REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 226 OF 2003
(From original conviction (s) and Sentence(s) in Criminal case No. 15 of 2003 of the Senior Resident Magistrate's Court at Makadara (Miss Oyaro -RM)

ISAIAH KAMAU MWANGI……...APPELLANT

VERSUS

REPUBLIC…… …….…....RESPONDENT

J U D G M E N T

The Appellant, **ISAIAH KAMAU MWANG**I, was convicted for **STEALING FROM A PERSON** contrary to Section 279(a) of the Penal Code. He was then sentenced to imprisonment for 4 years, and was to receive one stroke of the cane.

Being dissatisfied with the conviction and sentence, the Appellant filed this Appeal. He raised several grounds of Appeal in his Petition of Appeal. However, when the Appeal came up for hearing, the Respondent conceded the Appeal. The reason for the said concession was stated by the learned state counsel, Ms. Mary Mwenje, as the fact that the trial was conducted by an unqualified Public Prosecutor.

A perusal of the record of the proceedings reveals that the prosecution was conducted by PC Marubu and PC Mambo. By virtue of the provisions of Section 85 (2) of the Criminal Procedure Code, the Attorney General, could only appoint Public Prosecutors either from amongst advocates of the High Court of Kenya, or alternatively from amongst persons employed in the Public Service, who are not below the rank of Assistant Inspector of Police. Therefore, as both PC Marubu and PC Mambo held ranks that were below that of an Assistant Inspector of Police, they were not qualified to be appointed as Public Prosecutors.

In accordance with the decision of the Court of Appeal in **ROY RICHARD ELIREMA & ANOTHER vs. REPUBLIC, CRIMINAL APPEAL NO. 67 OF 2002** (at Mombasa), if a case or any part thereof was prosecuted by an unqualified prosecutor, the entire case would be rendered a nullity. Therefore, the Respondent was right to concede this Appeal. The result is that the Appellant's conviction is hereby quashed, and the sentence is set aside.

However, the Respondent did ask the court to order for the retrial of the Appellant. As far as Ms. Mwenje, learned state counsel was concerned, this was a proper case for retrial. The reasons for that submission were that the evidence by PW1, PW2 and PW3 was clear and straightforward. It is contended that the evidence which was adduced against the Appellant was so overwhelming that if a retrial were conducted, a conviction was almost certainly, likely to be the result. Also, the Respondent pointed out that as at the date of hearing this Appeal, the Appellant had only served about one and a half (1½) years, out of the four years to which he was imprisoned. Therefore, as far as the Respondent was concerned, the Appellant would not be prejudiced by an order for his retrial.

The Respondent said that witnesses will be readily made available, in the event of a retrial. And finally, the Respondent asked me to take into account not only the Appellant's circumstances, but to also take into consideration the impact which the Appellant's release would have on the victims of the crime in issue.

Faced with the Respondent's request for a retrial, the Appellant's counsel Mr. Kiiru advocate put forward a strong objection. He pointed out that the Appellant was arrested in February 2003, and had been in custody since then.

Having perused the record of the proceedings, I noted that the Appellant was the 3rd accused, during his trial. PW3 PC Marck Ndubi testified that the Appellant and the other 2 coaccused were all arrested on 30th December 2002. Indeed, the Appellant also testified that he was arrested on 30th December 2002. I have pointed out these details only to emphasize the fact that it is important for parties or their advocates to ensure that information they provided to the court was accurate.

However, it is correct that the Appellant remained in custody from 12th February 2003, when the learned trial magistrate cancelled his bond. The said cancellation was effected after the trial court realized that the surety did not meet the terms of the Bond which had been set by the Court.

Looking at the issue of the sentence, the following facts emerge. That the Appellant was sentenced to four years imprisonment, on 29th February 2003. If the Appellant did not benefit from remission, the Appellant would be in jail up to 28th February 2007. But if the Appellant received remission, he would serve a total of 32 months in prison. In effect he would be entitled to release on or about October 2005. The Appellant was therefore, right when he calculated that he had only about 10 more months to serve, if he benefited from remission. Bearing in mind the fact that the Appellant has already been in jail for some 23 months, out of 32 months, I have no doubt that an order for retrial would be prejudicial to the Appellant.

But on the other hand, it is clear from the evidence on record that the Appellant was arrested at the scene of crime. He also testified as follows, when he was defending himself;

"I was scared of being beaten. So I accepted I had stolen."

On balancing between the prejudice which the Appellant is likely to suffer, and the evidence on record, I find that although the evidence appears to suggest that a retrial would result in the Appellant's conviction, he has nonetheless already served a substantial part of the sentence. Doing the best I can, in these circumstances, I hold that the interests of justice would be best served by an order for the release of the Appellant. He should however, bear in mind the fact that this decision is an extremely close call. He should consider himself extremely lucky. I therefore, trust that his lifestyle henceforth will reflect total honesty.

In conclusion, having quashed the Appellant's conviction, I now direct that he be set at liberty unless he is otherwise lawfully held.

It is so ordered.

Dated at Nairobi this …….day of ……. 2005.

F. A. OCHIENG'

JUDGE

Read, signed and delivered in the presence of;

F. A. OCHIENG'
JUDGE