



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
HIGH COURT CRIMINAL APPEAL 205 OF 2003**

(From the Original Conviction and Sentence in Criminal Case No. 1022 of 2000 of
Resident Magistrates Court at Makindu: R.K. Mibei on 3/7/03)

JAMES KIETI MUSAU ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

J U D G E M E N T

The appellant James Kieti was charged along with Antony Kioko Muia in Makindu Criminal Case No. 1022/00. They were charged with the offence of Robbery Contrary to Section 296 (1) of the Penal Code. After hearing of the prosecution evidence the 2nd accused absconded. After giving his defence the appellant who was 1st accused was found guilty, convicted and sentenced to three (3) years imprisonment, three (3) strokes of the cane and 5 years police supervision after sentence. Being aggrieved by this conviction and sentence, he filed the present appeal.

The appellant raised 7 grounds in his petition of appeal. They can be summed up in one ground which is that the identification of the appellant was not watertight because the circumstances under which the appellant was allegedly identified were unfavourable. Even without the appellant arguing his appeal the learned State Counsel conceded the appeal on grounds that the proceedings before the lower court were partially conducted by an incompetent prosecutor one Police Constable Muasya and secondly that the case had been heard by Mr Ochako Resident Magistrate, who finished hearing the prosecution evidence. Mr Mibei took over hearing of the defence case but failed to comply with Section 200 of the Criminal Procedure Code by giving the accused a chance to decide whether he wanted the case to proceed to full hearing from where Mr Ochako stopped or he wanted to recall any witness. He urges the court to order a retrial since the offence was serious and the appellant had already served one year of his sentence.

The appellant vehemently objected to a retrial as he claims to have been in jail for long.

A perusal of the record of proceedings before the lower court does confirm that the prosecution evidence was taken by one Ochako Resident Magistrate. For some reason he did not finish hearing the case. Mr Mibei took over the defence hearing. It is apparent from the record that he did not comply with Section 200 Criminal Procedure Code whereby he should have informed the appellant of his right to recalling witness to be reheard or cross examined or he could ask that the case be heard a fresh. This is to avoid any prejudice to the appellant.

When the appellant gave his defence on 16/5/03, the prosecutor was one Police Constable Muasya. He is an unqualified prosecutor as per provisions of Section 85 (2) and Section 88 of the Penal Code. Under this Sections a qualified prosecutor will be a police officer of the rank of Ag. Inspector and above or an

Advocate of the High Court appointed by the Attorney General.

In the now celebrated case of **ROY ELIREMA & ANOTHER Versus Republic** Cr. Appeal 67/03 the Court of Appeal held that prosecution of a case by an unqualified prosecutor renders the whole proceedings a nullity. The prosecutor having been unqualified renders these proceedings before the lower court a nullity and this court declares them as such. The result is that the conviction is quashed and the sentence set aside.

What next, can the court order a retrial? In the case of **MANJI Versus Republic 1966 EA 343**, the Court of Appeal held that the court will generally order a retrial if the lower court proceedings are defective or illegal and that if no prejudice will be occasioned to the accused person.

In the present case the proceedings before the lower court were defective in that Section 200 Criminal Procedure Code was not complied with by Mr Mibei who took over at defence stage and the prosecution of the case by an unqualified prosecutor rendered the prosecution defective.

For the court to order a retrial it should consider the evidence adduced in the lower court to be such that on a careful consideration of the evidence, the court can find a conviction. In my view, the evidence on record is such that a conviction may result as the appellant was a neighbour of the complainant and his wife. They testified that they had interacted with him before when he worked for them. PW 1 saw him by the moonlight and while in the house the robbers ordered PW 2 to light a lamp. That evidence was not challenged.

The witnesses are residents of Makindu location and neighbours of the appellant. The court is convinced that if a retrial is ordered these witnesses would avail themselves to testify.

The last question is whether the appellant would be prejudiced by an order of retrial. The appellant appeared in court for plea on 30/11/00. The first witness was not heard till 5/6/01. The prosecution's case was concluded on 18/9/01 and court took a while for the appellant to give his defence.

In the process it seems the appellant had another case and was sentenced to prison. After several production orders appellant resurfaced on 16/5/03 for his defence. He was sentenced on 15/5/03 to three (3) years imprisonment. So far he has served one year five (5) months. He was in remand in respect of this case for about ten (10) months. All things considered this court is of the view that ordering a retrial in this case would be unfair and prejudicial to the appellant. Accordingly I do order that he be released forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 26th day of October 2004.

Read and delivered in the

Presence of

R.V. WENDOH

JUDGE