



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, GITHINJI & WAKI JJA)

CRIMINAL APPEAL NO. 475 OF 2007

BETWEEN

SHIMAVU OLE KUMUR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ) dated 16th February, 2009

in

H.C.CR.A NO. 893 OF 2002)

JUDGMENT OF THE COURT

Only one ground of appeal was argued by learned counsel for the appellant, Mr Ondieki, which ground was conceded by learned Senior Principal State Counsel, Mr Omirera. As it turned out, part of the proceedings before the trial court were conducted by an unqualified prosecutor thus rendering the entire trial a nullity.

The appellant appeared before Kibera Chief Magistrates Court for his trial on two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code, one Count of rape contrary to **section 140** of the Penal Code and an alternative charge of indecent assault of a female contrary to **section 144 (1)** of the Penal Code. The offences were alleged to have been committed on 25th and 28th November 2001 and the actual trial commenced on 5th April 2002 before Githinji (S.R.M). Between that date and 17th June 2002 three prosecution witnesses had testified although five more were lined up to give their evidence. The prosecutor at the time was an Inspector of Police, IP Kimemia, and the prosecution was therefore lawful. However, on the 21st June 2002, another prosecutor, one **Sergeant Mathenge** is recorded to have appeared in court to conduct further prosecution of the case but the witness he was intending to call, though in court at an earlier stage, had left and therefore Sgt Mathenge sought an adjournment. The court considered the application and in view of earlier adjournments sought and granted to the prosecution, the learned trial magistrate declined to grant any further adjournment and made an order that the trial shall

proceed. Thereupon Sgt. Mathenge closed the prosecution case and a ruling was delivered that the appellant had a case to answer. He proceeded to tender his defence and the judgment was set for 8th August 2002. He was convicted on one count of robbery with violence and the count of rape and was sentenced to suffer death while the sentence on rape was held in abeyance. His appeal to the superior court (Mutungi and Ochieng JJ) was dismissed on 26th April 2005.

As stated earlier, both counsel agree that the trial was vitiated by the participation of an unqualified prosecutor in a portion of it. This is in line with several authorities of this Court since **Elirema & Another vs Republic [2003] KLR 537**. In that *locus classicus*, this court stated:

“For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside

.....

It is, however, true that an inspector Wambua also conducted part of the prosecution. But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. the parts conducted by Corporals Kamotho and Gitau) are invalid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.”

Following that decision and others an amendment was made to **section 85 (2)** of Criminal Procedure Code by **Act No 7 of 2007** deleting the words “*not being a police officer below the rank of Assistant Inspector of Police*”, but the amendment is not relevant to this case. We must therefore apply the principle in the **Elirema** case and declare the trial a nullity with the consequence that the conviction of the appellant and the sentence of death passed on him are set aside.

The only issue that remains to consider is whether a retrial as requested by Mr. Omirera and opposed by Mr. Ondieki, should be ordered. The principles applicable here are also set out in several decisions of this Court, the guiding one being that each case must depend on the particular facts and circumstances of that case and that a retrial should only be made where the interest of justice require it. See **Benard Lolimo Ekimat v R Cr. Appeal No. 151 of 2004 (UR)**. Among the factors to be considered in exercise of judicial discretion in that regard are whether there were irregularities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; and whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial – see **Muiruri v Republic [2003] KLR 552**, and **Mwangi v Republic [1983] KLR 522**

We have taken all those principles into consideration and are of the view that this case is deserving of an order for retrial. The appellant shall be tried by a court of competent jurisdiction other than Githinji SRM and shall be produced before the Chief Magistrate Kibera for directions as to when and before whom the retrial would commence within 14 days of this order. In the meantime the appellant shall be detained in prison pending his trial.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 28th day of May, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR