REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 1 of 2006

REPUBLIC ……..…… APPELLANT

VERSUS

SELLY CHEPCHUMBA ….……..…..…..……. 1ST RESPONDENT

PHILLISTER NGETICH …….……..…… 2ND RESPONDENT

DANIEL KIPKEMBOI ……..…..……..…. 3RD RESPONDENT

JUDGEMENT

This is an appeal by the prosecution from the Judgement of the Senior Resident Magistrate, Kapsabet the Honourable J. M. Njoroge in Kapsabet Principal Magistrate's Court Criminal Case No. 1297 of 2003 and which was delivered on 23rd December, 2003.

The three Respondents in this Appeal were charged on 9th June, 2003 with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The hearing commenced on 29th July, 2003 and the Prosecutor was a Sergeant Sitati. The First trial Magistrate was L. M. Mugambi, District Magistrate II who later became a Resident Magistrate during the trial.

After the close of the prosecution case, the learned trial Magistrate on 5th November, 2004 in effect found the three accused had a case to answer and placed them on their defence.

The hearing resumed on 28th November, 2005, but this time before the Senior Resident Magistrate, Hon. Mr. J. Njoroge. The Defence concluded their case and judgment was reserved. Judgement was delivered on 23rd December 2005 when the three accused were acquitted. The Learned Magistrate in a brief decision had, inter alia, these to say:-

"…….

From the records, I have noted that on various dates thus 20.7.2003 and 4.2.2004 the prosecution was conducted by Sergeant Sitati who was then of a lower rank then than that of Assistant Inspector of Police. This is contrary to the provisions of Section 85 (2) of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya

Prosecution having been conducted by an incompetent person, I find that the prosecution has failed to prove its case against the accused persons to the required standards as provided, that is beyond reasonable doubt.

The accused persons are found not guilty and shall be acquitted as per the provisions of Section 215 of the CPC …….”

Being aggrieved the Appellant, the Republic of Kenya, lodged this Appeal raising only one ground based on the law. It states as follows:-

(1) THAT the Learned Trial Magistrate erred in law in acquitting the Respondents U/S 215 of the Criminal Procedure Code irrespective of the trial having been conducted by an unqualified Prosecutor hence rendering the whole trial a nullity.

The Appellant seeks that the said decision be reversed and an order for a re-trial be granted. The Respondents through their Counsel, Mr. Sagasi opposed the Appeal. Ms. Oundo for the Appellant argued that:-

- The trial Court erred in acquitting the Respondent under Section 215 of the Criminal Procedure Code.

- That the acquittal was based on the provisions of the law namely S. 85 of the Criminal Procedure Code that the Prosecutor was incompetent and/or unqualified to prosecute the case.

- That the Learned Magistrate should have considered:

· Whether the trial should have began afresh.

· Did the Prosecution prove its case.

· How long the trial had taken.

· Whether witnesses were still available.

· Any gaps in the prosecution case.

· Whether a re-trial was prejudicial to the Respondent

· Whether the ends of justice would be met by an acquittal or a re-trial.

Mr. Sagasi on the other hand submitted that:-

- That by the time the Defence hearing had started it had taken over 3 years.

- That there was no provision empowering a trial Magistrate to order re-trial.

- That the Magistrate was entitled to look at all facts, evidence and the law to form a judgement.

- That the trial Magistrate considered the submissions by Counsel.

- The trial Magistrate after the order of acquittal had no jurisdiction to order a re-trial. He could only refer the matter to the High Court for such an order.

- While Appeal is only on a point of law being an Appeal by the Attorney General, yet the High Court has power to look at all the facts and circumstances.

- The Court ought not make orders prejudicial to the Respondents.

- The Court to consider the evidence of PW1 and PW2.

- The Court ought not order a re-trial in exercise of its powers.

- Respondents had been subjected to a trial for a period of over 2 years.

- The Respondent had no control over the actions of the prosecution.

- It would be unjust, unfair, and expensive for a re-trial to take place.

- The Respondents who are ordinary 'wananchi' ought not suffer due to the failures of the prosecution.

- The Appeal was instituted on basis of malice.

- While the High Court has powers to order re-trial it should confine itself to the appeal.

I have considered the grounds set out in Amended Petition of appeal, the proceedings, Judgement and the submissions by Counsel.

Section 85 (2) of the Criminal Procedure code provides as follows:-

S. 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."

In the trial before the Resident Magistrate L. N. Mugambi and the Senior Resident Magistrate Mr. J. Njoroge, the prosecution was conducted by Sergeant Sitati whose rank was below that of an Assistant Inspector of Police. This clearly meant that the trial was a nullity ab initio. The Prosecutor had no capacity to prosecute the case against the Respondents. Even the second trial Magistrate Mr. Njoroge did not notice this until the time he was writing the Judgement. What then should he have done? Did he have the power or jurisdiction to declare the trial was flawed and amounted to a mistrial? I think that the learned Magistrate was entitled, if not obliged, to raise and record the question of the incompetence of the Prosecutor once he discovered the same. This is because the prosecutor had no power in law to carry out the prosecution.

Having discovered this fact at such a late stage at the time of preparing his Judgement, what should have the Trial Magistrate have done? Was he obliged to acquit the Respondents on this legal ground? Did he have any power to order a re-trial of the case if the circumstances demanded such an order?

I have considered this point of law and I am of the view that the Learned Magistrate who himself could be said to have acted improperly in allowing the Prosecutor to continue in the trial when he took over the hearing of the case at the start of the defence case, had no jurisdiction to acquit the Respondent or terminate the case at that stage. He ought to have stopped writing the Judgment and referred the matter to the High Court inviting it to exercise its powers of revision.

