REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 132 of 2003

(From original conviction and sentence in Criminal Case No.2722 of 1999 of the Senior Resident Magistrate's court at Molo – J. KIARIE, SRM)

EVANS MWAURA AVENSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Evans Mwaura Avensa was charged with 2 others for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** The particulars of the charge are that on 2/11/1999 at Elburgon Farm in Nakuru District, jointly with others not before the court, robbed Njihia Kahunyo of cash money 540/-, one Sanyo radio worth Kshs.3,500/-, one wall clock valued at 450/-, one set of table clothes valued at Kshs.1,500/- and clothes worth Kshs.10,490/- and immediately before or after the said robbery used actual violence on Njihia Kahunyo.

The appellant and his co-accused denied the offence and the case was heard by J. Kiarie, Senior Resident Magistrate, Molo. They were all convicted and sentenced to death. The court records show that the 2nd accused and 3rd accused have since died. Aggrieved by trial magistrate's decision, the appellant filed this appeal. The grounds of appeal are as follows:-

(1) That the trial magistrate erred when he based the conviction on circumstantial evidence that did not point irresistibly at him;

(2) That the trial court failed to consider that the appellant was only 16 years old at the time of conviction;

(3) That the trial magistrate failed to consider his defence that there existed a grudge;

(4) That the charge was not explained to the accused in a language that he understood;

(5) That the magistrate failed to comply with Section 169;

(6) That the court failed to consider Chapter 46 of Force Standing Order;

(7) That the magistrate erred in finding that the appellant was identified;

(8) That the prosecutor was not qualified.

These grounds of appeal were contained both in the memorandum of appeal and the appellant's written submissions.

Mr. Omwega, learned counsel for the State, opposed the appeal for the reasons that the offence was committed on the night of 1st and 2nd November 1999, and the appellant was arrested in possession of the stolen goods on 2/11/99; that the recovered items were positively identified by the complainant. Counsel also observed that the appellant's defence is a mere denial and the trial magistrate did consider it. He urged the court to find that there was overwhelming evidence against the appellant

Upon a keen perusal of the file, we decided to take up the ground of whether or not the prosecutor was qualified to prosecute the case facing the appellant. When the appellant appeared before the trial court for plea on 4/11/99, the record shows that the magistrate was J. Kiarie, SRM and the prosecutor was PC Njagi. PC Njagi also appeared on 13/1/00 when the case came up for a mention. After that the court never recorded the full quorum. The record shows that whether it was a mention or hearing, that court just recorded **"Coram as before, accused person present"**. This court can only assume that on all those days when the case was heard, there was a prosecutor present and that it was PC Njagi. As of 1999 when the appellant was tried, the provisions of the law relating to appointment of public prosecutors was **Section 85** of the **Criminal Procedure Code** which provides:-

"85(1) The Attorney General, by order in the Gazette, may appoint public prosecutor's for Kenya or for any specified area thereof, and either generally or for any specified case, or class of cases.

(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney General."

Section 85(2) of the **Criminal Procedure Code** clearly provides for who can be appointed as public prosecutor, an advocate of the High Court or a Police Officer not below the rank of an Assistant Inspector of Police. PC Njagi as described, was only a police constable and therefore not qualified to prosecute before any court because PC Njagi was a subordinate officer.

We should point out that **Section 85** of the **Criminal Procedure Code** has since been amended by **Act of 2007** to read as follows:-

"85(1) The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case;

(3) Every public prosecutor shall be subject to the express directions of the Attorney General."

The amendment to **Section 85(2)** seems to suggest that a public prosecutor must be of the rank of an advocate of the High Court or a person employed in the public service to be a public prosecutor. It means the ceiling of the rank of Ag. Inspector of Police has been removed so that even a police constable can be a public prosecutor provided he is employed in the public service as such.

In the celebrated case of **Elirema & Anor v Rep [2003] KLR 537**, the Court of Appeal said that:-

"Going by the provisions of the Criminal Procedure Code it is clear that the Attorney General had no power to appoint a police officer below the rank of Assistant Inspector as public prosecutor."

In that case the trial of the appellant in which a corporal prosecuted was declared a nullity. In the instant case the purported prosecution of the appellant by PC Njagi rendered the proceedings a nullity.

Although the appellant had raised this ground in his written submissions, the Learned Counsel for the State seems to have overlooked it and did not address it. The question we shall then address is whether we can order a retrial. The purpose of a retrial is to bring to the attention of the trial court an error that was committed during the trial. The court has a wide discretion whether or not to order a retrial but that discretion is guided by principles which have been developed by the courts over the years.

In the case of **Ahmed Sumar Vs Rep [1964] EA 481 at page 483**, the court stated as follows regarding retrial in criminal cases:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."

There are several facts that the court needs to consider when deciding whether or not to order a retrial. Some of the considerations were laid down in **Patel Ali Manji Vs Rep. [1960] EA 343** in which it was held:-

"(1) In general a retrial will be ordered when the original trial was illegal or defective;

(2) That each case must depend on its own facts and circumstances;

(3) That an order of retrial should only be ordered where the interest of justice requires it;

(4) A retrial will not be ordered if by so doing an injustice will be caused or occasioned.

The case of **Alloys Awori V Uganda [1972] EA 469**, introduced another condition which is:-

"5. A retrial will not be granted for purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial."

In the case of **Ratilal Shah v Rep [1958] EA 3,** it was held that:-

"6. A retrial should be ordered when the court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result."

See also **Pascal Clement Bragamza v Rep [1951] EA 52.**

Without saying much for fear of prejudicing the defence, we are of the view that in consideration of the potentially admissible evidence, a conviction on retrial might result. However, we observe that the appellant has already served about 12 years imprisonment having been imprisoned on 30/8/2000. The prosecution might have difficulty in tracing witnesses and a re-trial might take some time too. Having served for those years, it would be unfair to order a retrial. The circumstances dictate that we do not order a retrial.

We have not found it necessary to address the other grounds of appeal touching on the merits of the trial court's decision since this ground alone (the prosecution by an unqualified person, was a nullity determines the appeal.

In the end, we quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 4th day of July, 2012.

R.P.V. WENDOH

JUDGE

ANYARA EMUKULE
JUDGE

PRESENT:
In person - the appellant
Ms Idagwa for the State
Kennedy – Court Clerk