



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 513 of 2006

JULIUS MURANGA GICHURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1042 of 2000 of the Chief Magistrate's Court at Nairobi)

JUDGMENT

JULIUS MURANGA GICHURE the appellant, was charged jointly with another, with nine (9) counts of obtaining by false pretenses contrary to section 313 of the Penal Code. After a full trial, the other accused before the subordinate court was acquitted of all the counts. The appellant was convicted of counts 1, 2, 4, 5 and 6. He was sentenced to serve two (2) years imprisonment on each count and the sentences to run concurrently.

Being aggrieved by the decision of the learned trial magistrate, he appealed to this court on several grounds. His counsel M/S Kingoo Wanjau & Company advocates, filed an amended petition of appeal.

At the hearing of the appeal, Mrs. Wanjau argued in support of the appeal.

Learned State Counsel, Mr. Makura, conceded to the appeal on the ground that part of case proceeded in the presence of PC Achiya, who was not qualified to be a public prosecutor. He also submitted that ordering a retrial would not be appropriate, as the co-accused before the subordinate court, was acquitted. Further, the trial before the lower court took a period of six (6) years to complete. Therefore, a retrial would cause prejudice to the appellant.

I have perused the record of the proceedings before the subordinate court. Indeed, on 5/4/2002, PC Achiya was the prosecutor. Proceedings for determining the suitability of a surety took place, and evidence was given and a ruling delivered. On 8/4/2002 also, PC Achiya was the prosecutor, when proceedings and evidence was given for the approval of a surety.

As was held by the Court of Appeal in the case of **ROY RICHARD ELIREMA –vs- REPUBLIC** Criminal Appeal No. 67 of 2002 (KSM) –

“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provisions of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, and the order in which those witnesses are to be called and whether to continue or discontinue the prosecution”

P.C. Achiya as a junior police officer, was not qualified to be a public prosecutor. Section 85(2) of the Criminal Procedure Code (Cap. 75) provides for the appointment of public prosecutors thus –

“85 (2) 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”.

It is clear from the above provisions of the law that for a police officer, he has to be of the rank of at least an Assistant Inspector, before he can be qualified to be appointed as a public prosecutor. PC Achiya, who was below the rank of Assistant Inspector of police, was therefore not qualified to be a public prosecutor. Therefore, the proceedings that were conducted when PC Achiya was the prosecutor were a nullity.

The proceedings that were conducted with an unqualified prosecutor were with regard to approval of sureties. However, as evidence from witnesses was tendered, the subject proceedings cannot be detached from the rest of the trial. Therefore the whole trial became a nullity. Consequently, I have to quash the conviction and set aside the sentence on that ground.

Learned State Counsel also submitted that a retrial should not be ordered. The principles to be considered by the court in deciding whether to order a retrial are well settled. In the case of **AHMED SUMAR –vs- REPUBLIC [1964] EA 481 at page 483**, the Court of Appeal for East Africa stated –

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered”

The court further continued on the same page –

“We were also referred to the judgment in Pascal Clement Graganza –vs R [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of the case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely

I have considered the evidence on record before the learned trial magistrate. I have considered the nature and gravity of the offences. I have considered that the appellant was sentenced to serve five two years concurrent prison sentences on 5/9/2006, which is now more than seven (7) months. The trial before the lower court took more than six (6) years to complete. Putting together, all the facts and circumstances of this case, and especially that the appellant has already served almost half of the sentence imposed, before remission, I am of the view that ordering a retrial will not be in the interests of justice. I am not assured, in any case, that witnesses will be available. In my view, ordering a retrial is likely to cause prejudice to the appellant. I agree with the learned State Counsel that an order for a retrial will not be appropriate.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith, unless otherwise lawfully held.

Dated and delivered at Nairobi this 4th day of May 2007.

GEORGE DULU

JUDGE

In The presence Of –

Mrs. Kingoo for the appellant

No appearance for state