REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 62 OF 2002

MICHAEL MWASI……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

MICHAEL MWASI was convicted for **ROBBERY WITH VIOLENCE,** contrary to section 296(2) of the Penal Code. He was then sentenced to suffer death as by law prescribed.

At the hearing of his appeal, learned State Counsel, Mr. Makura conceded the appeal, as parts of the trial had been conducted by an unqualified prosecutor.

A perusal of the record reveals that on 25th January 2001, PC Radak was the prosecutor. In carrying out the function of a prosecutor, PC Radak led the evidence of PW1 and PW2. By so doing, he rendered the entire trial a nullity, as he did not hold the requisite qualification to be appointed as a public prosecutor.

By virtue of the provisions of Section 85(2) of the Criminal Procedure Code, the Hon. Attorney General is empowered to appoint public prosecutors from amongst advocates of the High court of Kenya, or otherwise from amongst persons employed in public service not below the rank of Assistant Inspector of Police.

For the foregoing reason, which was expounded upon by the Court of Appeal, in **ROY RICHARD ELIREMA & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO. 67 of 2002** (at Mombasa), the trial of the appellant herein, must be and is hereby declared a nullity. We therefore proceed to quash conviction and set aside the sentence.

However, the respondent has asked us to order that the appellant be retried. He says that the appellant has only been in custody for two years, and that therefore, a retrial would not be prejudicial to him.

Mr. Makura also contended that the State was ready to provide the witnesses, and also that it would be in the interest of justice to order a retrial.

The appellant strongly opposed the request for his retrial. He said that the mistake that resulted in the trial being rendered a nullity had been made by the prosecution, who must be presumed to know the law.

There is no doubt that the appellant did not play any role in the appointment of the prosecutor. He cannot therefore be responsible for the appointment of the unqualified prosecutor. However, that fact alone would not mean that this court should not order a retrial. Had that been reason enough to warrant refusal for a retrial, all cases which had been prosecuted, (even partially), by unqualified prosecutors would never be retried.

In **JOHN KARIUKI KAMAU VERSUS REPUBLIC, CRIMINAL APPEAL NO. 415 of 2002,** this Court made a diligent effort to summarize the grounds upon which an appellate court may order a retrial. The said grounds were as follows;

> **"1. A retrial may be ordered only when the original trial was illegal or defective (MANJI V REPUBLIC [1966] EA 343, and MWAURA V REPUBLIC, CRIMINAL APPEAL NO. 58 of 1989).**
>
> **2. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but 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 – (SUMAR V REPUBLIC (1964) EA 481; MANJI V REPUBLIC (Supra) and MWAURA V REPUBLIC (SUPRA)**
>
> **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 the potentially admissible evidence, a conviction might result."**

Applying the foregoing principles to this case, we note that the only eye witness to the incident was the complainant, PW1. He said that the incident happened at 9.00p.m.. He was going back home from the shops, when 3 young men surrounded him. In his testimony, the appellant, who was one of the three, removed shs 500/= from his pocket. But in any event, PW1 was able to extricate himself from the three, and run home. After he had thus escaped, the appellant followed him, held him and stabbed him, with a knife. PW1 then held onto the appellant, as he screamed for help. Neighbours came to PW1's help and they found PW1 still holding the appellant.

It was in those circumstances that the appellant was arrested.

The evidence of PW1 was corroborated by PW2, **CHARLES OBONYO ODUGU,** who was a neighbour. PW2 was also involved in the arrest of the appellant. PW3, APC Phillip Esioki, re- arrested the appellant at the Administration Police Camp Korogocho.

And PW4, Dr. Z.M. Kamau, testified about the injuries sustained by the complainant, PW1.

From the prosecution witnesses, it was therefore only PW1 and PW2 who were at the scene, at the material time. Both of them confirmed that the appellant was arrested when PW1 was holding onto him. In other words, the appellant was arrested in the act. That notwithstanding, however, both PW1 and PW2 confirmed that when the appellant was searched he did not have either the knife he used to assault PW1, or the money which he is alleged to have stolen from the complainant. As the appellant was caught red-handed, what happened to the knife with which he had just injured the complainant?

And what about the money?

Could the appellant have been arrested by mistake in the commotion, which PW1 talked about?

We do not have answers to those questions. But for that very reason, we hold the considered view that if the appellant was to be retried, the prosecution would have been accorded an opportunity to try and find answers to the said questions. If that were to happen, the appellant would be prejudiced.

We hold the view that, upon a proper consideration of the potentially admissible evidence, a conviction is not likely to be sustained. Therefore, we decline to order a retrial.

In the circumstances, we now direct that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 30th day of November, 2004

J. LESIIT

AG. JUDGE

FRED A. OCHIENG

AG. JUDGE

Delivered in the presence of

Olengo for State

Appellant in person present

Mr. Muya/Anne Wambui court clerks