

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 253 OF 2002**

**(From Original Conviction and Sentence in Criminal Case No. 409 of 2002 of the
Senior Principal Magistrate's Court at Mombasa J.S. Mushelle, Esq., SPM)**

JAMES LEMBIRIKANYI APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

This is an appeal against the conviction and sentence on a charge of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged that on the 1st day of February 2002 at about 9.30 p.m. at Customs quarters Bombolulu in Mombasa District within Coast Province with another not before the court being armed with dangerous weapons namely knives the Appellant robbed one Lilian Kwamboka Gichana of her handbag valued at Sh. 2,000/= and cash of Sh. 600/= and at or immediately before or immediately after the time of such robbery he used personal violence upon the said Lilian Kwamboka Gichana. The Appellant pleaded not guilty but after trial he was convicted and sentenced to death.

At the hearing of the Appeal Mrs. Mwangi, learned Assistant Deputy Public Prosecutor, conceded the appeal on the ground that part of the prosecution case was conducted by Corporal Mwamburi. She, however, sought a retrial arguing that the offence is serious and that the evidence against the Appellant was watertight. She also said that the prosecution witnesses are available to testify once again.

Opposing the plea for a retrial the Appellant argued that he has been incarcerated since February 2002 and has suffered. The evidence against him, he further argued, was not sufficient to sustain a conviction. A retrial will therefore cause him more suffering. We agree with Mrs. Mwangi that the prosecution case having been conducted by corporal Mwamburi the Appellant's trial was a nullity and we so declare it. Consequently we allow this appeal quash the conviction and set aside the sentence.

Before ordering a retrial in a matter like this among the things we need to take into account are the seriousness of the offence, whether or not the evidence on record may found a conviction if a retrial is ordered and whether or not a retrial is likely to cause prejudice to the Appellant.

We have carefully examined the lower court record. The complainant P.W.1 testified that on the material date at about 9.30 p.m. she was going home from her place of work. Soon after alighting from a bus she saw some two young men walking towards her. After passing her they turned and started following her. They caught up with her and produced knives threatening to kill her if she screamed. She threw the handbag at them. She screamed when they started running away with her handbag. Members of the public gave chase. P.W.2 towards whom they were running also gave chase. They threatened him also with knives but he managed to arrest the Appellant with the help of other members of the public. Later the Appellant was handed over to police.

Having considered this evidence and what the Appellant said we are of the view that the prosecution evidence may well found a conviction. Although the Appellant has been incarcerated since February 2002 no prejudice will be caused to him as this is a capital offence carrying a mandatory death sentence.

In the circumstances we order that the Appellant be retried before another magistrate.

DATED and delivered this 25th day of November 2004.

J. MWERA

JUDGE

D.K. MARAGA

AG. JUDGE