REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 488 OF 2001

(From Original Conviction and Sentence and Criminal Case No. 473 of 2001
of the Senior Resident Magistrate's Court at Narok)

SAMSON OLE NKUME…….....…..….APPELLANT

VERSUS

REPUBLIC…….....…..RESPONDENT

JUDGMENT

The Appellant, Samson ole Nkume was charged with another with the offence of robbery with violence contrary to **Section 296 (1) of the Penal Code**. The particulars of the offence were that on the 20th of August 2001 at upper Majengo Estate, Narok Township jointly with others not before Court robbed Margaret Seleyian Kasura of Electronic goods worth Kshs. 50,000/= and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Margaret Seleyian Kasura. After a full trial the Appellant was convicted as charged and sentenced to four years imprisonment. The Appellant was aggrieved by the said conviction and sentence and Appealed against the said conviction and sentence to this Court.

At the hearing of this Appeal, Mr. Gumo Learned State Counsel conceded to the Appeal filed by the Appellant on the sole ground that the Criminal Case before the trial Magistrate had been prosecuted by an incompetent prosecutor **contrary to Section 85(2) and 88 of the Criminal Procedure Code**. Mr. Gumo was not however asking that the Appellant be retried in view of the insufficient evidence adduced by the Prosecution against the Appellant in the Lower Court.

I have perused the proceedings of the trial Magistrate. I have noted that the proceedings thereto were prosecuted by Police Constable Ihaji, a Police Officer of a rank lower than that of an Assistant Inspector of Police. This was contrary to the provisions of **Section 85(2) and 88 of the Criminal Procedure Code**. The Court of Appeal in **Roy Richard Eliremah & Anor. –versus- Republic Cr. Appeal No. 67/2002 (Mombasa) (unreported) and Sylivester Keli Kakumi –versus- Republic Cr. Appeal No. 142/2002 (Mombasa) (unreported)** decided that where a Police Officer of such rank prosecutes a case before a Magistrate's Court, the proceedings thereto will be a nullity. I am bound by the decision of the Court of Appeal. I hereby declare the proceedings before the trial Magistrate's Court to be a nullity as a consequence of which the Appeal filed by the Appellant is allowed, the conviction quashed and sentence set aside.

Mr. Gumo does not wish the Appellant to be subjected to the rigours of a retrial in view of the insufficient evidence adduced by the Prosecution against the Appellant. I have reevaluated the evidence adduced by the Prosecution before the trial Magistrate's Court. I have noted that the Appellant was convicted on the evidence of Identification by the Complainant and his minor son. It was the evidence of these two witnesses that they were asleep in their house at about 5.00 a.m. They heard a bang at the door. She put on the Electric light. Two men entered her house stole her two radios, Television Set and Video Deck and went out. The Complainant screamed. Neighbours came to her rescue. The robbers had escaped. The stolen items were never recovered. The following day the Complainant saw the Appellant at the Telephone Booth. She called the Police. The Appellant was arrested. The Complainant testified that she had identified the Appellant during the course of the robbery. She testified that she had not known the Appellant prior to the robbery incident. She also testified that the robbery took place for about ten minutes. On re-evaluation of the said evidence and the Judgment of the trial Magistrate, it is evident that the Appellant was convicted on the sole evidence of Identification in circumstances that were difficult to

enable positive Identification to be made. The robbery took place for about ten minutes. The Complainant did not know the Appellant prior to the robbery incident. It cannot therefore be said that the Identification of the Appellant was that of recognition. It has severally been held that the trial Court should warn itself of the dangers of convicting an accused person on the sole evidence of Identification especially putting into consideration the difficult circumstances that the said Identification was made. (See **Abdulla bin Wendo & Anor – versus- Republic (1953) 20 E.A.C.A. 166, Roria –versus- Republic [1967] E. A. 583 and Maitanyi versus Republic [1986] K. L. R. 198**.

There is no evidence that the Complainant made a report to the Police after the robbery incident giving the description of the said robbers including, the unique features that would enable an Identification of the robber to be made when he is arrested. No evidence was adduced by the Complainant to prove that it was the Appellant and no one else who could have robbed her of her Electronic goods. In the absence of a report of the description of the robbers made immediately after the robbery, a conviction of the Appellant based on the sole evidence of Identification cannot be sustained. The possibility that the Appellant was mistakenly identified as the robber cannot be ruled out. No other evidence was offered by the Prosecution to connect the Appellant to the robbery. Mr. Gumo, right in my considered opinion, did not wish the Appellant to be subjected to the rigours of a retrial with such evidence.

The Appellant is consequently discharged. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 10th day of May 2004.

L. KIMARU

AG. JUDGE