



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 617 OF 2003

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO
29741 OF 2002 OF THE CHIEF MAGISTRATE'S COURT AT MAKADARA
JAMES OWINO ODHIAMBO.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **JAMES OWINO ODHIAMBO** was convicted for **PREPARATION TO COMMIT A FELONY** contrary to section 308(2) of the Penal Code. He was then sentenced to 5 years imprisonment.

When his appeal came up for hearing, the learned State Counsel, Ms Mwenje, conceded the appeal. She was right to do so because part of the prosecution was conducted by one PC Marubo. By virtue of his rank, PC Marubo did not qualify to be appointed a public prosecutor, pursuant to section 85(2) of the Criminal Procedure Code. The statute provides that the Attorney General may appoint public prosecutors either from amongst advocates of the High Court of Kenya, or alternatively, if from amongst persons employed in the public services, the persons should be of the rank of at least an Assistant Inspector of Police.

When faced with a scenario in which an unqualified prosecutor had conducted a trial, the Court of Appeal held that by so doing, the entire trial was rendered a nullity. The said decision was made in **ROY RICHARD ELIREMA & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO. 67 of 2002** (At Mombasa)

In accordance with the decision of the Court of Appeal, I do hereby declare that the trial of the appellant was a nullity. Accordingly, the conviction is hereby quashed and the sentence set aside.

Ordinarily, after a conviction is quashed and sentence set aside, an appellant would be set free. However, in this case, the learned State Counsel has asked the court to order for the appellant to be retried. Ms Mwenje submitted that the evidence on record is so much that if a retrial were to be concluded, it would almost certainly result in a conviction. She also said that the state would be able to make available the witnesses, very easily. Finally, the learned State Counsel said that as the appellant had so far only served about 1 1/2 years out of the sentence of 5 years imprisonment, he would not be prejudiced by an order for a retrial.

On his part, the appellant opposed the attempt to have him retried. He said that he had been in

custody since 12th December 2002, which is a period of 2 years.

A perusal of the record reveals that the appellant was actually arrested on 11th December 2002. He was first arraigned in court two days later, on 13th December 2002. After a few false starts, the trial commenced on 20th May 2003. The prosecution called two witnesses. PW1, PC Anderson Nzake testified that he was on patrol with PW2, on the night of 11th December 2002. He said that they saw 3 people who were suspicious, and therefore ordered them to stop. This was happening at Riverside.

When ordered to stop, the 3 people ran away, but eventually PW1 managed to arrest the appellant. When he was searched, the appellant was found with a toy pistol tucked into his waist.

PW2, PC James Wahome, corroborated the testimony of PW1.

Later, the appellant said, in his defence, that he was arrested at a funeral. He too confirmed that the police officers were running after suspects, but he denied being one of the suspects. In her judgment the learned trial magistrate held that the appellant had no defence. This is the way she expressed herself:

“Prosecution witnesses told the court what transpired on that day. In normal circumstances, police will not just arrest anyone. Also, accused person had no defence. He also accepted that the police officers were running after suspects, when they picked accused person and another from the funeral gathering. It could appear to me that the accused was among the suspects being ran after and that is why no other person from the funeral gathering was arrested by PW1 and also the other person arrested with accused person was released.”

I find the reasoning in the extract above, somewhat difficult to follow. For instance, even though the learned trial Magistrate started by saying that the prosecution witnesses told the court what had transpired on the material day, (and it was night, as opposed to day), the rest of the analysis that then followed was actually from the evidence of the appellant. PW1 and PW2 did not make any reference to having arrested the appellant at a funeral gathering. The first time that there was any reference to a funeral gathering was when the appellant was giving his sworn defence.

Secondly, the appellant was not cross-examined at all. In other words, the prosecution did not even attempt to challenge the defence. I find it surprising that the learned trial magistrate also seemed to have cited from the said defence, even after stating that it was no defence.

The conclusion of the trial court was that the appellant’s defence was a sham. But then as I have already pointed out above, the court quoted from it at length, and seemed to have accepted it, to the extent that the appellant was arrested at a funeral gathering. I am not able to understand the reason why therefore the defence was dismissed as a sham.

To my mind, if the appellant were to be retried, the prosecution may well have been accorded an opportunity of filling in the gaps that currently exist in the case. For instance, none of the prosecution witnesses had told the court anything about the following important issues;

(a) The distance between the police officers and the 3 suspects when the officers first saw the suspects.

(b) The lighting, if any, which was at the place

(c) The distance covered by the police when chasing the suspects.

(d) Whether or not the police officers kept the suspects in full view at all times during the chase.

(e) If the police were so sure of the suspects, why they released one of them, leaving only the appellant to face trial.

To my mind, if the appellant was to be retried, he would be prejudiced. I therefore hold that the interests of justice do not demand a retrial. Accordingly, I decline to order for a retrial. Instead, I direct that the appellant be set at liberty, unless otherwise lawfully held.

Dated at Nairobi this 24th day of January 2005

FRED A. OCHIENG

JUDGE

Appellant in person present

Mr. Odero Court Clerk