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

Criminal Appeal1023 of 2003

PATRICK MWANGI MUNGAI …….…..…….……..APPELLANT

VERSUS

REPUBLIC……..…..…….....……..….RESPONDENT

JUDGMENT

PATRICK MWANGI MUNGAI, hereinafter referred to as the Appellant was arraigned before Court on two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. He also faced one count of being in possession of a firearm contrary to Section 4 (2) (3) of the Firearms Act as well as one count of being in possession of Ammunition contrary to Section 4 (2) (3) of the firearms Act. He was however only convicted on the two firearmS related offences. Upon conviction as aforesaid the Appellant was sentenced to five years imprisonment on each of the two counts. The sentence was ordered to run concurrently. I must at once state that the sentence imposed was illegal. A conviction under Section 4 (2) (3) of the Firearms Act automatically attracts a minimum sentence of seven (7) years imprisonment. To have imposed a sentence of five (5) years on the said offence was a gross error on the part of the trial Magistrate. Had the state not conceded to the Appeal for the reasons that will soon be apparent and the Appeal proceeded to hearing and was unsuccessful I would have been minded to interfere with the sentence in such a manner as to impose the appropriate and legal sentence.

Be that as it may, the Appellant was aggrieved by the conviction and sentence. He lodged this Appeal. When the Appeal came up for hearing, the State through Ms. Nyamosi Learned State Counsel conceded to the same on grounds that an unqualified Prosecutor prosecuted part of the case. The said prosecutor was one P. C. Radak. P. C. Radak did not meet the requirements set out in Section 85 (2) of the Criminal Procedure Code. The proceedings were thus a nullity. Ms. Nyamosi, thus invited me to declare the proceedings a nullity and set aside the conviction entered as well as the sentence imposed.

I have perused the record of the proceedings and confirmed that indeed P. C. Radak prosecuted part of the case in the Lower Court. He infact led the evidence of PW2. His participation in the proceedings as a Prosecutor rendered the entire proceedings a nullity as it contravened the mandatory provisions of the law. In the light of the Court of Appeal decision in ***ELIREMA & ANOTHER VS REPUBLIC (2003) KLR 537*** in which it was held that such prosecution renders the proceedings a nullity, I would gladly accept the Learned State Counsel's invitation to annul the proceedings, set aside the conviction as well as the sentence imposed.

In conceding to the Appeal, the Learned State Counsel urged me to order a retrial. She was of the opinion that the offence was proved beyond reasonable doubt. That there was sufficient evidence to return a conviction if a retrial was ordered having regard to the evidence of the ballistic expert and the Police officers who arrested the Appellant. Finally Counsel stated that the offence was serious.

The Appellant would not hear any of the above. He claimed that the was convicted on a defective charge. That should a retrial be ordered the prosecution would be afforded an opportunity to correct the defect. The Appellant will thus be prejudiced. The Appellant further submitted that the evidence on record was contradictory and could not sustain a conviction. The Appellant further submitted that he was framed in the case. Finally the Appellant submitted that he had already served half of the jail term imposed.

As I have had occasion to state in the past, a retrial should not be ordered unless the seven or so, seven conditions are met. One that the original trial was a nullity or defective; two that the interest of justice require it; three no injustice will be occassioned to the Appellant, four; that an order of retrial should not accord the prosecution an opportunity to fill in the gaps in the evidence tendered during the initial trial; five that on consideration of the admissible and potentially admissible evidence if tendered during the retrial a conviction is likely to result, six an order of retrial would not prejudice the Appellant and finally each case must be decided on its facts and circumstances. See ***FATEHALI MANJI VS REPUBLIC (1966) E. A. 343, JACKSON MUTHARIA MWAURA & ANOR VS REPUBLIC, CR. APP. NO. 58 OF 1988 AND PIUS OLIMA & ANOR VS REPUBLIC CR. APPEAL NO 110 OF 1991.*** While I do not doubt that the first condition has been met, I do not think so with regard to the other conditions. The Appellant was sentenced to an illegal sentence of five years on 7th November, 2003. He has served almost ¾ of the sentence. In the circumstances I am convinced that an order of retrial would cause the Appellant injustice and prejudice. Infact the Appellant may end up suffering double jeopardy. Indeed it is possible that if a retrial is successfully conducted and the Appellant is convicted, the Court may this time impose the legal sentence. I do not think that such turn of events will be in the interest of justice.

Accordingly, I decline to order a retrial and order instead that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 29th day of March, 2006.

…….

MAKHANDIA

JUDGE