



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

Criminal Appeal 247 & 248 of 2002

WAWERU MAINA MWANGI ..... 1<sup>ST</sup> APPELLANT

JOHN GITHINJI MREFU ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ.) dated 31<sup>st</sup> July, 2002

in

H.C.C.R.A. NO. 26 OF 2001

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JUDGMENT OF THE COURT

The two appellants were convicted by the Senior Resident Magistrate Nyeri of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Their first appeals to the superior court against the conviction and sentence were dismissed.

The two appellants were charged with robbing one, James Kingori Nderitu (complainant) of Shs.5,000/=, one pair of shoes and a T-shirt on 9<sup>th</sup> November, 2000.

On the night of 9<sup>th</sup> November, 2000 at about 1 a.m., the complainant accompanied one, Mercy Wanjiku Muriithi (PW2) to her house. On arrival at PW2's house, PW2 left the complainant in the sitting room and she went to see a neighbour who was sick in the same building. After PW2 left the house, two people who were later identified as the two appellants entered into the house. One of them took a knife which was on the table and demanded money from the complainant. The complainant was ordered to remove his jacket, T-shirt and shoes. He was hit on the neck with the edge of the knife. The Shs.5,000/= which he had hidden inside his socks was taken after which he was slapped. PW2 heard noise from her house while she was in the neighbour's house. She went to her house and found the appellants beating the complainant. She screamed and the two appellants ran away.

The complainant reported the robbery at Nyeri Police Station at about 1:00 a.m. PW2 who knew Waweru Maina Mwangi (first appellant) before led the police to the first appellant's house where he was arrested at 6:00 a.m. and Shs.800/= recovered from him together with the complainant's pair of socks.

The first appellant in turn led the police to the house of **John Githinji Mrefu**, (second appellant) and from him the police recovered Shs.400/=. The second appellant also led police to the recovery of the complainant's T-shirt.

The appellants' advocates have filed a supplementary memorandum of appeal containing two grounds of appeal. The first and the main ground of appeal states thus:

***“That the original trial before the learned Senior Resident Magistrate was a nullity as the case was prosecuted by persons who are not qualified to prosecute under section 85(2) of the Criminal Procedure Code.”***

Mr. Njuguna, for the appellants, referred to the proceedings of the trial which show that on 1<sup>st</sup> December, 2000, Senior Sergeant Kigera conducted the prosecution when three of the material witnesses gave evidence. Mr. Njuguna further referred to the proceedings of 6<sup>th</sup> December, 2000 which shows that Sergeant Kamakia conducted the prosecution when the last prosecution witness gave evidence. He relied on the ***ELIREMA & ANOTHER V. REPUBLIC [2003] KLR 537*** and urged the Court to allow the appeal.

Mr. Orinda, learned Principal State Counsel for the Republic, conceded the appeal on the ground that the prosecution was conducted by unqualified prosecutors. He however supported an order for re-trial.

This is a clear case where the entire prosecution was conducted by police officers who are not authorized under **section 85(2)** of the Criminal Procedure Code to conduct criminal prosecutions. On the authority of ***Elirema*** (supra) we hold that the trial of the appellants was a nullity.

The appellants were convicted on 15<sup>th</sup> December, 2000. They have been in custody for over 5 years. Although Mr. Orinda supports a re-trial, he has not definitely told us that the witnesses will be traced without unreasonable delay if a re-trial is ordered.

The complainant was a driver while PW2 was a barmaid. From their nature of work it may probably be difficult to trace them over **5 years** after the incident.

In the circumstances, an order for a re-trial would, in our view, occasion injustice to the appellants.

For these reasons, we allow the appeal, quash the conviction of each appellant and set aside the respective sentence of death. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of May, 2006.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**