**Mwaura v Republic**

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

**Date of judgment:** 10 June 2004

**Case Number:** 1390/99

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Criminal law – Appeal – Identification – Whether identification was sufficient.*

*[2] Criminal procedure – Prosecution conducted partly by police constable – Offence of robbery with*

*violence – Whether trial a nullity – Whether retrial would be ordered.*

**Editor’s Summary**

The Appellant was convicted of robbery with violence and filed an appeal. Evidence had been led that three gang members posed as customers at a beer depot and subsequently robbed the depot. After the robbers escaped, the complainant alerted the police, who found the robbers’ footprints and tracked them to a river. The police subsequently arrested the suspected robbers. The suspects then gave up money and a toy gun. The appellant was subsequently placed in an identification parade of seven members, where he was identified by the complainants. The Appellant appealed on the ground that identification was improper, since the parade was carried out with seven rather than nine members; that the prosecution evidence connecting him to the offence was insufficient; that the first prosecution witness was not resworn during his further testimony; and that part of the proceedings were conducted by an unqualified public prosecutor. The court record showed that a police corporal was cited in the court record as the prosecutor when the case was mentioned. The Appellant insisted that the police corporal was the prosecutor during the hearing of the first prosecution witness. During this period, the court record merely indicated “coram as before”.

**Held** – The identification evidence was sufficient to justify conviction. There was sufficient time for the appellant to be identified during the commission of the offence. The fact that the identification parade was conducted with only seven members would not vitiate the evidence of identification, which was corroborated by the manner in which the appellant was arrested. It was evident from the court record that an unqualified person conducted part of the prosecution in this case. If an unqualified person conducts any part of the trial, the entire trial is a nullity (*Elirema and another v Republic* [2003] 1 EA 50 followed). In all the circumstances, the Court considered that the defence raised some issues which were not answered adequately and pertinently during the trial. The Court therefore declined to order a retrial. Appeal allowed. **Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Elirema and another v Republic* [2003] 1 EA 50 – **F**