



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: TUNOI, WAKI & ONYANGO OTIENO, J.J.A.**

**CRIMINAL APPEAL NO. 42 OF 2004**

**BETWEEN**

**WILSON BWAYO WENANI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the conviction and sentence of the High Court of Kenya at Kitale(Jean Gacheche J & George Dulu, Ag. J) dated 21 st January, 2004.**

**in**

**KTL. H.C.CR.A. NO. 166 OF 1999)**

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**JUDGMENT OF THE COURT**

***Wilson Bwayo Wenani*** , who is the appellant before us was the 2nd accused before Kitale Principal Magistrate’s Court. He and three others were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were that the four of them, on the 24th January, 1999 at Kipkirinya Reserve in West Pokok District, within Rift Valley Province, jointly with others not before Court, being armed with a dangerous weapon, namely a firearm robbed Abraham Mworor Maina of cash Ksh. 38,000 and two radios make Sanyo and National Star all totaling to Ksh.43,000 and at or immediately after the time of such robbery threatened to use actual violence to (sic) the said Abraham Mworor Maina. Bwayo was alternatively charged with handling stolen goods contrary to section 3 22(2) of the Penal Code. At the close of the prosecution case, two of those accused were acquitted under section 210 Criminal Procedure Code, while the other was released at the close of the trial under section 215 Criminal Procedure Code. Bwayo was however convicted on the main count of robbery with violence and was sentenced to death in accordance with the law. His appeal to the superior court against that conviction was dismissed and he now comes to us on a second and final appeal.

Learned Counsel for Bwayo Mr. Kipnyekwei fully argued his appeal on three issues of law attacking findings made by the two courts below that the doctrine of recent possession was applicable; that there was any possession of stolen goods, recent or otherwise, proved against the appellant and that the exhibit produced in court was sufficiently identified as the stolen item.

In the course of reply to those submissions however, learned State Counsel Ms Oundo drew our

attention to the original record of the trial court and pointed out that part of the trial was conducted by the court through a prosecutor who was unqualified. The typed copies in our possession indicated that the prosecutor in the proceedings was **Inspector of Police, Nyongesa** but on examining the original handwritten record we confirmed that he was indeed a Corporal. On that basis Ms Oundo conceded the appeal, and rightly so.

This is yet another criminal case where the proceedings are vitiated on account of intermeddling by unqualified persons. The mitigating circumstance is that the proceedings were conducted before the judgment of this Court in **Roy Richard Elirema & Another v R** Criminal Appeal No. 67/2002. That case did not however, introduce anything new, since the law relating to appointment of public and private prosecutors has always been there in sections 85 and 88(1) of the Criminal Procedure Code. In the Elirema case , two police officers of the rank of corporal purported to lead several witnesses in giving evidence in the trial. They had no authority to do so. Neither the trial court nor the superior court to which an appeal was preferred said anything about the legality of the trial. But this Court said it could not ignore a matter of law relating to jurisdiction even where it was raised for the first time on second appeal. It stated:-

***“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the r ole of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. .... 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 person employed in the public service not being a police officer 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 Co de 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.”***

In the appeal before us Corporal Nyongesa appeared before the trial court (Mrs. Sewe, Principal Magistrate) on 6th April, 1999 and 6th July, 1999, when he led five prosecution witnesses in giving their evidence. The remaining part of the trial was however taken over by Chief Inspector Muhavi who led evidence from five more witnesses before closing the prosecution case and making submissions therein. Judgment was on 1st December, 1999.

A similar situation arose in the **Elirema case** where a large portion of the prosecution was conducted by Corporals Kamotho and Gitau. It was held that that part of the trial which was invalid could not be separated from that which was valid, since there was only one trial, and if any part of it was materially defective, then the whole trial must be invalidated.

This appeal must suffer the same fate. We declare the original trial a nullity, quash the conviction and set-aside the sentence imposed on the appellant. Should there be a retrial?

Learned State Counsel Ms Oundo seeks none on the ground that the events giving rise to the trial occurred more than six years ago. The state would find it difficult, if not impossible, to summon the necessary witnesses and to produce exhibits. We think that apprehension is reasonably entertained in the circumstances of this case. In the event we order no retrial of the matter.

***Dated and delivered at Eldoret t his18th day of February, 2005.***

***P. K. TUNOI***

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*JUDGE OF APPEAL*

*P. N. WAKI*

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*JUDGE OF APPEAL*

*J. W. ONYANGO OTIENO*

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*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR**