



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 62 OF 2003

JOSEPH NJUGUNA MUCHOKI ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nakuru*

*(Apondi & Lesiit, JJ) dated 3<sup>rd</sup> April, 2003*

in

**H.C.CR.A. NO. 88 OF 2000)**

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JUDGMENT OF THE COURT

**Joseph Njuguna Muchoki**, the appellant herein was arraigned before the Chief Magistrate’s Court at Nakuru where he was charged with robbery with violence contrary to **section 296(2)** of the Penal Code. The plea was taken before the Principal Magistrate, Mr. H. K. Bomett on 10<sup>th</sup> September, 1999 when the appellant pleaded “Not Guilty” to the charge. The record of proceedings shows that Inspector Kiptum appeared as the Court prosecutor. The learned Principal Magistrate then fixed the case for hearing on 8<sup>th</sup> November, 1999. There were usual mentions of the case after every two weeks up to 5<sup>th</sup> November, 1999 when the matter was mentioned before an Acting Senior Resident Magistrate, Mrs. S. Muketi. The record of the proceedings for that day shows as follows:

**“5-11-99**

*Before S. Muketi – (Mrs) Ag. SRM.*

*CP-Sgt. Winnie*

*Court Clerk – Njoroge*

*Accused present*

**COURT**

***Hearing on 8-11-99***

**S. MUKETI (Mrs)**

**Ag. SRM.”**

Come 8<sup>th</sup> November, 1999 and the record of proceedings for that day shows as follows:-

**“8-11-99**

***Coram as before***

***Accused present***

*Charge read over and explained*

***Accused – Not guilty”***

Immediately after the foregoing the Court proceeded to record the evidence of the first prosecution witness John Wariahe Munga (PW1).

When this appeal came up for hearing on 27<sup>th</sup> February, 2006 Mr. Karanja the learned counsel for the appellant raised the issue of the trial being a nullity on the ground that the prosecutor being Sgt. Winnie, was not qualified which fact was not addressed by the first appellate court.

Mr. Gumo, the learned Assistant Deputy Public Prosecutor did not wish to support the appellant's conviction as he conceded that the prosecution was indeed conducted by an incompetent person in the person of Sgt. Winnie.

We think this appeal can be disposed of by dealing with this one ground only i.e. the proceedings in the trial court were a nullity on account of incompetent prosecutor.

We have anxiously considered this appeal. The record of the trial court as we have set out above indicates that when the trial commenced on 8<sup>th</sup> November, 1999 the Coram was indicated as “*Coram as before.*” It is difficult to appreciate what that phrase “*Coram as before*” meant in the record as that entry followed the entry of 5<sup>th</sup> November, 1999 which shows that the Court Prosecutor was Sgt. Winnie. It must follow that when the trial commenced on 8<sup>th</sup> November, 1999 the Coram must have been as on 5<sup>th</sup> November, 1999.

On our own perusal of the record as reflected above, we agree with the learned counsel for the appellant that there was nothing in the record to show clearly that a competent prosecutor was present and prosecuted the case before the trial court. As correctly pointed out by Mr. Karanja this matter was not taken before the superior court and consequently that court did not consider this serious omission in the proceedings.

As this is a matter of law, relating to jurisdiction, we cannot ignore it.

In **Roy Richard Elirema and Another v. Republic** [2003]1 EA 50 at p.55 this Court stated, inter alia:-

*“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of Constitution and the Code there must be a prosecutor either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue the prosecution.”*

In view of the foregoing we hold that the proceedings of 8<sup>th</sup> November, 1999 in which the appellant was purportedly convicted were a nullity as the prosecutor was not of the rank specified in **section 85(2)** of the Criminal Procedure Code.

Since the decision of this Court in *Elirema* case (supra) there are many decisions on this question of a competent prosecutor and what to follow in the event that a trial is declared a nullity as we have done in the present appeal. The learned Assistant Deputy Public Prosecutor did not ask for the retrial of the appellant and we therefore decline to make an order for a retrial.

In view of the foregoing, the trial of the appellant is declared a nullity with the result that the conviction recorded against him must and is hereby quashed and the sentence set aside. The appellant is set free forthwith unless otherwise lawfully held.

*Dated and delivered at Nakuru this 3rd day of March, 2006.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR