

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
Criminal Appeal 21 of 2004

APPELLATE SIDE

CHRISTOPHER LOMOI
APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement and Sentence by W. N. Njage Esq., Principal Magistrate, in Eldoret Chief Magistrate's Court Criminal Case No. 4559 of 1999 on 26th April 2004)

JUDGEMENT

The appellant was charged with twelve (12) counts. The first count was for attempted murder contrary to section 220(a) of the Penal Code (Cap.63). Count two was for causing grievous harm contrary to section 234 of the Penal Code (Cap.63). The third count was for unlawful use of a firearm by a public officer contrary to section 26A (1) (a) of the Firearms Act (Cap.114). The fourth count was for carrying a firearm while drunk or disorderly contrary to section 33 of the Firearms Act (Cap.114). The fifth count was attempted murder contrary to section 220(a) of the Penal Code (Cap.63). The sixth count was causing grievous harm contrary to section 234 of the Penal Code (Cap.63). The seventh count was unlawful use of firearm by public officer contrary to section 26A (1) (a) of the Firearms Act (Cap.114). The eighth count was for carrying a firearm while drunk and disorderly contrary to section 33 of the Firearms Act (Cap.114). The ninth count was attempted murder contrary to section 220(a) of the Penal Code (Cap.63). The tenth count was causing grievous harm contrary to section 234 of the Penal Code (Cap.63). The eleventh count was unlawful use of a firearm by public officer contrary to section 26A (1) (a) of the Firearms Act (Cap.114). The twelfth count was carrying a firearm while drunk or disorderly contrary to section 33 of the Firearms Act (Cap.114).

The appellant was tried before the Principal Magistrate at Eldoret. At the end of the trial, he was acquitted of counts 5, 6, 7 & 8. He was convicted of counts 1, 2, 3, 4, 9, 10, 11 and 12. He was sentenced to serve five (5) years imprisonment on each of the counts, the sentences to run concurrently. Being dissatisfied with the decision of the learned trial magistrate, he preferred this appeal against both conviction and sentence.

At the hearing of the appeal, the learned Principal State Counsel Mr. Omutema conceded to the appeal, and rightly so, on the ground that part of the prosecution was conducted by an unqualified person, a PC. Mwangi. I have perused the record of the proceedings. It is true that on 31st July 2003 PC. Mwangi was the Prosecutor who closed the prosecution case and was also the prosecutor when the appellant gave his defence.

It is trite that where the prosecution is partly conducted by an unqualified person, the whole of the proceedings in the case become a nullity. This position was reiterated in the case of Wilson Bwayo Wenani –vs- R - Eldoret Criminal Appeal No. 42 of 2004, in which the Court of Appeal stated that-

“A similar situation arose in the Elirema case (Roy Richard Elirema & Another – vs- R –Criminal Appeal No. 67 of 2002) where a large portion of the prosecution was conducted by Corporal Kamotho and Gitau. It was held that that part of the trial which was invalid could not be separated from that which was valid, since

there was only one trial, and if any part of it was materially defective, then the whole trial must be invalidated.”

In our present case, PC. Mwangi was not a qualified public prosecutor in terms of section 85 (2) of the Criminal Procedure Code (Cap.75). He conducted part of the prosecution in the case. The result is that the entire proceedings are a nullity. The learned Principal State Counsel has rightly conceded to the appeal on that ground. I agree with him. The appeal will succeed on that ground, as the proceedings were a nullity.

The learned Principal State Counsel has asked for a retrial. A retrial can only be ordered if it is in the interests of justice. The court has to consider the sufficiency of evidence, availability of witnesses and exhibits, nature of the offence and period in custody **(See the case of Benard Lolimo Ekimat –vs- R – Eldoret Criminal Appeal No. 151 of 2004).**

I have considered that the offences are of the nature of violence, and the use of a firearm.

The appellant was imprisoned for five years for several offences, such sentences to run concurrently. He was sentenced on 26th April 2004, which is more than one year. He was on bond during the trial.

This appeal has succeeded because of a technicality that part of the prosecution was conducted by an unqualified person. I am of the view that witnesses and exhibits are available. The offences are in the nature of threat to public security. I consider that a retrial is called for under the circumstances of this case. It is in the interest of justice to do so.

For the above reasons, I allow this appeal, quash the convictions of the trial magistrate and set aside the resultant sentences. I however order that the appellant be retried before a magistrate of competent jurisdiction.

Dated and delivered at Eldoret this 28th day of July 2005.

George Dulu

Ag. Judge

In the presence of: Appellant in person.

Mr. Omutelema for State