

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE

CRIMINAL APPEAL NO. 230 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 381 of 2002 of the Resident Magistrate's Court at Makueni: J. K. Kiia Esq. on 30.4.2002)

MUTUVI MUTUAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The appellant Mutuvi Mutua was charged along with two others in Makueni Criminal Case No. 381/02 for the offence of robbery contrary to section 296(1) of the Penal Code. Accused 1 and 2 pleaded guilty and were dealt with immediately. The appellant who was the 3rd accused denied the offence and the case proceeded to trial whereby the appellant was convicted and sentenced to serve 12 years imprisonment, hard labour and 6 strokes of the cane. It is against this conviction and sentence that this appeal is brought.

When the appeal came up for hearing the Learned State Counsel conceded the appeal on grounds that Corporal Kyumbu was unqualified to prosecute the case in the lower court. Section 85 of Penal Code and Section 88 of the Penal Code provides for who is a qualified prosecutor. It has to be a police officer of the rank of an Acting inspector of police and above or an Advocate of the High Court. The said Corporal Kyumbu was none of these. In the case of **ROY ELIREMA V. REPUBLIC CR. APP. 67/03**, the Court of Appeal held that prosecution of a case by an unqualified prosecutor renders the proceedings a nullity. Accordingly I hold that the proceedings before the lower court were a nullity and the appellants conviction is therefore quashed and sentence set aside.

The Learned State Counsel prays that the court do order a retrial of the case for reasons that there is overwhelming evidence on record which may result in a conviction if a retrial is ordered; that the offence committed against the complainant was very serious and ideally the appellant should have been charged with offence of Robbery with violence and the offence should be punished so that justice is seen to be done. The State Counsel also submitted that no injustice will be committed against the appellant because the offence was committed in 2001 November and the conviction was in April 2002 and so far the appellant has only served 3 years out of the period of 12 years to which he was sentenced and lastly that the witnesses who testified in the lower court would be available if required to testify at a retrial.

The appellant vehemently opposed the prayer for a retrial because he has been in custody for long and has suffered a lot. He submitted that he has already served 2½ years in prison and 6 months in prison.

Generally, the court will order a retrial if the trial in the lower court is illegal or defective. This is what was held in the case of **MANJI V. REPUBLIC 1964 EA 353**. In this case, the trial was conducted by an unqualified prosecutor and the trial has been declared null and void. It is a case that can be considered for a retrial.

In the above cited case of **MANJI V. REPUBLIC** it was also held that a retrial will not be ordered if it will result in the accused suffering any injustice or prejudice and that each case has to be considered on its own peculiar circumstances. I have carefully scanned the evidence adduced before the lower court. The offence committed against the complainant is very serious. As pointed by the Learned State Counsel ideally the appellant should have been charged with a more serious offence but that was not the case. It

does not mean that if the court ordered a retrial the appellant would be charged with the more serious offence as that would be prejudicial to the appellant. However, all things considered the perpetrators of the heinous offence against the complainant should be brought to book and not be let off the hook due to sheer technicalities or mistakes.

I have read the evidence on record and it is the view of the court that the evidence on record is such that if a retrial is ordered a conviction may result.

The offence was committed in Makueni which falls within the local limits of the Resident Magistrate's Court and the witnesses in the lower court can be recalled to testify.

The appellant was arrested in November 2001. he was sentenced in April 2002. he has so far served about 2½ years. He was sentenced to serve 12 years imprisonment. He has hardly done a third of the sentence. In my view the appellant will not suffer prejudice if a retrial is ordered. The court has to weigh the prejudice that the appellant would suffer without forgetting the offence with which he was charged with.

All things considered, this court finds that the court do order a retrial of this case. It is ordered that the appellant be sent back to the trial court for a mention when the case can start afresh. Mention before Makueni Resident Magistrate's Court on 18.10.2004.

Dated, read and delivered at Machakos this 13th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE