

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MACHAKOS
APPELLATE SIDE

Criminal Appeal 252 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 314 of 2001 of the

District Magistrate's Court at Makueni DM I on 15/8/03)

THOMAS KIVUVA MUANGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant appeals from the judgement of the DM I Makueni Criminal Case 314/01.

Before that court, the appellant faced two offences of malicious damage to property Contrary to Section 339 (1) of the Penal Code and stealing Contrary to Section 275 of the Penal Code. He was convicted of both counts and sentenced to; count I Ksh.10,000/= in default 6 months imprisonment and count II Ksh. 6,000/= in default 4 months imprisonment. Fine was paid on the same day of sentence on 15/8/03. He was aggrieved by both conviction and sentence.

At the hearing of the appeal even without going into the merits of the appeal the state counsel conceded the appeal on ground that the proceedings in the lower court were conducted by an incompetent prosecutor and urged the court to declare these proceedings a nullity. He did not apply for a retrial. It is evident from the record of appeal that the proceedings before the lower court were conducted by Corporal Kyumbu.

He is an incompetent prosecutor in terms of Section 85 and Section 88 of the Criminal Procedure Code which provides that the Attorney General shall appoint public prosecutors from Advocates of the High Court or police officers of the rank of acting Inspector of police and above. Corporal Kyumbu did not fall under any of the above categories and was, therefore, incompetent to prosecute.

It is now trite law that such proceedings prosecuted by an incompetent prosecutor are a nullity (***see ROY ELIREMA versus REPUBLIC Criminal Appeal 67/03.***) The court hereby declares the proceedings in the lower court a nullity and the conviction is hereby quashed and sentence set aside.

The prosecution did not request for a retrial of the case. I have scanned through the record of evidence adduced before the lower court and do find that thought the court found that the appellant was guilty of the two offences, the prosecution did prove beyond any doubt the ownership of the alleged stolen property and damaged property to be that of the complainant. There was doubt as to whether the complainant was the owner of that property in issue and the conviction was, therefore, unsafe. Ordering a retrial would be doing so in vain and the appellant is hereby set at liberty forthwith and the fine of Ksh. 16,000/= paid in court on 15//8/03 should be refunded to the appellant forthwith.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE