

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 792 OF 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 2921 of 2001 of the Senior Principal Magistrate's Court at Kibera (Ms. Mwangi – P.M.)

STEPHEN MUNGU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **STEPHEN MUNGU MWANGI** was found guilty and convicted of one count of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 297(2) of Penal Code. One count of **BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE** contrary to Section 4(2) of the Firearms Act and one count of **BEING IN POSSESSION OF AMMUNITION WITHOUT A FIREARMS CERTIFICATE** contrary to **Section 4(2)** of the Firearms Act. He was sentenced to death in the first count and to 4 years and 2 years respectively in counts 2 and 3. being aggrieved by the conviction and sentence the Appellant lodged this Appeal. When the Appeal came up for hearing, **MR. OGETII** learned counsel for the state informed the court that he was conceding to the Appeal. He submitted that part of the Prosecution witness were lead in evidence by **Cpl. KARICIITHO**.

MR. KANYI, learned counsel for the Appellant did not oppose the submission. On our part, we did peruse the trial court proceedings and did confirm that indeed one; **CPL. KARICIITHO** led the evidence of the Complainant in count 1. That rendered the entire proceedings a nullity being in contravention of Subsection 85(2) and 88 of the Criminal Procedure Code. In line with the ruling of the Court of Appeal in a similar matter in the case of **ROY ELIREMA & ANOTHER vs. REPUBLIC C.A. No. 67 of 2002** (Mom) we hold that the proceedings were invalid. We accordingly quash the conviction and set aside the sentence.

MR. KANYI for the Appellant urged us not to order a retrial. He argued two points. One that the Appellant was not to blame for the mistake that led to the invalidation of the trial proceedings by this court. We do agree that the Appellant was not to blame in any way for the mistake by the prosecution. However, that is not the only consideration in determining the issue at hand. There are other issues to determine and principles to apply. As Mr. Kanyi submitted, the other important issue to decide is whether or not there was sufficient evidence to sustain a conviction. **KANYI** submitted that the evidence before the trial court was insufficient for various reasons. He argued one of those reasons as being the insufficiency of the evidence of identification.

OGETII on his part was of the view that not only was the evidence strong enough to sustain a conviction but that there was eye witness account of the incident with the identifying witnesses PW1, 2 and 3.

In **MWANGI vs. REPUBLIC 1983 E.A. 522** the Court of Appeal held that even though a retrial could be ordered where the original trial was defective, as was the case in the instant case, that no retrial should in fact be ordered unless the Appellant court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result.

We have re-evaluated the evidence adduced before the lower court. We are satisfied that a conviction could result if we were to order a retrial.

The other principle applicable in a case such as this one is that no retrial should be ordered if that may result in prejudice against the Appellant. In any event, whether or not to order a retrial depends with the facts and circumstances of each case. See **MANJI vs. REPUBLIC 1966 E.A. 343**.

We have considered the circumstances and facts of this case. The offence took place 3 years ago. The Appellant has been in prison for the last 2 years. We do not find that any prejudice will be occasioned to him if a retrial were ordered. The Prosecution has also indicated that the witnesses are available and will be availed if a retrial were ordered.

We have also considered the offences involved in the charge. They are very serious offences which should not be treated casually.

Having considered this Appeal and the principles applicable in determining whether or not to order a retrial, we are agreed that this is a fit case to order a retrial. Accordingly we order that a retrial be held in this case. In that regard we order that the Appellant be held in custody until the 26th day of October 2004 when the Appellant should be produced before **KIBERA Senior Resident Magistrate's Court** for a plea in the case. Orders Accordingly.

Dated at Nairobi this 19th day of October 2004.

LESIIT

JUDGE

OCHIENG'

Ag. JUDGE

Read, signed and delivered in the presence of;