

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 275 OF 2013

(Appeal from Conviction and Sentence in Kangema PM Criminal Case No 374 of 2012 – A Too, RM)

JOHN MUCHORA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **John Muchora Mwangi**, was convicted after trial of the alternative charge of **By way of Trade Exposed Infringing Copies of a Copyright Work** contrary to **section 38(1) (b)** as read with **section 38(5)** of the **Copyright Act, 2001**". It was alleged in the particulars of the offence that on the 13th day of August 2012 at Kanyenyaini Trading Centre in Kangema District within Murang'a County, he was found have made for sale infringing copies of local music copyright work of the Assignors John Njagi Macharia, in contravention of the provisions of the Copyright Act. He was fined KShs 50,000/00 and in default of payment to serve 12 months imprisonment. He paid the fine. He has appealed against both conviction and sentence.

2. The main ground of appeal disclosed in the petition and in the submissions of learned counsel for the Appellant is that the prosecutor had not been duly and specifically appointed for purposes of the **Copyright Act, Cap 30** and was thus incompetent to prosecute the Appellant. That point is conceded by the Respondent.

3. Learned Prosecution Counsel for the Respondent also pointed out that infringement of copyright under **sections 35** and **38** of the Act presupposes existence of a copyright, and that in this case there was no evidence of existence of the copyright allegedly infringed by the Appellant. Learned Prosecution Counsel also pointed out that there was no evidence placed before the trial court that the equipment confiscated from the Appellant (computers, memory sticks, etc.) contained any music belonging to the complainant.

4. Upon my own assessment of the evidence placed before the trial, court I am not satisfied that the same was sufficient to sustain the conviction. The offence charged was not proved beyond reasonable doubt. The conviction is unsafe and cannot be allowed to stand. Learned Prosecution Counsel properly conceded the appeal.

5. I will in the event allow the appeal in its entirety. The conviction of the Appellant is quashed and the sentence set aside. The fine imposed, if paid, shall be refunded to the Appellant. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF NOVEMBER 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 27TH DAY OF NOVEMBER 2015