**Katumo and another v R**

**Division:** High Court of Kenya at Nairobi

**Date of Judgment:** 2004

**Case Number:** 174 and 183/00

**Before:** Ochieng and Makhandia AJJ

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Criminal law – Appeal – Retrial – Factors to be considered by court before ordering a retrial.*

**JUDGMENT**

**OCHIENG AND MAKHANDIA AJJ**: These two appeals were consolidated, as they both arose out of one criminal case in the Court below. The appellants had been convicted on charges of robbery with violence contrary to section 296(2) of the Penal Code. Following conviction, they were sentenced to death, as prescribed by law. Being dissatisfied with the conviction and sentence the appellants preferred appeals. The appeals were filed against both conviction and sentence. However, when the appeal (now consolidated), was due to be heard before us, on 6 May 2004, the Learned State Counsel, Miss Otieno conceded the appeal. The concession was made on the grounds that unqualified prosecutors had participated in the proceedings, contrary to the provisions of sections 85(2) and 88 of the Criminal Procedure Code. Following the concession by the State, the appeal automatically succeeds. Accordingly, the conviction and sentence imposed on the appellants is hereby set aside. But before any further orders could be made, to enable the appellants to gain their freedom, the State made an application for re-trial. It was submitted that the evidence which was adduced before the trial court was overwhelming, and that therefore the appellants should not be permitted to enjoy their freedom, simply because of a technicality during the trial. Upon a perusal of the record of the proceedings before the trial court, it is noted that applicant number one was the tenth accused, while appellant number two was seventh accused. The two appellants were said to have been part of a gang which descended upon Kisiiki Market, Yatta Division, Machakos District, on the night of 22 January 1997. The two appellants were identified by PW4, a retired nurse who was then operating a shop at the market. In her testimony, she said that she and her three children had hidden in the roof of her shop after she had observed part of the mayhem through her shop window. She testified that the appellants and a few other members of the attacking group entered her shop, but by then she was hiding in the roof. The gang switched on the lights of her vehicle. By so doing, they provided her with sufficient light to positively identify the appellants, amongst the robbers. PW10, a teacher at Mavoloni Secondary School, also identified the appellants herein, inside the bar. A pressure lamp was on, at the material time. We note that whilst the second appellant disputed his identification by PW1, for the reason that the said PW1 had a case with the appellant’s father, there was no serious challenge to the identification by PW4 and PW10. We note that the charges against the appellants arose from a very serious incident, in which four people lost their lives, through the hands of merciless robbers. Many others were maimed or otherwise injured, in varying degrees. There is no doubt that there was a robbery with violence at the material time. From the evidence adduced before the trial court, it appears more probable than not that the appellants were part of the gang that orchestrated the robbery. This Court has forewarned itself that a retrial ought not be ordered if by doing so, the prosecution will be accorded an opportunity to seal any apparent loopholes in the evidence adduced earlier. We have also borne in mind that: “In general a retrial will be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence”. – per Russel J in *Suma v R* [1964] EA 481. The trial herein was defective, as it was partially conducted by someone who is not legally qualified to conduct prosecutions in Kenya. That is the sole reason why the appeal has been allowed. For the foregoing reasons, we hold the considered view that the interests of justice will be best served by a re-trial. Accordingly, we hereby order that the appellants shall be retried. We further direct that the trial be conducted by any Magistrate of competent jurisdiction, other than Mr EO Awino. For the appellants: *Information not available*

For the respondent:

*Miss Otieno*, State counsel instructed by Attorney-General