



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 47 OF 2004

JOHN NGILU KITHEKAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No.374 of 2003 by J.B.A. OLUKOYE – R.M.)

J U D G M E N T

The appellant, **Julius Ngilu Kitheka** was tried and convicted on one count of Burglary contrary to *Section 304 (2)* of the Penal Code by the Resident Magistrate at Nyeri (**J.B.A. Olukoye presiding**) and, upon that conviction, sentenced to suffer 4 years imprisonment. Aggrieved by the said conviction and sentence the appellant now comes to this court by way of appeal.

When this appeal came up for hearing on 22nd June, 2009, the learned Senior state counsel **Mr. Makura**, conceded to the appeal on the technical grounds that the prosecution of the appellant in the trial court was conducted by **Sergent Njagi** who was a person not qualified to conduct such prosecution. He however did not ask me to order for a retrial of the appellant before another magistrate of competent jurisdiction. In support of that position he submitted that the evidence that led to the conviction of the appellant was that of a single identifying witness. It was thus unlikely that a conviction will be secured in the event of a retrial.

As the learned state counsel conceded that the appellant's trial was conducted by a person who was not qualified to conduct such prosecution, the main issue to be considered would be whether or not I should order a retrial. The appellant did not address me on the issue though.

The issue of who is qualified to prosecute in criminal trials in this country was considered and settled by the court of appeal in the case of **Roy Richard Elirema & Anor. Vs Republic – Criminal Appeal No.67 of 2002** (UR) in which it was stated:-

“For one to be appointed as a public prosecutor by the Attorney General one must either be an advocate of the High Court of Kenya or a person employed in the public service not being a police officer below the rank of an Assistant Inspector of police. We suspect the rank of Assistant Inspector must have been replaced by that of Acting Inspector but the code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the

trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.”

I think it is in view of the foregoing observations that **Mr. Makura** conceded this appeal. Since, **Sergeant Njagi**, did not, in law, have authority to prosecute as a public prosecutor, then the entire trial must be declared a nullity. I now do so with the result that the conviction recorded against the appellant must be and is hereby set aside as well as the sentence.

That, however, is not the end of the matter. I must now come to the issue of whether a retrial ought to be ordered or not.

As I consider the issue of re-trial I must bear in mind the charge of which the appellant had been tried on. Perhaps, I may go back to the decision in **Roy Richard Elirema** (supra) in which the court once again observed.

“Should we order a retrial as we were asked by Mr. Gumo to do? We note that the alleged offense took place in January, 1999. that is a period of over four years. The main witnesses, i.e. the victims of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya. The mistakes which have led to our quashing the convictions were entirely of the prosecution’s making. There is still – the issue of whether the offense were committed within Kenya or within Tanzania and hence whether the Kenya courts had jurisdiction at all to try the appellants. We do not think it is necessary or expedient for us to decide that issue but in considering the question of whether or not we should order a retrial we are entitled to take that factor into account.”

In the present appeal the appellant was sentenced to serve 4 years imprisonment on each limb. The sentences were ordered to run concurrently. This was on 12th June, 2003. By any estimate, he must have served fully the terms of imprisonment aforesaid. To order a retrial in the circumstances will not be in the interest of justice. Indeed it shall be prejudicial the appellant. It may end up even being a case of double jeopardy.

In the premises, I decline to order a retrial with the consequence that, should the appellant be still held in prison custody over this case then he should be released forthwith unless otherwise lawfully.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE