



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 20 OF 2009
(Formerly CR.A. 70/04 at Nyeri)

EUSTACE IRERI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

The Appeal is rightly conceded by the state on ground 6 of the Grounds of Appeal dated 5.05.2010 which ground states

“That the trial before the lower court was prosecuted by an incompetent person thereby rendering the whole trial null and void.”

Although the appellant did not raise the issue, the learned counsel for the state also conceded the appeal on the ground that the charge sheet was defective. I will very briefly state why I uphold the said concession.

On the first ground, the record shows that when the plea was taken, the prosecutor was one Sgt Musila. When the matter took off for hearing, Sgt Musila also appeared as the prosecutor; he led some witnesses before IP Githae finally took over.

The law on this issue is now very clear, where a criminal case is prosecuted by an incompetent prosecutor, then those proceedings are a nullity.

The provisions of Section 85, 85(2), 86, 88(1) C.P.C. are all clear on the issue and I need not paraphrase the said provisions.

Case law led by the celebrated case of **ELIREMA & ANOTHER VS REPUBLIC (2003) KLR 537; EKIMAT VS REPUBLIC; AMOS GITUMA KINYUA VS REPUBLIC** and many others all reiterate this position.

The proceedings herein were prosecuted by an incompetent prosecutor and they were therefore a nullity.

I also agree that the charge sheet was defective for failing to include the words “unlawful” in the particulars of charge.

The state has not asked for a retrial and given that the offence is said to have been committed over 8 years ago, such a move would not be tenable or just in the circumstances. The appellant has a good Appeal.

I allow the same and quash the conviction herein and set aside the sentence of 5 years imprisonment.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 3rd day of November 2010

In presence of:- Mr. Githinji for Magee for Appellant & Ms. Matiru for State.