IN THE COURT OF APPEAL

AT NYERI

(CORAM : O'KUBASU, GITHINJI & WAKI JJ A)

CRIMINAL APPEAL NO. 38 OF 2001

BETWEEN

MOSES MWANGI KANYEKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court at Nyeri (Juam & Tuiyot JJ) dated 1st December 2000

in

HCCr Appeal No 92 of 2000)

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JUDGMENT

Moses Mwangi Kanyeki, the appellant herein, was tried and convicted on three counts of robbery with violence contrary to section 296(2) of the Penal Code by a Senior Resident Magistrate at Nyeri and upon that conviction was sentenced to suffer death in the manner authorized by the law. He appealed to the High Court at Nyeri but by its judgment dated and delivered on 1st December, 2000, the High Court (Juma and Tuiyot, JJ) dismissed his appeal. The appellant now appeals to this Court by way of a second and final appeal.

When the appeal came up for hearing before us on 1st November, 2004, the learned senior state counsel (Mr Orinda) drew our attention to the fact that prosecution of the appellant before the learned Senior Resident Magistrate was conducted by a person who was not qualified to conduct such prosecution, to wit, a sergeant of police. Having so stated, Mr Orinda submitted that the evidence against the appellant was clear as the two prosecution witnesses (PW 1 and PW 3) knew the appellant. He therefore urged us to make an order for retrial of the appellant.

As the learned senior state counsel conceded that the appellant's trial was conducted by a person who was not qualified to conduct such prosecution, the main issue to be considered would be whether or not we should order a retrial. But before we come to that, we think it pertinent to state that the issue of who is qualified to prosecute in criminal trials has been considered by this Court in various decisions starting with its decision in *Roy Richard Elirema & another v Republic* in which it was said, *inter alia*:-

“For one to be appointed as a public prosecutor by the Attorney General one must either be 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 We suspect the rank of assistant inspector must have been replaced by that ofan acting inspector but the Code has not been amended to conform to the Police Act.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 is in view of the foregoing observations that Mr Orinda conceded this appeal since, although it was only a portion of the trial which was conducted by Sgt Kigera, the trial being only one, if any part of it was materially defective, then the whole trial must be invalidated. Hence, since Sgt Kigera did not, in law, have authority to prosecute as a public prosecutor, then the entire trial must be declared a nullity. We now do so with the result that all the convictions recorded against the appellant must be and are hereby quashed and the sentences are set aside.

That, however, is not the end of the matter. We must now come to the crucial issue of whether a retrial ought to be ordered. The learned senior state counsel urged us to order a retrial on the ground that there was clear evidence against the appellant as he had been identified by two witnesses. Mr Ng’ang’a, the learned counsel for the appellant, was of the view that this was not a proper case for a retrial as the appellant had been sufficiently punished.

On the outset we must remind the learned counsel for the appellant that his client had been tried and convicted on three counts of robbery with violence contrary to section 296(2) of the Penal Code which provides:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

The plea by the counsel for the appellant to the effect that his client had been sufficiently punished would only be appropriate if the appellant had been tried on some other offence, which did not provide for a mandatory death sentence.

On the issue of retrial, perhaps we may go back to the decision in *Roy Richard Elirema* (*supra*) in which this Court said:-

“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, ie 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 appeal before us, the victims of the robbery were from Nyeri town and they can be easily traced. The offence is alleged to have been committed within Nyeri town. Taking all these factors into account and in view of the fact that the appellant was charged with capital robbery, we are of the opinion that this is a proper case for a retrial. Hence, we order a retrial of the appellant. As the appellant was charged, tried and convicted of capital robbery, we order that he be remanded in custody as he awaits the retrial.

Dated and Delivered at Nyeri this 5th day of November 2004.

E.O.O'KUBASU

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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 rue copy

of the original.

DEPUTY REGISTRAR