REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1212 of 2002

(From original conviction and sentence in Criminal Case No.4983 of 2002 of the Senior Principal Magistrate's Court at Kibera, Ms. Siganga, SRM)

HENRY GITAU NJUGUNA ……………..…….........................……………..….APPELLANT

VERSUS

REPUBLIC …………………………………….......................……….. RESPDONDENT

JUDGMENT

HENRY GITAU NJUGUNA was charged with four counts of Arson contrary to Section 332 of the Penal Code. It was alleged in all the four counts that on the 7th day of January, 2002 at Kiserian Town in Kajiado district of the Rift Valley Province the appellant willfully and unlawfully set fire to a building namely a dwelling house. The Complainants in the four counts were tenants in the said building. The Prosecution called nine witnesses in total and at the close of the case, the learned trial Magistrate found the Appellant guilty, convicted and sentenced him to 15 years imprisonment on all the four counts. The sentences were ordered to run concurrently. It is out of the said conviction and sentence that the Appellant has preferred this Appeal.

When the Appeal came up for hearing, Mrs. Kagiri, Learned Counsel for the State conceded to it on a technicality. Counsel submitted that when the case came up for hearing on 24th October, 2002, the Prosecutor was one Corporal Osiemo. He led the evidence of PW9 and was also the Prosecutor present during the defence hearing. According to the Learned State Counsel the participation of Corporal Osiemo in the proceedings contravened the provisions of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. Consequently the proceedings were rendered a nullity. Counsel therefore invited me to so hold, quash the proceedings and set aside both conviction as well as sentence.

Counsel also urged me to consider ordering a retrial. In support thereof Counsel submitted that the evidence on record though circumstantial irresistibly pointed to the Appellant as the culprit. Counsel maintained that the offence was serious as a whole residential building was razed to the ground and property worth thousands of shillings belonging to the four Complainants destroyed. Counsel further submitted that a young child also died in the inferno. That during mitigation the Appellant showed no remorse. Considering the loss suffered by the Complainants, Counsel submitted, the interest of justice will be best served by an order for a retrial. Finally Counsel pointed out that the Appellant will not suffer any prejudice if a retrial was ordered as he had not served a substantial portion of his jail term.

In response, the Appellant chose to rely on his written submissions which I have carefully considered. It is evident from the written submissions that the Appellant has not addressed the issue of the proceedings being a nullity by virtue of the participation in the same by Corporal Osiemo nor has he addressed the issue of retrial.

Be that as it may, I have perused the record of the proceedings and confirmed that indeed corporal Osiemo partly prosecuted the case for the prosecution. Corporal Osiemo was not a qualified Public Prosecutor in terms of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code. The Court of Appeal, while dealing with a similar situation in the celebrated case of ***ELIREMA &***

ANOR VS REPUBLIC (2003) KLR 537 held that a trial in which a police officer of the rank below that of Assistant Inspector of Police participates as a Prosecutor is a nullity as such Police Officers are not qualified public Prosecutors. A Corporal is obviously a rank below that of an Assistant Inspector of Police. As I am bound by the aforesaid authority I accordingly find that the proceedings were a nullity, quash the conviction and set aside the sentence.

On a retrial, I have carefully considered the evidence on record. The evidence though circumstantial clearly points to the Appellant in the commission of the offence. If a retrial is ordered and the self-same evidence is tendered a conviction is likely to result. (See ***MWANGI VS REPUBLIC) (1983) KLR 522.***

The offence committed was serous as it resulted in a whole building being guttered down. The Complainants lost all their valuable properties. Indeed one of them even lost a child in the inferno. In those circumstances and as correctly urged by the Learned State Counsel, the interest of justice would require that an order for retrial be made.

The Appellant has been in prison custody since 7th November, 2002. That is a period of about 3 1/2 years. He was sentenced to 15 years imprisonment. The Appellant has therefore not served a substantial portion of his prison term. In the premises I find that an order for retrial will not occasion the Appellant any prejudice or injustice. See ***AHMED SUMAR VS REPUBLIC (1964) EA 481.***

The upshot of all the foregoing is that there shall be a retrial in this case. Towards this end, the Appellant shall appear before the Senior Principal Magistrate's Court at Kibera on 7. 7. 2006 to face the self same charges. The trial shall be presided over by another Magistrate of competent jurisdiction other than Ms. Siganga, SRM who handled the initial trial. Until then the Appellant shall remain in prison custody.

Dated at Nairobi this 26th day of June, 2006.

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MAKHANDIA

JUDGE