



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

CRIMINAL APPEAL NO. 324 OF 2003

ANNE NJERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 325 OF 2003

STEPHEN KIHANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 325 OF 2003

ARTHUR KAHURA MUROKIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants, **ANNE NJERI MACHURA, ARTHUR KAHURA MUROKI** and **STEPHEN KIHANYA MAGU**, were convicted for the offence of **STEALING BY AGENT** contrary to section 283(c) of the Penal Code. The learned trial Magistrate then sentenced them to two years imprisonment, each.

Being dissatisfied with the conviction and sentence, the appellants lodged appeals to this court.

When the said appeals came up for hearing, the appellants were represented by Messrs P.K. Njoroge and R.K. Macharia advocates, whilst the state was represented by learned State Counsel, Mr. Kaigai.

The state did notify the court that they were constrained to concede the appeals, on the grounds that the

trial was prosecuted by an unqualified prosecutor. I have perused the record of the proceedings before the trial court and ascertained that on 7th May 2002 when PW1 testified, the prosecutor was one PC Simiyu. The same prosecutor did duty on the next day, when PW2, PW3 and PW4 testified. On the 3rd day, 9th May 2002, PC Simiyu was, once again the prosecutor, when PW5 testified. Thereafter, he prosecuted on 15th July 2002, when PW6 and PW7 testified.

Later, on 23rd October 2002, when PW8 testified, the prosecutor was one PC Achiya. Then on 6th February 2003, when PW9 and PW10 testified, the prosecutor was one PC Tom.

In a nutshell, the entire case was prosecuted by Police Constables. By virtue of their rank, all the said prosecutors did not qualify to be appointed as prosecutors, as Section 85(2) of the Criminal Procedure Code expressly stipulates that to qualify, one must be either an advocate of the High Court of Kenya or alternatively be a police officer of a rank not below that of an Assistant Inspector.

In ROY RICHARD ELIREMA & ANOTHER V REPUBLIC, CRIMINAL APPEAL CASE NO. 67 OF 2002, (at Mombasa), the Court of Appeal held that if any part of a criminal case was prosecuted by an unqualified prosecutor, the entire trial was rendered a nullity. Accordingly, the trial of the appellants herein was rendered a nullity by the fact that the case was prosecuted by unqualified prosecutors. Therefore, I do now quash the convictions and set aside the sentences meted out against the appellants.

However, that is not the end of this matter, as Mr. Kaigai, learned State Counsel has asked the court to order for a retrial. He says that the amounts of money stolen were vast, and even more so, the fact that the said money ought to have gone to a self – help group. In his view, justice would only be achieved if the appellants were retried.

In answer to the request for an order for retrial, Mr. Njoroge advocate submitted that the evidence which was tendered at the trial did not support the appellants conviction. He said that the conviction was basically founded on the appellants' confessions, which had been retracted. In his considered view, the person who received the money was PW8, thus removing all blame from the appellants.

The 3rd point he raised was that the money in issue was never proved to have been intended for the self help group, in any event.

On his part, Mr. Macharia advocate, associated himself fully with the sentiments expressed by Mr. Njoroge advocate. He added that following the enactment of Act No. 5 of 2003, confessions had been outlawed. That being the case, Mr. Macharia believes that there was no evidence upon which the appellants could be convicted, even if they were to be retried. For those reasons, he urged the court to set the appellants free, unconditionally.

I have carefully given consideration to the competing submissions on the issue as to whether or not a retrial should be ordered. I have noted that the offence in issue was said to have been committed in September 2000. It is an offence in respect of which the bulk of the evidence ought to be documentary. I therefore believe that there should be little difficulty in procuring the necessary documentary evidence. I also note that the money in issue has some connection with a self help group. That would imply that the persons who believe they were entitled to receive the money, for use in advancing the lot of their members, are relatively poor persons. Not only that, but the said self – help group appears to have had connections with the Presbyterian Hunger Programme. The connotation is that the members of the group were persons in need of assistance.

Since they now feel cheated of funds which ought, (in their view), to have been used to uplift their lot, I think that it is only fair to both the appellants and the self-help group to get to the bottom of this matter. In other words, justice does demand that the appellants be retried. I do not think that they could be prejudiced in any way by a retrial. I say so because at all material times, both during their trial and also as they awaited the hearing and determination of this appeal, the appellants were not in custody.

In conclusion, I do hereby order that the appellants be retried. Their retrial will be conducted by any court

of competent jurisdiction, other than Mr. J.M. Wakahora. The said retrial should be accorded priority.

In the meantime, as the appellants wait to appear in court, on 3rd May 2005, they will remain out, on bond. Once the appellants appear before the trial court, the said court shall be responsible for determining whether or not to grant bail or bond, if the appellants should apply for the same.

It is so ordered.

Dated at Nairobi this 25th day of April, 2005

FRED A. OCHIENG

JUDGE