

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 13, 14 & 15 of 2002

(From original conviction and sentence in Criminal Case No. 181 of 2001 of the Resident Magistrate's Court at Narok, W. O. Lichuma, SRM)

KAPOLONTO OLE KENANA.....1ST APPELLANT

MURERA OLE KEKO.....2ND APPELLANT

KISONGOI OLE KIKONYA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants were charged with incitement to violence contrary to **Section 90(b)** of the **Penal Code**. The particulars of the offence were that on the 6th day of April, 2001 at Olokoselimai area within Loita Location in Narok District of the Rift Valley Province, jointly with others not before court, they uttered some words namely, "**REMOVE YOUR EQUIPMENT OR WE DESTROY THEM. THIS BORE HOLE WILL NOT BE DRILLED HERE SO LONG AS WE ARE STILL ALIVE.**" It was alleged that the said words indicated or implied that they would prevent the digging of a bore hole which was in progress by a water engineer, an act which was calculated to lead to damage of the equipment used for the digging of the borehole or any other property of the Catholic Diocese of Nakuru who were undertaking the digging of the bore hold.

The appellants were tried, convicted and each was sentenced to twelve months imprisonment. They were aggrieved by the said conviction and sentence and each appealed against the same. However, each of the appellants was released on a bond of Kshs.20,000/-. They raised twenty (20) grounds of appeal. Shortly after their counsel, Mr. Kibe Mungai, began arguing their appeals, Mr. Koech, state counsel, informed the court that he was not opposing the appeal because part of the prosecution proceedings before the trial court were conducted by an unqualified prosecutor. He also indicated that he was not urging a retrial given that the offence had allegedly been committed nearly five years ago and the witnesses who had testified in the matter were not likely to be traced. Mr. Mungai welcomed the concession of the appeals by the state.

It is now trite law that for a criminal prosecution to be valid the provisions of **Section 85(1)** of the **Criminal Procedure Code** must be fully complied with failing which the trial and any conviction flowing therefrom will be a nullity, see ***ELIREMA & ANOTHER VS REPUBLIC [2003] KLR 537*** I agree with Mr. Koech that part of the prosecution proceedings in this matter were conducted by a police officer who was not of the rank of an Inspector and as such the conviction that was reached by the trial court cannot stand. I also agree that a retrial will be inappropriate given the reasons as stated by Mr. Koech. I therefore allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court. As the appellants had been released on bond pending the hearing and determination of the appeal, the bonds that they had executed are now nullified and the appellants are set at liberty.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of June, 2006.

D. MUSINGA

JUDGE

20/6/2006

Judgment delivered in open court in the presence of Mr. Kibe Mungai for the appellants and in the absence of Mr. Koech for the state.

D. MUSINGA

JUDGE

20/6/2006