



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS

CRIMINAL APPEAL 938 OF 2003

**VINCENT OTIENO ODAWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant, **VINCENT OTIENO ODAWA**, was tried and convicted for the offence of handling suspected stolen property contrary to Section 322 (2) of the Penal Code. The particulars of the charge were that on 3<sup>rd</sup> day of April, 2000 in Nairobi within Nairobi Area, jointly with others not before Court, otherwise than in the course of stealing dishonestly assisted in the retention of a motor vehicle registration number KAB 195D Toyota Corolla AE80 Saloon white in colour knowing or having reason to believe it to be stolen property or unlawfully obtained. Upon conviction, the Appellant was sentenced to serve 3 years imprisonment. The Appellant was aggrieved by the conviction and sentence. He therefore lodged the instant Appeal.

When the Appeal came up for hearing, Mrs Kagiri conceded to the same on the ground that part of the prosecution of the case in the subordinate Court was undertaken by P.C. Kenduiywo who was unqualified to be a Public Prosecutor in terms of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. His participation in the proceedings as such according to the Learned State Counsel rendered the proceedings a nullity. The Learned statement therefore invited me to set aside the conviction and the sentence imposed. Mr. Nyachoti, Learned Counsel for the Appellant welcomed the move by the state.

I have carefully perused the proceedings of the Lower Court and noted that indeed Police Constable Kenduiywo participated in the proceedings as a Court Prosecutor. He led the evidence of PW2, PW3, PW4, PW5 and PW6. As held by the Court of Appeal in **ELIREMA & ANOR VS REPUBLIC (2003) KLR 537**, participation in the proceedings by a Police officer below the rank of assistant Inspector of Police as a Police Prosecutor renders the proceedings a nullity. Accordingly and as invited by the Learned State Counsel I annul the proceedings, set aside the conviction and sentence imposed.

The Learned State Counsel urged me to order a retrial. In support thereof Counsel submitted that going by the evidence on record, if a retrial is ordered a conviction is likely to result. That the evidence tendered in support of the charge was consistent and corroborative. Counsel maintained that justice will not have been seen to be done if a retrial is not ordered as the Appellant had only served 3 months out of the 3 years sentence imposed before he was released on bail pending Appeal. The Learned State Counsel further argued that the Appellant will suffer no prejudice if a retrial was to be ordered.

For obvious reasons, Mr. Nyachoti opposed the Application for retrial. He submitted that the Appellant will be prejudiced If an order for retrial was to be made since the charge had been hanging over him for

the last 4 years. Counsel pointed out that in the ***ELIREMA'S CASE (supra)*** the Court held that in determining whether to order a retrial the Court should consider whether a retrial will be in the interest of justice and whether the witnesses will be readily availed. On the merits of the Appeal, Counsel for the Appellant pointed out that there was no evidence to show that the motor vehicle the subject of the charge had been stolen nor was there a Complainant.

To order a retrial is an exercise in discretion. This exercise is not undertaken randomly, capriciously or clandestinely but is grounded on well known principles developed by our Courts over a long period of time. Indeed it is exercised with great care. The case of ***FATEHALI MANJI VS REPUBLIC (1966) EA 343*** spelt out the factors to be considered when the Court ponders whether or not to order a retrial. These are:-

- (i). A retrial will be ordered when the original trial was illegal or defective
- (ii). Each case must depend on its own peculiar facts and circumstances.
- (iii). That an order of retrial should only be made where the interests of justice require it..
- (iv). It will not be ordered if by so doing an injustice or prejudice will be occasioned to the accused.
- (v). An order of retrial will not be made for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial.
- (vi). Finally in the case of ***RATILAL SHAH VS REPUBLIC (1958) EA 3***, it was held that a retrial should not be ordered unless the Court is of the opinion that on proper consideration of the admissible and potentially admissible evidence a conviction might result.

Applying the above principles to the circumstances of this case I note that the proceeding were a nullity and therefore defective by virtue of the participation in the proceedings as a prosecutor by a person not so authorised or qualified. I have looked at the evidence tendered and I am persuaded that if the self-same evidence was tendered, a conviction is likely to result. It is not lost on me that by the time the Appellant was released on bail pending Appeal, he had only served 3 months out of 3 years imprisonment term imposed. The Appellant cannot therefore claim that if a retrial is ordered, it will occasion him injustice and or prejudice. On the question of availability of witnesses, the Learned State Counsel has assured the Court and the Appellant that witnesses will be readily available to testify again in the event that a retrial is ordered. It has not been suggested that if a retrial is ordered, the Prosecution will have been accorded an opportunity to fill up the gaps in the evidence tendered during the first trial. I do not see which other evidence the Prosecution may wish to call which has not already been tendered.

Everything considered, I think the best order which commends itself to me is that there should be a retrial in the circumstances of this case. In the premises I order that the Appellant does present himself before the Senior Principal Magistrate's Court, Kibera on 3<sup>rd</sup> April for the retrial to commence before any other Magistrate of competent jurisdiction other than Ms. Mwangi, PM who heard the initial case.

Dated at Nairobi this 27<sup>th</sup> day of March, 2006.

.....

**MAKHANDIA**

**JUDGE**