case goes back to the Chief Magistrate’s Court Nairobi for retrial.

In that regard we order that the Appellant be held in custody until 1st November 2004 when he should be produced before the Chief Magistrate’s Court Nairobi for plea to this charge.

Orders accordingly.

Dated at Nairobi this 26th day of October 2004.

LESIIT

JUDGE

OCHIENG’

Ag. JUDGE

Read, signed and delivered in the presence of;

Miss Gateru for state

Appellant in person

LESIIT

JUDGE

OCHIENG'

Ag. JUDGE