REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 155 of 2003

BETWEEN

KENNETH KOOME ……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Being an appeal against the conviction and sentence of Principal Magistrate Hon.

P.M. Ndun'gu dated 1.8.2003 in
Isiolo Criminal Case No. 118 of 2002)

JUDGMENT OF THE COURT

The appellant herein, Kenneth Koome was the second accused in Isiolo Principal Magistrate's Criminal case No. 118 of 2002 in which he was jointly charged with the first accused therein on count 1 with the offence of consorting with a person in possession of a firearm contrary to section 89(2) of the Penal Code. The appellant was also charged in count 2 of being in possession of a firearm without a firearms certificate contrary to section 4(2) (a) of the Firearms Act Cap 114 Laws of Kenya. In count 3, the appellant was charged with being in possession of ammunition without a Firearms Certificate contrary to section 4(2) (a) of the Firearms Act, Cap 114 Laws of Kenya.

The prosecution's case is that on 22.1.2002 Administration Police officers attached to the D.C.'s office Isiolo among them PWI – No. 94018281 A.P.C. Martin Mugambi Njoka, PW2 – No. 82006252 A.P.C. Mohammed Juma and PW3 – No. 96064490, A.P.C. Mohammed Ali – received information that there was a person who was enquiring on ammunition for a berretta pistol. The police were thereafter shown the appellant together with accused 1 in the lower court – Bakari Etan. The police decided to trail the pair. The appellant herein was a police officer and was well known to the police. After a long trail the appellant and his co-accused were confronted at Baraza Park. The appellant informed the police that the first accused was a police officer and that the police should therefore leave him alone although the said first accused had failed to identify himself as required.

During the ensuing struggle, the appellant tried to stop the police from arresting the first accused. The appellant also spat at PW2 as he continued abusing him. When the appellant tried to run away, PW2 and PW3 followed him. As the appellant made as if to remove something from the hips, PW2 jumped at him and that is when PW2 felt a gun on the appellant's hips. On noticing that the appellant had a gun on him, PWI fired twice in the air. During the continuing struggle between PW2 and the appellant, the appellant bit PW2 on the hand. PW3 came to PW2's rescue, while PWI handcuffed the appellant and PW3 wrestled

the gun from the appellant. The gun contained four rounds of ammunition. The appellant together with his co-accused were subsequently charged with the offences. The appellant gave an unsworn testimony. He stated that on 22.1.2002 he went to the AP's offices at the DC's office. He then met an officer by the name Martin Mugambi. He stated that the reason for going to the DC's office was to get the said Mugambi to encash a cheque for him in the sum of Kshs. 96,000/=. They went together with Mugambi and another askari called Ali, and the appellant had his cheque encashed in one of the stores in town. Afterwards, the trio went for lunch together and later on he paid Mugambi and Ali Kshs. 200/= each then left them. The appellant then went to Total petrol station where he found his uncle waiting for him and together they went to buy spares for the uncle's lorry. At about 7.00pm, Mugambi and Ali came to where the appellant was and told him of a Somali youth who was selling a gun at Bula Pesa and requested him to go and assist them in arresting the youth by posing as a potential buyer. The two also asked the appellant to carry Kshs. 20,000/= for the intended purchase. They went as planned but the deal was to be completed later. He left the Kshs. 20,000/= with the youth in a house which he later learnt was to Ali's.

Later while in town, the appellant met with his co-accused and together they went to the appellant's house. The time was 7.00pm. Later on the appellant and his cowww. accused went to town while the appellant went to look for the Somali youth. The first accused was left in town. That is when the appellant saw Juma, PW2. The Somali youth turned up later and after the youth gave a paper bag to Mugambi the appellant emerged but Ali did not do so as had been agreed. Instead of arresting the Somali youth, Mugambi and Ali let him go on the pretext that the youth was going to bring another gun. As the trio walked towards the mosque where they were to meet the Somali youth the appellant noticed that the first accused had been arrested and handcuffed by PWI. The appellant intervened so that first accused could be set free since he was known to the appellant, but the first accused was not released. When appellant asked for his Kshs. 20,000/= he was not given. He then asked for the pistol instead but he was not given. That is when he used force to recover his money from Juma (PWI). Juma was assisted by PW3 and appellant fell down as he shouted for help. Shots were fired in the air and he was then told to surrender. He surrendered and was arrested. The appellant stated that the allegations against him were not true.

