REPUBLIC OF KENYA

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

Criminal Appeal 492 of 2004

(*From Original Conviction and Sentence in Criminal Case No. 1878 of 2002 of the Senior Resident Magistrate's Court at Githunguri – C.V. Odembo RM)*

DAVID KAMOTHO THIONGO …….....…….…… APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

JUDGMENT

The appellant, ***DAVID KAMOTHO THIONGO*** was convicted for the offence of being in possession of Narcotic drugs contrary to Section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read together with Section 2(a) of the same Act. He was sentenced to 5 years imprisonment with hard labour. The appellant was aggrieved by the Court's finding and therefore lodged this appeal.

When the appeal came up for hearing, Mrs. Gakobo, learned state counsel conceded to the appeal on the ground that the prosecution of the case in the subordinate court was conducted by corporal Ongeri who was an unqualified prosecutor in terms of Section 85(2) as read together with Section 88 of the Criminal Procedure Code. Accordingly the conviction of the appellant was a nullity. Counsel therefore invited me to annul the proceedings. On the issue of whether a retrial should be ordered, the learned state counsel informed the court that even though the offence was serious and prevalent, the state was nonetheless not seeking a retrial as the appellant had served a substantial portion of the sentence imposed. A retrial would in the circumstances be prejudicicial to the appellant, the learned state counsel concluded her submissions.

The appellant for obvious reasons was elated by the turn of events. All he could say in response was that he should be released from prison custody forthwith.

I have perused the record of the proceedings. It emerges that indeed CPL Ongeri led the evidence of the entire prosecution case. The said prosecutor was not qualified to prosecute the case in terms of the aforesaid Sections of the Criminal Procedure Code as well as in terms of the Celebrated case of ***ELIREMA & ANOR – VS – REPUBLIC (2003) KLR 537.*** His participation in the proceedings therefore rendered them defective and or a nullity. Accordingly and as invited by the learned state counsel, I declare the proceedings to have been a nullity and consequently set aside both the conviction and sentence.

On retrial, the state counsel has indicated that she does not seek the same. I have re-evaluated and carefully considered the evidence adduced before the trial court. The principles applicable in determining whether or not to order a retrial are now well settled and I do not have to repeat them here. Suffice to say that there are basically two considerations; one whether the interests of justice require an order for retrial being made and whether the order if made would occasion prejudice to an accused person, and seriously, whether the admissible and potentially admissible evidence if tendered may result in a conviction. ***SEE MANJI VS REPUBLIC (1960) E.A. 343 AND MWANGI VS REPUBLIC (1983) KLR 522.***

Having considered the issue of retrial at length against these two broad principles, I am not satisfied that a retrial would be the proper order to make in the circumstances of this case. The appellant was

convicted and sentenced to 5 years imprisonment and hard labour. This was on 7th May, 2003. To date therefore the appellant has served more than 3 years of his jail term. To order a retrial in the circumstances would be prejudicial to the appellant and may indeed occasion injustice. The learned state counsel was therefore right in not pursuing a retrial on that basis. For this reason alone, I decline to make an order for retrial. Instead I order that the appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 24th day of May, 2006**.**

…….

MAKHANDIA

JUDGE