REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 9 of 2005

(Original Bungoma SPM'S CR. NO.960 OF 2004)

PETER JUMA

ALEX NYARANGA...APPELLANTS

VS

REPUBLIC..PROSECUTOR

JUDGMENT

The appellants, *Peter Juma Wekesa* and *Alex Nyaranga* were charged, tried and convicted by *S. G. Sogomo*, Resident Magistrate on 17th February 2005. They preferred two separate appeals which were consolidated on 15th November 2005 by *Hon. Justice Sergon* as Bungoma H. C. Criminal Appeal No.9 of 2005.

The charge, the subject matter of the case, was burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal code.

The particulars are that on the night of 23rd and 24th March 2004 at Mabanga Shopping Centre in Bungoma District within Western Province jointly with others not before the court broke and entered a dwelling house of *Amos Masinde* with intent to steal therein and did steal therein one T.V make J.V.C, serial no.AV 20 NMG 3 B and a video player S/No.167625 and two remote control, the property of *Amos Masinde* all valued at Sh.52,000/=.

The record of proceedings show that prosecution was undertaken by an inspector of *Police Leichana.*

The appellants at the hearings through *Mrs Aburili* and *Mr. Kraido* abandoned all grounds of appeal save 6. It was urged on behalf of the appellants that the prosecutor was incompetent in terms of the provisions of section 85(2) of the Criminal Procedure Code. That far from being *inspector Leichana*, the prosecutor was infact *P.C. Kirui.*

Mr. Onderi, for the state, conceded the appeal. He drew my attention to the fact that after due enquiries he ascertained from the DCIO Bungoma that indeed the prosecutor was *P.C. Kirui.* That there would appear to have been an oversight on the part of the court.

Mr Onderi further argued that the subject matter of the charge was not recovered and offences under section 304 (2) and 279 (b) of the Penal Code are serious offences. That the court gave one sentence instead of two sentences. Furthermore, the court did not make an order whether the sentences were to run consecutively of concurrently. That the first charge carries a maximum of 10 years and a second charge a

maximum of 14 years. *Mr. Onderi* summed it up that there were therefore several irregularities which necessitate an order of retrial.

Mrs Aburili and *Mr. Kraido* for the appellants finally took the view that a retrial would meet the ends of justice.

The law on re-trail is now well settled. *In FETEHALI MANJI -VS- REPUBLIC E.A 343* the East African Court of Appeal said as follows:

"In general, a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even whether conviction is …………. By a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its peculiar fact and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause any injustice to the accused person."

In this case, there are several irregularities:

(1) The prosecutor was a police constable.

(2) The court gave one sentence instead of two when the charges were under sections 304 (2) and 279 (b) of the Penal code.

For those reasons, I am satisfied that this is a proper case to order for a retrial.

Accordingly, I allow the appeal, set aside the sentence and order that the appellant's case be remitted to the Senior Principal Magistrate's Court at Bungoma for hearing and disposal as by law enjoined.

By way of directions, I order that this matter be mentioned before the Senior Principal Magistrate for purposes of taking fresh plea.

DATED and DELIVERED at BUNGOMA this 26th day of June 2006.

N.R.O. OMBIJA

JUDGE