The appellant also called two witnesses, Mwangi Anampiu (DWI). Mwangi told the court that on the material day he was with the appellant from 8.00am repairing a vehicle. Later, some people whom he later learnt were police officers came to where they were and went away with the appellant. After two hours, the appellant returned. At about 2.00pm, the two people again came to where the witness and the appellant were and they went away with the appellant. The appellant returned at 5.00pm. A third time the people returned, and for the third time, they went out with the appellant. Then Kinyua asked for money from the appellant, which money the appellant promised to give later. The witness went away since it was becoming dark. They went to the market and saw the appellant with the first accused and three other people. The appellant was asking for his money. A quarrel ensued. The person who was being asked to give the money fired in the air. The witness then went away. When DWI was cross-examined he said he did not know the person who fired the shot. He also said that he did not know where the appellant was each time he went away with the other people.

DW2, Samuel Kinyua stated that on 22.2.2002 he was repairing a motor vehicle. That is when the appellant was approached by some two people who went away with him at about 11.00am. Appellant went away again at 2.00pm and returned at 3.00pm. At 5.00pm, the appellant again went away with his friends and then returned. The appellant was asking for his money. Then one of the appellant's friends produced a pistol and fired in the air. The witness ran away. While under cross-examination, the witness told the court that he was not with the appellant on 22.2.2002 as stated in his evidence in chief. After considering all the evidence adduced before him, the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt and rejected the appellant's unsworn statement together with the testimonies of his two witnesses. The appellant was convicted on both counts 2 and 3 and sentenced to seven (7) years imprisonment on each count.

The appellant has appealed against both conviction and sentence. The Petition of Appeal, filed in court on 6.8.2003 comprises four (4) grounds of appeal:-

(a) The learned trial magistrate erred in both law and fact in convicting the appellant on

uncorroborated evidence.

(b) The learned magistrate erred in law and fact in convicting the appellant against the weight of evidence.

(c) The learned magistrate erred both in law and fact in convicting the appellant on hearsay evidence.

(d) The proceedings were conducted by an unqualified person.

During the hearing of the appeal, the main complain of the appellant was that the proceedings in the lower court were conducted by an unqualified person and urged the court to quash the conviction and set aside the sentences on that ground. Mr. E. Momanyi for the appellant cited the decision in CRIMINAL APPEAL NO. 251 OF 2001 – MOMBASA – ALFRED MUMO KIOKO V. REPUBLIC. Mr. Oluoch for the respondent conceeded the appeal on the ground that the case in the lower court was conducted by an unqualified prosecutor but urged the court to order a retrial under the provisions of section 354(3) (a) (i) of the Criminal Procedure Code (CPC). Section 354(3) (a) (i) of the CPC provides as follows:-

"(3) The court may, then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –

(a) In an appeal from a conviction –

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction."

Mr. Oluoch submitted that the case for retrial is supported by the unanimous evidence of PWI, PW2 and PW3 who all testified that at the time of arrest, the appellant was in possession of a firearm and four rounds of ammunition without a Firearm's Certificate. Secondly, that the prosecution would be in a position to recall all the three prosecution witnesses since they were all police officers. Thirdly Mr. Oluoch submitted that there was a high likelihood of a conviction if the case goes back for retrial. He cited the following authorities in support of his case:-

