

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 132 OF 2001
(From original conviction and sentence in Criminal Case No. 32 of 2000 of the Senior Resident Magistrate's court at MOLO – J. KIARIE, ESQ.)

W K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellant and 2 others were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged that on 1/1/2000 at Kichagi Farm Nyakiambi of Nakuru District, the Appellant and 2 other persons jointly robbed Anthony Kuria of one bicycle make Raja valued at Kshs.3,400/- and immediately after the time of such robbery threatened to use actual violence to the said Anthony Kuria. The Appellant was convicted of the said offence but because he was 15 years at the time he committed the offence he was detained in prison at the President's pleasure as per the provisions of Section 25(2) of the Penal Code.

He was aggrieved by the said conviction and sentence and he appealed against the same. Before the Appellant addressed us on his appeal, Mr. Koech, the learned state counsel informed the court that the prosecution in the lower court had been conducted by unqualified police prosecutors, who were police constables. He therefore conceded to the appeal and as to whether the Appellant ought to be retried or not, he chose to make no submission but left the issue to the court.

The Appellant said that he was opposed to a retrial, saying that his co-accused had died in custody. We have considered the issues raised by the learned state counsel and the Appellant. We have ascertained that the prosecution case was conducted by Police Constable Ngesa and Police Constable Njagi. Both were unqualified in terms of the provisions of Section 85(2) of the Criminal Procedure Code which requires that such prosecution, if conducted by a police officer, such a police officer should not be below the rank of an Assistant Inspector. The trial was therefore a nullity. The legal position was clearly stated by the Court of Appeal in **ROY RICHARD ELIREMAH & ANOTHER VS REPUBLIC** Criminal Appeal No. 67 of 2002 at Mombasa (unreported). In that matter, the Court of Appeal allowed an appeal where the Appellants had been convicted and sentenced to death because the prosecution case had been conducted by an unqualified police prosecutor. The court did not order a retrial, considering the fact that the Appellants had been in custody for a long period of time. In the present matter, being satisfied that the trial was a nullity for the reason aforesaid we set aside the conviction and quash the sentence that was handed down to the Appellant by the trial magistrate.

We note that the Appellant has been in custody since 1/1/2000 when he was arrested and considering the long period of his incarceration, the nature of the offence allegedly committed and his age at the time when he was alleged to have committed the offence, we are of the considered view that it would not be in the interest of justice to order a retrial and we consequently, discharge the Appellant and order that he be set at liberty forthwith unless otherwise lawfully held.

DATED at Nakuru this 17th day of December, 2004.

D. MUSINGA

JUDGE

17/12/2004

L. KIMARU

JUDGE

17/12/2004