REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 27 of 2004

ALICE KAGURE KINGORI……..…APPELLANT

Versus

REPUBLIC……..RESPONDENT

(*Being appeal against the sentence and conviction by D. K. Ngomo, Principal Magistrate, in the Principal magistrate's Criminal case No. 1758 of 2002 at Nyahururu)*

JUDGMENT

The Appellant was charged with assault causing actual bodily harm contrary to *Section 251* of the Penal Code. After trial, the Appellant by the judgment dated 7th January 2004 was convicted and sentenced. The Appellant being dissatisfied with that conviction and sentence filed an appeal before this court. That appeal has raised both legal and factual grounds. When the matter came up for hearing of that appeal counsel for the State having indicated that he was not supporting the conviction, in view of the fact that the prosecution during the trial was conducted by unqualified person, the Appellant's counsel took the queue and submitted in respect of this appeal based on that defect. The Appellant's counsel submitted that when the trial began on the 19th June 2002, and when the plea was taken that the prosecution was led by sergeant Maina. This, he submitted was 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.

In the case of **Elirema & Another -V- Republic(2003) KLR 537** which was relief upon by the Appellant held that a trial prosecuted by a person not qualified as per *Section 85(2)* of the Criminal Procedure Act was a nullity. The Court of Appeal in that case was of the view that such a person who does not qualify under that section ought to have sought permission from the trial magistrate to prosecute a case as a private prosecution as provided by *Section 88* of the Civil Procedure Code. As stated before the State Counsel did not support the conviction herein in view of that nullity.

For a trial to be valid under the law, it is essential that the prosecution of it is done in accordance with the law. This trial did not accord with that legal requirement. The next question the court needs to consider is whether the Appellant should be retried. The incident the subject of the charge occurred in May 2002. The evidence of the complainant was that the Appellant along side other people assaulted him. He identified the Appellant as the one who hit him with a shoe. The shoe was never produced by the prosecution. P.W.2 also confirmed that the complainant was attacked by the Appellant together with other people. That the Appellant used her shoe to hit the complainant. P.W. 3 also confirmed that the complainant was attacked by other people together with the Appellant but stated that he did not see the Appellant hit the complainant with a shoe. P.W.4 did not witness the complainant being assaulted. P.W.5 confirmed the assault on the complainant but could not confirm what part of the shoe hit the complainant. P.W.6 the clinical officer confirmed the injuries on the complainant to be bruises all over his body and a cut on the head. Having examined in summary that evidence I find that the Appellant, whose conviction is being set aside due to the mistake of the prosecution, cannot be retried because of passage of time, the insufficiency of prosecution case and failure to produce the weapon. In the case of

SUMA -V- R (1964) E. A. 481 the court had the following to say on retrial:

"***In general a 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."***

I am of the view that there was doubt in the prosecution's case and perhaps much more than that the shoe allegedly used in the assault was never produced to the court. For that reason I will not order that the Appellant be retried.

That being the finding of this court, this court does not hesitate to and which it does hereby do, to quash the conviction against the Appellant herein and the court further does hereby set aside the sentence against the Appellant which was as consequence of that trial. The court thus hereby order that the Appellant be refunded any fines that were paid in respect of the judgment entered against him herein. It ought to be noted that the matters which are the respect of the trial occurred in May 2002. That being the case and also because the State was of the view, which is evident in the proceedings that there were other persons involved in the assault who were not charged, the court will not order that the Appellant be retried for this same offence.

Dated and delivered this 16th March 2007.

MARY KASANGO

JUDGE