



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO.14 OF 2004
APPELLATE SIDE

KIBET JOHNA KORIR
APPELLANT

-VERSUS-

REPUBLIC.....
RESPONDENT

(Being an Appeal from the decision of L. N. Mugambi Esq. District Magistrate II(Prof.)

in Kapsabet Principal Magistrate’s Court Criminal Case No.668 of 2002

made on 9th March 2004)

JUDGEMENT

At the hearing of the appeal the learned State Counsel Ms. Oundo conceded to the appeal on the ground that the prosecution was conducted by an unqualified prosecutor.

I have perused the proceedings and it is true that the prosecution was conducted by PC. Kunga, PC. Langa and Sgt. Sitati all of whom were not qualified to be public prosecutors under the provisions of Section 85(2) of the Criminal Procedure Code (Cap.75), they are not police officers of or above the rank of Assistant Inspector. As was held by the Court of Appeal in the case of Roy **Richard Elirema –vs- Republic [2003] KLR 537** , the effect of prosecution by an unqualified prosecutor is to render the whole proceedings a nullity. The State Counsel rightly conceded to the appeal on that ground. The learned State Counsel however has asked the court to order a retrial, in case the appellant paid the fine imposed. In her view, if the appellant had already served the default six months imprisonment term, then she would not seek for a retrial.

In considering the ordering of a retrial the court has to take into account the sufficiency of evidence, the availability of witnesses and exhibits, the nature of the offence, the period in custody, and generally whether ordering a retrial will be in the interests of justice (**see Bernard Lolimo Ekimat –vs- R. Eldoret Criminal Appeal No.151 of 2004 – unreported**).

The appellant herein was charged with the offence of creating a disturbance likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code (Cap.63). The learned magistrate exercised his discretion in sentencing him to a fine of Kshs.20,000/= or

in default to serve 6 months imprisonment. The appellant was sentenced on 9th March 2004, which is more than a year ago. In my view, the offence is not a serious offence. The fine imposed was a punishment just like the alternative term of imprisonment. The maximum sentence for the offence is six months imprisonment. Whether he paid the fine or not, in my view, does not make any difference. More than a year has lapsed since he was sentenced. The Learned State Counsel has not informed this court that witnesses and exhibits are readily available.

I am of the respectful view that, even if witnesses and exhibits are readily available, the lapse of time of more than one year from the date of sentence and the nature of the offence which is not a serious offence, do not justify ordering a retrial.

In the above circumstances I allow the appeal, quash the conviction of the learned magistrate and set aside the sentence. I order that if the appellant paid the fine, then the same be refunded to him.

Dated and Delivered at Eldoret this 19th Day of May 2005

George Dulu

Ag. Judge