I hold this view because of the following reasons:-

1. The Prosecutor ought to have known that he was not qualified to prosecute the case. He knew his rank and its limitation. Ultimately the responsibility lies with the Attorney General who has the final powers and authority over prosecutions under the provisions of S.26 of the Constitution. Police prosecutors carry out powers of prosecution on delegation by the Attorney General.

2. The trial Court through the first Magistrate, the District Magistrate (and later promoted to Resident Magistrate) was under a duty to satisfy itself as to the competence and qualification of the Prosecutors and the Defence Counsel who appear before him, failed to inquire into the matter and exclude the said Prosecutor prosecuting the case. When presiding over the trial, the Magistrate was exercising his jurisdiction to try case of assault under Section 251 of the Penal Code.

3. When the Second Magistrate, a Senior Resident Magistrate took over the case he similarly failed in ascertaining the rank of the Prosecutor.

4. When trying the case the Senior Resident Magistrate was exercising a similar jurisdiction as the other trial Magistrate under S. 251 of the Penal Code. He did not have any more or higher jurisdiction in this regard than the first Magistrate. For the purpose of the charge they were the same.

5. As a result, the Senior Resident Magistrate could not, so to speak, sit on appeal of the conduct of the First Magistrate.

6. The Second Magistrate also had no power to revoke or nullify his own actions and proceedings for which he was liable or partly responsible for.

I am more convinced in the aforesaid views if I can ask myself – what should have happened if the trial was conducted by a single Magistrate to the end? Could such a Magistrate, at the point of writing Judgement place the entire blame on the Prosecutor and find that the trial was flawed since the Prosecutor was unqualified. Isn't the Magistrate also partly and not substantially responsible or to blame for the situation being the person presiding over the trial and who had at that level ultimate authority? If the trial Court was part of the problem should the buck be passed to the prosecution alone?

It should be remembered that in criminal cases the Complainant is the state but it is true also that the victims of the offences and their families also have sufficient interests and rights in the cases and the manner in which they are conducted. In the premises, what about the complainant's rights in his case which was an assault case involving alleged personal injuries.

In the light of the foregoing, I do hereby hold that the learned Senior Resident Magistrate did not have the jurisdiction to acquit the Respondent in this case on the basis of Section 85 (2) of the Criminal Procedure Code. Once he discovered the fact that the evidence had been fully taken and recorded with an unqualified Prosecutor, he should have stopped and not written a Judgement. He should have referred this matter to the High Court and invited it to exercise its powers of revision. The trial Magistrate could not in effect sit on his own cause where he was party to the flawed process.

I also think that he should have referred the matter without making a final order since acquittal is not the only possible decision which could result from the mistrial due to the unqualified prosecutor. There is also the possibility that a order of re-trial could arise in such a situation. I think that the Senior Resident Magistrate ought to have considered whether a re-trial was necessary and if so considered what ought to have been done. Had he considered this he ought have found that in law the Subordinate Courts do not have any power or jurisdiction under the provisions of the Criminal Procedure Code to order a re-trial of a criminal case for charges before them. (See Section 363 of the Criminal Procedure Code). Since such jurisdiction is vested only in the High Court, he should not have acquitted the Respondents. In effect such an acquittal usurped and/or was pre-emptive of the jurisdiction of the High Court and had the effect of fettering the full exercise of such jurisdiction. The trial Court had no power to acquit or order a re-trial in the circumstances.

Apart from the foregoing, I also think that the Learned Trial Magistrate was wrong in not confining himself to the point of law which was under-pinned on the provisions of Section 85 (2) of the Criminal Procedure Code. He ought not gone to the weight of evidence or any aspect of the evidence. The Learned Magistrate held that the prosecution had failed to prove its case against the accused persons to the required standard as provided by law, that is beyond any reasonable doubt. The acquittal was on a legal point and no facts were considered and analysed. This finding is highly prejudicial to the

prosecution and was a total misdirection.

The net result is that I do hereby allow the appeal and reverse the order of acquittal under the provisions of Section 215 of the Criminal Procedure Code. Should this Court order re-trial of the case under the provisions of Section 364 of the Criminal Code?

The Respondents were charged on 9th June, 2003 and Judgement delivered on 23rd December, 2005. The entire trial took 2½ years. Considering the Kenyan experience as to the length of trials which I take judicial notice of, for a trial to be concluded in 2½ years is a reasonable period and performance. For this assault case it should not have exceeded one year considering all circumstances. I have also taken into account that while the appeal has taken about 1½ years yet the Respondents were at all times free and not incarcerated. The witnesses are available and the evidence which are on record still intact. While the court appreciates that it is painful for a party to undergo a second trial and that the reason for the nullification of the earlier trial was due to the errors and/or failures on the part of the prosecution and the Court, yet justice demands that the rights and interests of the complainant and interests of the administration of justice in general are not prejudiced. Each case must be decided on their respective peculiar circumstances. This Court can also order and fix a time limit within which the trial must be concluded.

I hereby therefore, do order that there be a re-trial of the case against the Respondent herein. For expeditious and fair hearing, I do hereby order that the case be heard at the Chief Magistrate's Court at Eldoret by a Magistrate with competent jurisdiction. I direct and order that the case be heard with immediate effect and concluded within a period not exceeding twelve (12) months from the date hereof.

DATED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE

07/06/2007