



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**Criminal Appeal 47 of 2004**  
**(Being an appeal against the original conviction and sentence in**  
**Tigania Chief Magistrate's Court Criminal Case No 2330 Of 2002**  
**By Hon. G. OYUGI – District Magistrate II Prof)**

**JACKSON KIRAITHE..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein was convicted in Meru DM Court's Criminal Case No. 2330 of 2002 and sentenced to serve community Service at Kiranga Primary School for a period of twelve months. The offence he had allegedly committed was that of Forcible Entry contrary to s.90 of the Penal

Code. It was alleged that on diverse dates between 23.8.2002 and 25.8.2002 at Ontulili Location of Meru Central District, in order to take possession there, he entered on to parcel number Nkando Estate No. 624 belonging to Alex Manyara in a violent manner by breaking the fence and burning it in order to cultivate the same.

2. The Appellant dissatisfied with the conviction aforesaid has preferred this Appeal on the following grounds as summarized;

(a) That the trial was a nullity because the prosecution was conducted by an unqualified person.

(b) That there was no evidence whatsoever to sustain the charge.

3. The two grounds were argued exhaustively by Mrs. Kaume, Advocate for the Appellant and Mr. Muteti, learned State Counsel conceded to the Appeal on the very same grounds that Mrs. Kaume urged.

4. I have perused the record in this matter and I note that on 3.3.2003 when the trial commenced, the prosecutor was one S/sgt Kirima and although IP Kanampiu later took over the prosecution of the case, whatever part of the trial that S/sgt Kirima conducted rendered the whole trial a nullity and IP Kanampiu's entry later could not alter that fact. In Elirema vs. R. (2003) KLR 537 it was held that where an assistant Inspector prosecuted a case, that conduct was contrary to s.85 (2) of the Criminal Procedure Code and the trial rendered a nullity. Since S/sgt Kirima was also an unqualified person to act as a prosecutor, it follows that the trial being a nullity then the Appellant's conviction must be quashed and the sentence imposed ought to be set aside. Having done so, is a retrial viable in the circumstances of this case?

5. Learned State Counsel has submitted that a retrial in the circumstances of this case would not be reasonable and I agree. The appellant was sentenced to serve community service which he has duly performed and to subject him to a retrial would amount to double jeopardy. As was said by the Court of Appeal in Fatehali Manji vs Republic [1966] E.A. 343, a retrial must be considered only upon looking at each case on its own facts and circumstances and that such an order "**should only be made where the interests of justice require it.**" In this case the interests of justice would not be served if a retrial is ordered and I need not repeat the fact that the sentence has been served.

6. In the event, the Appeal must be allowed, the conviction quashed and since the Appellant is at liberty, no orders of release can be made.

7. Orders accordingly.

**Dated signed and delivered this 2<sup>nd</sup> day of August 2007**

**ISAAC LENAOLA**

**JUDGE**

**In the presence**

Mrs Kaume Advocate for the Appellant

Mr. Muteti State Counsel for the Republic.

**ISAAC LENAOLA**

**JUDGE**