REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 75 of 2004

JESEE MAKANYA GICHUHI…..……..APPELLANT

Versus

THE REPUBLIC…….....…….RESPONDENT

(An Appeal from the judgment and conviction by the Principal Magistrate, Nyeri dated 20th February, 2004 in the Nyeri Chief Magistrate's Court Criminal Case No. 2277 of 2002)

JUDGMENT

The Appellant was charged with three counts of obtaining by false pretences contrary to *Section 313* of the Penal Code. After trial the Appellant was convicted on both counts and in respect of count one, was fined Ksh.50,000/- and in default four months imprisonment. In respect of the second count, the Appellant was fined Ksh.20,000/- and in default four months imprisonment. The Memorandum of Appeal filed herein by the Appellant is dated 3rd March 2004. The Appellant raises both legal and factual grounds as a basis for that appeal. When this matter came up for hearing on the 12th of March 2007 the Appellant's counsel Mr. S. K. Njuguna raised a legal point that is that the person who conducted the trial was unqualified by virtue of *Section 85 (2)* of the Criminal Procedure Code.

The court has perused the proceedings before the subordinate court and has found that the evidence of P.W.1 to P.W. 4 was recorded whilst the prosecution was conducted by a senior sergeant Kigera. In respect of P.W.5, the evidence was recorded while prosecution was led by Inspector Yusuf. One therefore may ask whether some parts of the trial could be regarded to have been conducted by unqualified person whereas another part could be regarded as having been prosecuted by a qualified person. The answer to that question can be found in the case of **Elirema & Another -V- Republic (2003) KLR 537**. In that case where the circumstances were similar to this present case in respect of who conducted the prosecution, the Court of Appeal had the following to say:

"***We cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by inspector Wambua) while at the same time holding that the other parts (i.e. the parts conducted by corporals Kamotho and Gitau) are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated."***

The Court of Appeal in that case also found that a prosecutor is vital to a criminal trial for the purpose of

ensuring that a trial is conducted as required under *Section 77(1)* of the Constitution. In that respect the court stated as follows:

"We must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution."

The Appellant's advocate submitted that the conviction and sentence of the Appellant ought to be set aside in view of the nullity of the proceedings in the subordinate court. He further submitted that the Appellant should not be retried for the offence because the matters which are the subject of this case occurred in the year 2001. It ought to be noted that the State Counsel conceded to the appeal on that ground and on the basis that the transaction, the subject of the charge was based on a promise to do something in the future. He therefore concluded that the false pretence may not have been proved. On retrial, State Counsel submitted that the same will not serve any purpose.

I have considered the Appellant's appeal and the submissions made by counsels. As stated herein before, the evidence of P.W.1 to P.W. 4 was tendered at the subordinate court while the trial was prosecuted by Senior Sergeant. That indeed is contrary to *Section 85(2)* of the Criminal Procedure Code. That Section provides as follows:

"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 Assistant Inspector of Police, to be a public prosecutor for the purposes of any case."

As can be seen the provisions of that section make it clear that the prosecution of this case by a Senior Sergeant was a nullity. It does not matter that one witness tendered his evidence while the case was prosecuted by an inspector. The nullity caused by the prosecution by a Senior Sergeant affect the whole trial. The court therefore does find that the trial of the Appellant by the subordinate court was a nullity.

Having so found, should the Appellant be subjected to a retrial? I find am in agreement with the submissions made by the Appellant's advocate in that the alleged offence having occurred some six years ago the Appellant cannot be subjected to a retrial. In the aforementioned case on the Court of Appeal concluding that the trial was a nullity, did not order for a retrial of the case because amongst other reasons the period since the offence occurred was four years before. The Court of Appeal also concluded that the mistake which led to the quashing of the conviction was entirely the prosecution's making.

The Appellant was charged of obtaining by false pretence, contrary to *Section 313*. That section provides:-

"***Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years."***

In order to determine whether the court should order a retrial the court is guided by the case of **SUMA V. R [1964] E.A. 481** where it was found as follows:-

"***In general retrial will be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence." Per Russel J.***

The evidence that the Appellant faced at the trial in summary is as follows. P.W.1 stated that she paid the Appellant money on a promise that the Appellant would get her son a job in the army. P.W.1 on being cross-examined stated that she requested the Appellant not to pursue the job with the army because he took too long. The prosecution failed to prove how P.W.1 was subjected to false pretence in view of that testimony. It would also have assisted prosecution if evidence had been adduced from the army to confirm that the Appellant could not get a job for the son of P.W.1. P.W.2 gave evidence of giving

money to Appellant for him to get a course for her son at a college in Meru. The Appellant took her son, P.W.4, to that college, he was requested to return on another day with tools and on returning he was told no money had been paid for him. Prosecution did not prove that P.W.2 had agreed with the Appellant that the Appellant was responsible to pay the fees of that college. P.W. 3 gave evidence of giving money to the Appellant for him to get her son a job in the Army. Her son never gave evidence so it cannot be confirmed that he did not get a job with the army.

That short summary is enough to show the evidence was not sufficient to sustain a conviction and accordingly this court will not order a retrial of the Appellant. It ought to be noted that the Appellant was convicted by the trial court in February 2004.

In the end the court does hereby quash the conviction against the Appellant, the sentence is hereby set aside and any fine imposed on the basis of that conviction shall be refunded to the Appellant.

Dated and delivered this 16th March 2007.

MARY KASANGO

JUDGE