



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Criminal Appeal No. 26 of 2006

PETER NDUNGU THUMBI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An appeal from the judgment of R. Nyakundi,

Chief Magistrate, in the Chief Magistrate's Court, Nyeri,

Criminal Case No.773 of 2006)

JUDGMENT

The Learned Provincial State Counsel Mr. Orinda, has conceded the appeal but asks for a retrial.

The learned counsel for the Appellant, Mr. Njuguna Kimani while welcoming the fact that the appeal is conceded opposes re-trial.

From Submissions on both sides on the issue of re-trial it has emerged clearly, that the retrial is being asked for:

- (a) Because the plea of guilty was not unequivocal;
- (b) Because the charge should have been under section 11 and not under section 8 of Cap 385.
- (c) Because section 14, the penalty section, was not mentioned in the charge sheet.

No fault on the part of the Accused has been pointed out.

It means therefore that in the retrial, the prosecution, learning from these appeal proceedings, is going to change the charge to be under Section 11 instead of the present charge under Section 8. The prosecution is going to include section 14 which was not in the original charge.

In general the prosecution is going to confront the Appellant with a completely new charge all at no fault of the Appellant who will have to go through another strain of a trial.

From the principles I stated in **Criminal Appeals 310/2001, 311/2001 and 312/2001, consolidated, Laban Kimondo Karanja & Others Versus Republic (represented)** at page 79, this appeal comes under proviso (b) and proviso (d) where under Proviso (b), there should be no retrial where the purpose is to enable the prosecution to fill up gaps in its evidence at the original trial.

Here if the appellant again pleads guilty, the Prosecution will be able to fill up gaps on the facts they stated in the original trial.

Under proviso (d) there should be no retrial where the conviction is quashed or set aside because it was vitiated by an illegality or defect for which the prosecution is to blame. That will be unfair.

The above being the position, I see no need to write more as I do hereby allow the appeal of the Appellant. Quash the Appellant's conviction and set aside the sentence imposed upon him.

I do refuse to order the appellant's retrial. He be set at liberty forthwith unless lawfully detained in some other cause.

Dated at Nyeri this 30th day of March, 2006.

J. M. KHAMONI

JUGDE