REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 22 of 2003

EUSTANCE MURANGIRI ..... 1ST APPELLANT
BOSCO MBAE KUBAI ..... 2ND APPELLANT
VERSUS
REPUBLIC ..... RESPONDENT

(Appeal from the judgment, conviction and sentence of the resident magistrate's court at Chuka A.N. Kimani SRM dated 13th February 2003 in Criminal Case No. 1311 of 1997)

JUDGMENT

Before the lower court, the appellant, Eustance Murangiri, was charged alongside with others in relation to a theft that took place on the night of 19th/20th 1997. The theft took place at Chogoria PCEA Petrol Station where Kshs. 73,581/= was stolen. The appellant was the watchman of those premises. He was therefore charged with the offence of theft and in the alternative the offence of neglect to prevent the commission of a felony contrary to Section 392 of the Penal Code. He was convicted of the alternative charge. PW1 and 2 did not give evidence that pointed to the guilt of the appellant in respect of the alternative charge. PW2 stated on the following day it was reported that the Petrol Station had been broken into. But on being cross examined by the appellant, he responded thus:-

"You were not working when the money was stolen."

Although PW1, 2 and 3 referred to the appellant as the watchman of that petrol station, when PW8 gave evidence he stated that the watchman was the 3rd accused who was the co-accused of the appellant. In respect of the appellant, this witness referred to him as a former employee of Chogoria PCEA. I have re-examined the lower court's evidence as first appellant court. I am aware that I am expected to submit the whole evidence of the lower court to a fresh and exhaustive examination. In so doing, I must weigh the conflicting evidence and draw my own conclusion. I should however make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of **Okeno Vs. Republic** [1972] E.A. 32. As can be seen from my little interrogation of the evidence of the lower court, the prosecution failed to prove the guilty of the appellant in respect of the offences that he faced. In the case of **Thomas Patrick Gilbert Chomondeley Vs. Republic** Criminal Appeal No. 116 of 2007 the Court of Appeal had this to say on the burden placed on the prosecution.

"..... in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Dalamere whose grandson the appellant is said to be."

The prosecution, as stated before, did not meet that threshold. Further, when the prosecution adduced evidence from PW7, prosecution's case was led by a Police Constable. This trial took place in September 2001. That was before the amendment by Act 7 of 2007 to Section 85(2) of the Criminal Procedure Code. That Section before amendment was in the following terms:

"The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of an assistant inspector of police, to be a public prosecutor for the purpose of any case."

Bearing that section in mind, the fact that part of the case in the lower court was prosecuted by a police constable made the trial to be incompetent. This was so stated in the case **Amos Gituma Kinyua Vs. Republic** Criminal appeal No. 265 of 2003. the Court of appeal

stated thus.

"…….. The law as it has always existed in the Constitution of Kenya Section 77 (1), the Criminal Procedure Code Sections 85, 85 (2), 86, 88 (1), 202 and Police Act Cap 84 Section 3(2). The combined effect of those provisions is that where an incompetent police officer prosecutes a criminal case before a magistrate court, the proceedings therein will be a nullity. Both PC Nderitu and CPL. Kabogo who conducted the prosecution's case in this matter were not public prosecutors. The trial in which they purported to be such prosecutors was therefore a nullity, and we so declare."

In our case, the prosecution by the police constable on 17th September 2001 makes the appellant's trial before the lower court a nullity. I also so declare. Having declared the trial to be a nullity, I am of the view that it could not be in the interest of justice to order the appellant re-trialed. This is because the offence occurred in 1997. The state did not address the court on whether witnesses would be traced after so many years. In my view, it would be difficult to trace witnesses who were in employment of PCEA Chogoria and who possibly may have left employment these 13 years later. I will therefore not order for re-trial. The appeal by Eustance Murangiri does succeed and the conviction of the lower court is hereby quashed and the sentence is hereby set aside. The appellant has been out on bond and I therefore will not order for his release.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE