



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT

MACHAKOS

APPELLATE SIDE

Criminal Appeal 272 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 469 of 2003 of the Senior Resident Magistrate's Court at Kangundo N.N. Njagi (Esq.) on 11/8/03

JOHN MUIA MULWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant John Muia Mulwa was the accused in Criminal Case 469/03 before Senior Resident Magistrate's Court, Kangundo. He faced the following charges:

1. Shop breaking and committing a felony Contrary to Section 306 (a) of the Penal Code. In the alternative, he was charged with handling stolen property Contrary to Section 322 (2) of the Penal Code.
2. Malicious damage to property Contrary to Section 339 (1) of the Penal Code.
3. Escape from lawful custody Contrary to Section 123 of the Penal Code.

After the trial he was convicted of the alternative charge in Count I, 2nd and 3rd charges and sentenced to 6 years, 4 years and 6 months respectively. The sentences were to run consecutively. The appellant was dissatisfied with the conviction and sentences and filed this appeal.

At the hearing of the appeal the learned state counsel Mr O'Mirera conceded the appeal on grounds that the case in the lower court was prosecuted by PC Mbonge who was an unqualified prosecutor and hence the proceedings were a nullity. He urged the court to order a retrial.

The record of appeal does confirm that PC Mbonge prosecuted the case in the lower court. His purported prosecution offends the provisions of Section 85 and 88 (2) of the Criminal Procedure Code which provide for who the Attorney General can appoint as prosecutors and that is Advocates of the High Court or police officers of the rank of acting Inspectors and above. PC Mbonge is neither of the above and, therefore, unqualified to prosecute. In light of the now celebrated case of **ROY ELIREMA versus REPUBLIC Criminal Appeal 67/03**, where the Court of Appeal held that such prosecution of a case by an unqualified prosecutor renders the proceedings a nullity; I hereby declare the proceedings before the

lower court a nullity. The convictions are quashed and sentences set aside.

What happens to the appellant?

Though the state urges that a retrial be ordered the appellant vehemently opposed such order contending that he has suffered a lot, that he is 17 years though claims to have been born in 1984 and wants to go back to school.

The principles upon which a retrial can be ordered are: where the trial in the lower court is defective or illegal; whether such order of retrial will prejudice the appellant; whether the witnesses can be found; whether the admissible evidence on record can result in a conviction. I have scanned the record of appeal and it is clear that the trial of the appellant took a short time. He was arraigned in court on 23/6/03 and was convicted less than 2 months later on 11/8/03. He was sentenced to a total of 10 ½ years. So far he has only served about 1 ½ years which is a very small proportion of the sentence.

I wish to point out at this stage that the magistrate did not give the reason for ordering the sentences to run consecutively.

His discretion was not exercised judiciously and I hold that there is no basis for the said order. Since the proceedings before the lower court were defective the court would generally order a retrial (see **MANJI versus REPUBLIC 1966 E.A 343**).

As to whether witnesses would be readily available, I find that they would as the offence occurred in Kakuyuni area within Machakos District, in this court's jurisdiction.

On assessment of the evidence on record, I find that there was no evidence to support count 1 and even the alternative charge. No evidence was led on how the appellant was arrested, where and there is no evidence that the complainant identified the batteries recovered as hers or that they were stolen from her shop. However, as regards count II and III, I do find there to be ample, admissible evidence on record that might result in a conviction if a retrial is ordered.

In count II, the appellant was sentenced to 4 years imprisonment. The maximum sentence under the said section is 5 years. The offence is a misdemeanor. In my view, the sentence was harsh and excessive in the circumstances. The offence of escape from lawful custody is also a misdemeanor and maximum sentence is 2 years. A sentence of 6 months was fair. As earlier noted, the order that the sentence runs consecutively was uncalled for and harsh and without basis and in my view the sentence of about 1 year 5 months already served is sufficient in the circumstances and the court will decline to order a retrial and set the appellant at liberty forthwith unless otherwise lawfully held.

Dated at Machakos this 25th day of January 2005

Read and delivered in the presence of

R.V. WENDOHI

JUDGE