

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 169 OF 2003**

SAMUEL MWANGI MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT .

(Appeal from judgment dated 13th May, 2003 in

**the Chief Magistrate's Court Nyeri Criminal Case
No. 2474 of 2002 by C. D. Nyamweya, Senior
Resident Magistrate).**

JUDGMENT

Although the Charge Sheet indicates that there were two counts facing the Appellant who was being accused in each count of robbery with violence contrary to *Section 296 (2) of the Penal Code* and indeed the record of plea on the first day, 19th November 2002 shows there were two counts, subsequent proceedings show no evidence of two counts and the judgment appealed from is no better – up to the sentence. The trial magistrate in his judgment talked about the robbery on Julius Maina Karanja where on 13th October 2002 at Kaini Village in Nyeri District, the Appellant is alleged to have been in company of others not before court and armed with dangerous weapons, when they robbed Julius Maina Karanja of one torch and cash Ksh.700/= using violence. That was in Count I. The victim in Count II was Nancy Njeri Maina – from whom Ksh.200/= was alleged to have been robbed. The judgment does not refer to her.

In any case during the hearing of the appeal before us with Mr. Nderi appearing for the Appellant and Mr. Orinda for the State, Mr. Orinda told us that he conceded the appeal pointing out that the trial of the Appellant was a nullity because prosecution was conducted by a prosecutor who was not qualified to prosecute in terms of *Section 85 (2)* of the Criminal Procedure Code. Mr. Orinda added that he was not asking for re-trial.

From the record of proceedings before the trial magistrate, there is no dispute that prosecution of the Appellant having been started by Inspector Kagambi was, more than half later, continued and completed by Corporal Mwangi who was not qualified in terms of *Section 85 (2)*. That, no doubt, made the trial of the Appellant a nullity.

Accordingly, we do hereby allow the Appellant's appeal. Quash his conviction and set aside the sentence thereof. We do order the Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 18th day of November 2004.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE

