



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 236 OF 2002

JOSEPH WANJOHI MAINA 1ST APPELLANT

RICHARD OSOYE OBENGI 2ND APPELLANT

KURIA CHEGE MUGA ALIAS KUSH 3RD APPELLANT

MARTIN MURIUKI GAKERE 4TH APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

Nairobi (Mbogholi & Mbito, JJ) dated 2nd October, 2002

In

H.C. Cr. A. NO. 189, 190, 191 & 192 of 1998)

JUDGMENT OF THE COURT

Mr. Kivihya, learned counsel for the Republic, conceded these consolidated appeals, rightly in our view, on the basis of the well-known principles enunciated by this Court in the case of ELIREMA & ANOTHER VS. REPUBLIC, [2003] 1 EA 45. The prosecution of the appellants in the subordinate court was throughout the proceedings conducted either by a police corporal or by a police constable, contrary to the then existing provisions of *section 85(2)* of the Criminal Procedure Code. Nor did Mr. Kivihya ask us to order a retrial and once again, we think Mr. Kivihya was entirely right. The alleged offence on which the four appellants were tried and eventually convicted of was said to have taken place on 12th June, 1997; that is some ten years ago and it would be unreasonable to order a retrial after such a long time. But even more important than the length of time which has passed since the commission of the offence, the evidence on which the appellants were convicted was simply baffling. Benard Opiyo Ouma (PW1) and Jerry Okal (PW7) were the victims of the robbery; they were also the only eye witnesses to the robbery which appears to have taken place at 10.00 p.m. or thereabouts. Both witnesses said in their evidence that because of darkness, they were unable to identify their attackers during the time of the robbery. In spite of that evidence the police still organized identification parades at which the two witnesses now purported to identify the appellants. When cross-examined Benard told one of the appellants:-

“It was at night. It was dark. I am not sure about your involvement because visibility was poor. Police said you was (sic) involved. It was at night; there was no light. Police mentioned you. I do not know why you were arrested. I identified you in a parade. I had seen you in police station before the parade. Police knew you were arrested. I don’t know you.”

Despite this type of evidence, the trial Magistrate chose to convict the appellants, and even more surprising, the superior court, without going into these matters confirmed the conviction by the trial magistrate. We are satisfied that even if a retrial was still feasible, no useful purpose would be served by such an exercise as there is no possibility that a conviction could reasonably be had on the available evidence. We think the appellants were merely convicted and sentenced to death because of the disgusting behaviour of those who attacked PW1 and PW7; they chopped off the penis of PW1 and hence the disgust of the two courts below. We allow the appeal of each appellant, quash the conviction for the offence of robbery recorded against each one of them and set aside the sentence of death imposed. The appellants are to be released from prison forthwith unless they or any of them is held for some other lawful cause.

Dated and delivered at Nairobi this 15th day of February, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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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.