REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 234 OF 2004

1. ELIJAH ISABOKE)

2. WASHINGTON OMONDi) …… APPELLANTS

AND

REPUBLIC ……,,,,,…….... RESPONDENT

JUDGMENT OF THE COURT

The two appellants, Elija Isaboke and Washington Omondi, were tried and convicted on six counts of robbery with violence contrary to section 296(2) of the Penal Code by a Senior Resident Magistrate at Mombasa and upon their conviction each of them was sentenced to suffer death in the manner authorized by the law. They then appealed against their conviction and sentence to the High Court at Mombasa but by its judgment dated 11th April, 2003, the High Court (Onyango Otieno, J (as he then was) and Ouna, J) dismissed their appeals. The appellants now come to this Court by way of second appeal.

When the appeal came up for hearing before us on 24th January, 2005 the learned Senior State Counsel, Mr. Ogoti, addressed us stating that the State was conceding the appeals but asked us to order a retrial of the two appellants. Mr. Ogoti's main reason for conceding the appeal was that while the trial was conducted up to the closure of the prosecution case by a qualified prosecutor, when the appellants were put to their defence, one Cpl. Mwamburi appeared for the State and as Cpl. Mwamburi was not qualified to prosecute, his participation rendered the trial a nullity.

We have perused the record and it is indeed true that when the appellants defended themselves, it was one Cpl. Mwamburi who conducted the prosecution case. The record shows that Cpl. Mwamburi cross-examined one Stephen Maina Mucharo who was the appellants' co-accused during the trial before the learned Senior Resident Magistrate (Mr. H. Njiru). The appellant, Washington Omondi, in defending himself gave evidence on oath and was cross-examined by Cpl. Mwamburi.

The issue of who, in law, has authority to prosecute as a public prosecutor was considered in the decision of this Court in Roy Richard Elirema and Vincent Joseph Kessy V. Republic – Criminal Appeal No. 67 of 2002 (unreported) in its judgment delivered at Mombasa on 5th August, 2003 in which the Court stated, inter alia :-

"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 We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act.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 all the convictions recorded against the two

appellants must be and are hereby quashed and the sentences are set aside."

It has been indicated that the trial of the appellants right from the beginning to the close of the prosecution case was conducted by police officers who had authority to prosecute, to wit, those not below the rank of Acting Inspector of Police. But the appearance and participation of Cpl. Mwamburi towards the end of the trial i.e. during the defence of the appellants invalidated the whole trial. Indeed, on that aspect of a trial where unqualified person participates only in a part of the trial, this Court in its decision in Elirema (supra) stated:-

"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."

In view of the foregoing, since Cpl. Mwamburi was not qualified to act as a prosecutor, the trial of the appellants in which the said Cpl. Mwamburi purported to act as a public prosecutor must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.

That, however, is not the end of the matter. The learned Senior State Counsel while conceding the appeal asked us to order a retrial of the appellants as, in his view, there was sufficient evidence against the appellants. Mr. Ogoti reminded us that the witnesses who testified for the prosecution were available and that there would be no prejudice caused to the appellants if we ordered a retrial.

Mr. Sangoro, who appeared for both appellants, was of the view that the two appellants would be prejudiced if they were to stand a trial once again. He particularly referred to the fact that the appellants' co-accused was acquitted and hence Mr. Sangoro was of the view that the re-trial might take a different direction as the one who was acquitted might be called as a prosecution witness.

In dealing with what has to be considered whether a retrial ought to be ordered or not, this Court in its decision in the same Elirema case stated:-

"Should we order a retrial as we were asked by Mr. Gumo to do? We note that the alleged offences took place in January, 1999. That is a period of over four years. The main witnesses i.e. the victims of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya. The mistakes which have led to our quashing the convictions were entirely of the prosecution's making. There is still the issue of whether the offences were committed within Kenya or within Tanzania and hence whether the Kenyan Courts had jurisdiction at all to try the appellants. We do not think it is necessary or expedient for us to decide that issue but in considering the question of whether or not we should order a retrial, we are entitled to take that factor into account."

In the present appeal, the alleged offences took place in June, 2001 in Bamburi within Mombasa District. The victims of the crime were all from Mombasa and hence still available to testify if called upon to do so. Taking into account all these factors and bearing in mind that the appellants were arraigned before the trial court on very serious charges, we think, in view of what was stated by various witnesses in their evidence, that this is a proper case in which a retrial ought to be ordered. Whether any of the evidence to be adduced by the prosecution at the retrial is objectionable or not is really for the court seized of the matter to decide. We therefore order that the two appellants be held in custody to await a retrial.

Dated and delivered at Mombasa this 28th day of January, 2005.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR