

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 235 of 2003

(From Original Conviction and Sentence in Criminal Case No.1059 of 2002 of the Chief Magistrate's Court at Nairobi- T. N. Ngugi- RM)

CHARLES MBINDYO NZIOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**CONSOLIDATED WITH
Criminal Appeal 240 of 2005**

SIMON GATHOGO GITHIGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

CHARLES MBINDYO NZIOKA and SIMON GATHOGO GITHIGA were convicted on eight (8) counts ranging from stealing contrary to Section 275 of the Penal Code to Forgery contrary to Section 349 of the Penal Code and attempting to steal contrary to Section 389 of the Penal code. Upon conviction they were each sentenced to 18 months imprisonment on each of the 8 counts. The sentences were ordered to run concurrently. They were aggrieved by the conviction and sentence and therefore each lodged an Appeal to this Court. With consent of the parties, the Appeals were consolidated for ease of hearing and as they emanated from the same trial in the Lower Court.

When the Appeal came up for hearing, the state conceded to the same on the grounds that one P. C. Munguti partly undertook the Prosecution of the case in the Lower Court. The participation of this Prosecutor in the case according to the Learned State Counsel contravened Sections 85 (2) and 88 of the Criminal Procedure Code and therefore rendered the proceedings a nullity. Counsel therefore urged me to declare the proceeding as a nullity. Mr. Nyaberi, Learned Counsel who appeared for the Appellants welcomed the move by the state.

I have perused the record of proceedings and have confirmed that indeed P. C. Munguti prosecuted the case on behalf of the State and indeed led the evidence of P.W.4. That rendered the proceedings a nullity as it contravened mandatory and express provisions of the law. In the light of the Court of Appeal decision in ELIREMA & ANOTEHR VS REPUBLIC (2003) KLR 537 which held that such Prosecution rendered the entire proceedings a nullity, which decision is binding on me, I have no alternative but to accede to the request by the Learned State Counsel. Consequently I now declare the proceedings to have been a nullity and set aside the conviction and sentence imposed.

The only other matter left for my determination is whether or not to order a retrial in the circumstances of this case. The state did not seek an order for retrial. It was submitted in support of the state's position that the Appellants were sentenced to serve 18 months out of which they have already served seven (7) months. With remission, the Appellants would only have five (5) months to go on their jail term. In view of the foregoing, the Learned State Counsel submitted that it will not be in the interest of justice to seek an order for retrial.

A retrial should not be ordered unless the original trial was a nullity or defective, that the interest

of justice require it, that no injustice will be occasioned to the Appellant by such an order and finally that on proper consideration of admissible or potentially admissible evidence, the Appellate Court is persuaded that if the same evidence is tendered during the retrial, a conviction may result.

See generally, *SUMAR VS REPUBLIC (1964) EA 1966) EA 343, JACKSON MUTHARIA MWAURA & ANOR VS REPUBLIC, C. A. NO. 58 OF 1988, PIUS OLEMA & ANOR VS REPUBLIC C. A. NO. 110 OF 1991 AND MWANGI VS REPUBLIC (1983) ILLR 522.*

I have no doubt at all in my mind that the first condition has been met. However I doubt in the circumstances of this case whether the other three conditions have been met. The Appellants were sentenced to serve rather short terms of imprisonment, 18 months to be precise. This was on 5th April, 2005. As correctly pointed out by the Learned State Counsel, the Appellants have already served seven (7) months out of the eighteen (18) months. The Appellants are entitled to a remission on their jail term. If this is taken into account, the Appellants are only left with about 3 months to go on their jail term. In a way the Appellants have almost served the entire sentence meted out on them. In those circumstances I am persuaded that an order for retrial will occasion the Appellant injustice and or prejudice. I do not think that the interest of justice would require that a retrial be held in this case. Accordingly, I would not order a retrial. Instead I order that the Appellants be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Nairobi this 16th day of January, 2006.

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MAKHANDIA

JUDGE