



IN THE COURT OF APPEAL

AT NAKURU

CRIMINAL APPEAL 177 OF 2002

JUSTUS KORIR SAMBU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a sentence of the High Court of Kenya at Nakuru (Ondeyo & Visram, JJ.) dated 4<sup>th</sup> October, 2002*

in

H.C.C.R.A. NO. 48 OF 1999)

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JUDGMENT OF THE COURT

**Justus Korir Sambu**, the appellant, has come to this Court on second appeal challenging his conviction by the Principal Magistrate's Court, Nyahururu, for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

By dint of the provisions of **section 361** of the *Criminal Procedure Code*, he could only appeal to this Court on matters of law only. In his home made memorandum of appeal and a supplementary memorandum of appeal filed by his counsel, Mrs. Ndeda, he has raised several grounds. However, at the hearing of this appeal, Mrs. Ndeda abandoned all other grounds and confined her submissions to **ground No. 5** in the *supplementary memorandum of appeal* which reads as follows:-

**“5. The learned Judges erred in law by failing to note that the case proceeded without the prosecutor being in Court and if there was the same was conducted by unqualified person.”**

Prosecutors are appointed by the Attorney General pursuant to the power conferred on him by **section 85** of the *Criminal Procedure Code*, which, as material, provides as follows:-

**“85 (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.”**

It was Mrs. Ndeda's submission before us that the appellant's case was conducted by an unqualified person and therefore his trial was rendered invalid for that reason.

The appellant was presented to the trial Court on 9<sup>th</sup> July, 1997 and appeared before an Ag. Principal Magistrate, one Mrs. Karanja. An Inspector of Police one, Odhiambo, was prosecuting. The appellant was jointly charged with another person who was acquitted, with the robbery with violence charge. They pleaded not guilty, and that necessitated a trial. The case was mentioned several times. In some instances the name of the prosecutor was given. The recording invariably read “*Coram as before*”. “*Accused present.*” The last date before the Court received evidence when the name of the prosecutor was specifically mentioned was 17<sup>th</sup> March, 1998. On that day, W.N. Nyarima, Ag. SRM, was presiding. Senior Sergeant Kiprono appeared for the prosecution. Thereafter the names of the prosecutor were not shown. The trial commenced before Mrs. Karanja, P.M. on 6<sup>th</sup> April, 1998. The name of the prosecutor was not given, nor did the Coram read “*As Before.*” The hearing of the prosecution case appears to have been concluded on that same day, and the defence case was heard in part. Thereafter, the case was mentioned a couple of times before the defence concluded their case on 24<sup>th</sup> June, 1998. During those several mentions the name of the prosecutor was not given. Judgment was reserved on 1<sup>st</sup> July 1998 and was not delivered until 9<sup>th</sup> September, 1998. It was then that the name of **Sergeant Maina** was given as the Prosecutor.

On the basis of the foregoing, Mrs. Ndeda, submitted that the trial of the appellant was conducted with the help of an incompetent Public Prosecutor, and was therefore a nullity.

In answer, Mr. Gumo Asst Deputy Public Prosecutor, submitted, that Sergeant Maina only took the judgment but that the trial was conducted by a competent Public Prosecutor. With due respect to the **Asst. DPP**, his submission is not supported by the record. It is possible as he says there was a competent prosecutor during the trial. However, in absence of any clear evidence of that, we can only give the benefit of the doubt to the appellant.

Mrs. Ndeda, cited this Court’s decision in ***ELIREMA & ANOTHER V. R.*** [2003] KLR 537, in support of her submission. In that case the Court rendered itself thus :-

***“Going by the Provisions of the Code which we have already fully set out, it is clear that the Attorney-General has no power to appoint a police officer below the rank of an Assistant Inspector to be a public prosecutor. Corporals Kamotho and Gitau were clearly acting as public prosecutors. They did not, for example, ask the trial Magistrate to give them permission under section 88 (1) of the Code, to prosecute as private persons. They were clearly purporting to prosecute as public prosecutors pursuant to the provisions of section 86 of the Code. They were clearly not entitled to act as public prosecutors.”***

The situation in that case obtains here, and we cannot but hold that the case was not prosecuted by persons properly appointed by the Attorney General under **Section 85(2)** above. The Court did not however exhaustively deal with the possibility that the two officers who prosecuted the Elirema Case, could have by implication been permitted by the trial Magistrate to prosecute the matter. **Section 85(2)**, above requires that the Attorney General, appoint in writing certain persons as public Prosecutors. The section also clearly provides that he cannot delegate that function. The appointment has to be in writing under his hand.

**Section 88(1)** of the Criminal Procedure Code, on the other hand does not require the trial magistrate to give permission to prosecute in writing. The sub-section provides:-

***“88(1). A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specifically authorized by the Attorney-General, in this behalf shall be entitled to do so without permission.”***

The provision gives the Magistrate discretionary power to appoint. Exercise of judicial discretion like all discretion requires material upon which it is to be based. True, in the circumstances of this case it may be argued that because the trial Magistrate was aware of the ranks of the officers who appeared before her and also because she is presumed to be aware of the provisions of **section 85(2)** of the Criminal Procedure

Code, she tacitly permitted them to prosecute the case. This argument may not be applied here in absence of circumstances which would have necessitated the giving of permission to a **Police Officer** of the rank below **Asst. Inspector** to prosecute the case.

The appellant's trial was a nullity. Accordingly, we quash the appellant's conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and set aside the sentence of death which was imposed on him.

*Should we order a retrial?*

Mr. Gumo, quite properly submitted that a retrial will be prejudicial to the appellant, and we accordingly order that the appellant be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nakuru this 3<sup>rd</sup> day of October, 2008.***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**