



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: OMOLO, O’KUBASU & GITHINJI, J.J.A.)
CRIMINAL APPEAL NO. 272 OF 2002

BETWEEN

JOHN OMONDI ALIAS LAWI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

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

Mombasa (Onyancha, J. & Mrs. Khaminwa,
Commissioner for Assize) dated 17th September, 2002

in

H.C.CR.A. NO. 112 OF 2000)

JUDGMENT OF THE COURT

Mr. V. S. Monda, learned counsel for the Republic, conceded in his submissions before us that the appeal of the appellant, *John Omondi alias Lawi*, must be allowed on the ground that the prosecution of the appellant before the trial Magistrate was conducted by an unqualified and/or unauthorized person contrary to the provisions of section 85(2) of the Criminal Procedure Code.

In view of the long line of cases starting with *ROY RICHARD ELIREMA & ANOTHER VS. REPUBLIC*, Criminal Appeal No. 67 of 2002 (unreported), there cannot be any answer to that complaint. We accordingly quash the two convictions for robbery contrary to **section 296(2)** of the Penal Code and set aside the sentence of death imposed thereon. Mr. Monda, however, asked us to order a retrial. He told us that his witnesses are still available and can be called to testify again whenever required. The offences were allegedly committed in Mombasa and the appellant was apparently arrested by members of the estate where he resided and who were dissatisfied with his conduct within the estate. There appears to be a valid justification for the dissatisfaction with the appellant’s conduct. The evidence brought against him during the abortive trial if brought again, might well result in a conviction. Time has elapsed since the alleged offences were committed but as we have been told, the witnesses are still available and are in Mombasa. The police officers can be traced through the police force. The judgment of the superior court against which the appeal is brought before us was delivered only on 17th September, 2002. Taking all these matters into account, we reject the contention of Mr. Wameyo for the appellant

that a fair trial is not possible in the circumstances.

Accordingly, we order that the appellant shall remain in custody and shall be tried *de novo* before a Magistrate with competent jurisdiction in Mombasa. Those shall be our orders in the appeal.

Dated and delivered at Mombasa this 23rd day of July, 2004.

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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR