**Ngarachu and another v Republic**

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

**Date of Judgment:** 3 June 2004

**Case Number:** 10/00

**Before:** Ochieng and Makhandia AJJ

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Criminal procedure –* Autrefois *convict – Accused persons charged with same offence for which he*

*had earlier been convicted – Whether latter conviction can stand – Section 77(5) Constitution of Kenya.*

**JUDGMENT**

**OCHIENG AND MAKHANDIA AJJ:** The appellants in the instant case, John Ng’ang’a Ngarachu and David Githinji Gatu were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. Particulars of the charge were succinctly outlined in the charge sheet. Following a full trial in which the prosecution called five witnesses, the trial Magistrate was convinced of their guilt and consequently convicted them as charged. He sentenced them to death as provided for in the law. Being aggrieved by the sentence and conviction the appellants lodged individual appeals. When the two appeals came up for hearing they were consolidated by consent of the parties involved. At the very commencement of the hearing Mr *Makura*, the Learned State Counsel who appeared for the State intimated to the Court that the State was conceding the appeal. The sole ground upon which the State took that step was that the appellants suffered double jeopardy. The Learned State Counsel submitted that the appellants were earlier on charged with the offence of simple robbery contrary to section 296(1) of the Penal Code. This was in criminal case number 1170 of 1999 in the Chief Magistrate’s Court at Nyeri. They were convicted and sentenced on 3 September 1999. They were again charged on 13 August 1999 with two counts of capital robbery. The Learned State Counsel submitted that the applicants ought not to have been charged with the first count of capital robbery as the facts were similar and witnesses who testified were the same as those who testified against the appellants in the initial trial for the offence of simple robbery. Indeed at some point in the proceedings the initial trial Magistrate disqualified himself saying that he had dealt with a similar case before. The Learned State Counsel submitted that the appellants ought not to have been tried and convicted on the subsequent charge of capital robbery. Applying the principle of *autrefois* convict as enshrined in section 77(5) of our Constitution, the Learned State Counsel urged the Court to allow the appeal, quash the conviction and set aside the sentence. We have perused the lower Court proceedings in respect of criminal case number 1469 of 1999 that spurred this appeal and criminal case number 1170 of 1999 in which the appellants had been tried and convicted for the offence of simple robbery. The latter file had, earlier on, been requested for by the appellants to be availed at the hearing of this appeal. Our careful perusal of the record confirms what the Learned State Counsel has submitted. The witnesses in the two cases were identical. The evidence and the facts of the two cases were similar. Indeed one Samuel Wamiti Muhihu who was the complainant in criminal case number 1170 of 1999 was also the complainant in the second count of capital robbery in criminal number 1469 of 1999. His testimony in both cases is the same. Section 77(5) of our Constitution provides, as follows: “No person who shows that he has been tried by a competent court for a criminal offence and whether convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal”.

It is clear from the record of the trial Court, that this cardinal provision of our constitution was breached and the appellants thereby suffered injustice. The initial trial Magistrate is recorded in the proceedings to have said: “I have dealt with the case before. In the interest of justice, case fixed for hearing on 30 August 1999 in Court number 3”. It beats logic for a trial Magistrate to disqualify himself from a case because he has heard it before and then refer it to another Magistrate to hear the same. The upshot of the appeal is that it is allowed, the conviction quashed and sentenced set aside. The appellants are set at liberty unless they are otherwise lawfully held.

For the appellants:

*Information not available*

For the respondent:

*Makura* instructed by Attorney-General