1. Criminal Procedure Code Section 354(3) (1).

2. Nyeri HCRA No. 415 and 416 of 2002 John Kariuki Kamau and another v. R (unreported).

3. Muyumba and others V. Uganda (1969) E.A. 433.

4. Galos Hired and Another V. R (1944) AC 149.

5. Ahmed Ali Dharamshi Sumar V Republic (1964) EA 481 at page 482.

6. Salim Hohsin V Salim Bin Mohammed and others (1950) 17 E.A.C.A. at 128.

Having conceeded the appeal and rightly so in my view on the basis of the decision of the Court of Appeal in ROY RICHARD ELIREMA AND ANOTHER V REPUBLIC – Court of Appeal Criminal Appeal No. 67 of 2002, the only issue left for determination of the court is whether the case should be referred for retrial. The plea for an order of retrial was opposed. Mr. Momanyi's contention on behalf of the appellant was that since the first appellant, who never preferred an appeal is already serving sentence, it would be highly prejudicial to the appellant to go through the process of another trial. Secondly, it was submitted for the appellant that the respondent had not demonstrated its ability to marshall all the witnesses for speedy disposal of the case if a retrial was ordered, especially in view of the fact that the appellant was convicted on 1.8.2003 and has remained in custody since then, a period of nearly two years by the time of hearing of the appeal.

In the **ALFRED MUMO KIOKO** case (supra) the Court of Appeal held that in considering whether or not to order a retrial in any criminal case, the court is bound by law to consider each case on its own circumstances. The court further held that the purpose of ordering a retrial must not be seen as allowing the prosecution a second bite at the cake. The circumstances to be considered include period that has elapsed between the conclusion of the trial and the time when the retrial is ordered; the availability of witnesses in case of a retrial; the reason why the appeal has succeeded, namely whether it was of the prosecution's making or not.

I have given anxious thought and consideration to the issues in hand. While there is no doubt that the appeal must succeed because the trial in the lower court was conducted by an unqualified prosecutor, I am of the view that a retrial in this case would not be prejudicial to the appellant. The Court of Appeal in the case of FATEHALI MANJI V THE REPUBLIC (1966) E.A. 343 at page 344 set out the principles upon which a retrial should be ordered. The court of appeal expressed those principles as follows in the following passage:-

"The question for decision in this appeal is whether the order for retrial was justified or not. Section 319 (1) (a) (i) of the Criminal Procedure Code of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial, but as was pointed out in AHMED ALI DHARAMS SUMAR V REPUBLIC (1964) EA 481 at page 482, quoting excerpts from the judgment in SALIM MUHSIN V SALIM BIN MOHAMMED and OTHERS (1950) 17 EACA 128 ……. Discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion. We will not quote the other passages in full but will be content ourselves with stating the principles which emerge from them. They are the following:- in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

In the present case, the prosecution's case against the appellant seems watertight and unshaken by the defence given by the appellant and his witnesses.

Infact, if it was not for the fact that the proceedings in the lower court were conducted by an unqualified person, the appellants appeal would not have succeeded. It is clear therefore that the prosecution evidence against the appellant is sufficient and as such a retrial in this case would not be serving the purpose of giving the prosecution an opportunity to fill up gaps in its case. The evidence of PWI, PW2 and PW3, is consistent and corroborated. In this case also a retrial would not cause an injustice to the appellant. The appellant's co-accused is already serving sentence and to order a retrial would be in the best interests of justice.

Further, the appellant was arrested on 22.2.2002. The case proceeded expeditiously and judgment was given on 1.8.2003. The prosecution has submitted that all the three prosecution witnesses who are all police officers can be availed at the earliest opportunity if a retrial is ordered. I agree with the learned state counsel in this regard and there is no other way in which the state could have demonstrated its ability to avail these witnesses apart from assuring this court that this will be so. It was noted in the trial court before sentence that the offence with which the appellant was charged was serious and the prosecutor asked for a deterrent sentence. It would seem to me therefore that it would be in the interests of justice for the appellant to be tried afresh.

In the result, I allow the appeal, quash the conviction and set aside the seven (7) year imprisonment imposed upon the appellant on counts 2 and 3. I order that the case shall now be remitted to the lower court for a retrial to be held before a magistrate other than the one who heard the case in the first instance. Orders accordingly.

Dated and delivered at Meru this 3rd day of May 2005.

RUTH N. SITATI

Ag JUDGE

3.5.2005