



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: OMOLO, GITHINJ & WAKI, JJA
Criminal Appeal 139 of 2003
BETWEEN

ANTONY NGUGI KIBIGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma

& Mitey, JJ) dated 19th March, 2003

in

H.C.C.R.A. NO. 60 OF 2001)

JUDGMENT OF THE COURT

The first trial of the appellant **ANTONY NGUGI KIBIGI** opened before a Senior Resident Magistrate, C.P. Mwangi on 30th November, 1999. She received evidence from three witnesses **James Ithunga Wahome (P.W.1)**, **Appollo Mwangi (P.W.2)** and **Jane Wangare Kirungu (P.W.3)**. This was between 30th November, 1999 and 21st January, 2000. It appears that the Magistrate was transferred and on 13th March, 2000, a fresh trial commenced before another Senior Magistrate, M. Rintari. The prosecutor before Ms Rintari was a Senior Sergeant of Police Kigera. He prosecuted the case up to the end and by her judgment which was apparently delivered on 19th September, 2000 the magistrate convicted the appellant on count one of the charges and sentenced him to death. On the principles set down by this Court in the case of **ROY RICHARD ELIREMA & ANOTHER V. REPUBLIC** [2003] **1EA 50 (CAK)**, both Mr. Muragori Mwangi for the appellant and Mr. Orinda for the Republic agreed the trial of the appellant before Ms Rintari was a nullity. We agree. Accordingly, we quash the conviction recorded against the appellant and set aside the sentence of death imposed on him.

We were asked by counsel on either side not to order a retrial, but we note from the record of evidence that the persons who perpetrated the offence of robbery in the bar of **James Wahome** were extremely vicious, shooting down two police officers who happened to be in the bar and it was by the grace of God that the two officers survived. The offences were committed on 1st September, 1999 but as we have seen, the trial before Ms Rintari was not concluded until 19th September, 2000 and the consequent appeal to the High Court was not determined until 19th March, 2003. We have ordered a retrial in similar circumstances in the case of **JOSEPH MURIUKI WACHIRA & ANOTHER VS. REPUBLIC**, *Criminal Appeals Nos. 254 and 255 of 2003* (unreported) and we see no valid reason why we should draw a distinction between the present appeal and those two other appeals. If we draw any distinction between this appeal and not order a retrial and the other two appeals where we have ordered a

retrial it would leave those appellants with a sense of grievance as to why they are being treated differently from this appellant. Accordingly, we have no doubt in our mind that a retrial would be the correct order to make in this appeal. We, therefore, order that the appellant shall be tried de novo before a different magistrate and for that purpose, the appellant shall continue to be held in prison custody pending his production before a magistrate for the fresh trial. Those shall be our orders in the appeal.

DATED and DELIVERED at NYERI this 20TH day of May, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR