

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL 1097 OF 2003

**(From original conviction and sentence in Criminal Case Number 939 of 2003 of the Republic
Magistrate's Court at Kikuyu)**

JAMES MUKIRI KIMANI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Learned State Counsel, Ms. Gateru conceded this Appeal and a rightly so, in my view, since the original trial was a nullity. The matter was heard by Mrs. Murage, SRM at Kikuyu Law Courts. On 30th September, 2003, the Prosecution was under taken by one P.C. Tom who led the evidence of PW1, the Complainant and PW2 who re-arrested the Appellant and recovered a panga from him. However on 11th November, 2003, when PW3 testified the Prosecution was undertaken by one I.P. Kilonzo. In terms of Sections 85 (2) and 88 of the Criminal Procedure Code, P.C. Tom was unqualified Public Prosecutor as his rank is and was not above the rank of an Assistant Inspector of Police.

Since the decision of the Court of Appeal in **ROY RICHARD ELIREMA & ANOR VS REPUBLIC, CRIMINAL APPEAL NO. 67 OF 2002** which was made on 5th August, 2003, such proceedings have been declared nullities and fallen by the wayside. In the aforesaid decisions the Court held:-

“In Kenya, we think, and we must hold that for a Criminal trial to be validly conducted within the provision of the constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witness to call, the order in which those witnesses are to be called and whether to continue or discontinue the Prosecution.... For one to be appointed as a Public Prosecutor by the Attorney general one must be either an Advocate of the High Court of Kenya or a person employed in the Public service not being a Police Officer below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of acting Inspector but the code has not been amended to confirm to the Police Act. Kamotho and Gitau were not qualified to act as Prosecutors and the trial of the Appellants in which they purported to act as public Prosecutors must be declared a nullity. We now do so with the result that all the conviction recorded against the two Appellants must be and are hereby quashed and the sentences set aside.”

The trial Court in the instant case clearly conducted an unlawful trial in the light of the aforesaid authority which is binding on me. I must therefore declare the proceedings a nullity with the result that the conviction recorded against the Appellant is quashed and the sentence set aside. It matters not that part of the prosecution was subsequently undertaken by a properly qualified Public Prosecutor to wit I.P. Kilonzo. The record of the prosecution undertaken by the unqualified Prosecutor cannot be severed from that undertaken by the competent Prosecutor.

I was asked by the Learned State Counsel to consider an order for retrial on the grounds that the Appellant was convicted on 11. 12. 2003 and sentenced to 10 years imprisonment out of which he had only served 21/2 years. No prejudice would in those circumstances be occasioned to the Appellant. Counsel further submitted that witnesses were readily available to testify again if an order of retrial was made. Finally, she submitted that there was sufficient evidence linking the Appellant to the offence.

The Appellant as expected opposed an Order for retrial. He submitted that he was arrested on 30. 6. 2003 and had since been behind bars. He had thereby suffered and sufficiently punished. He also asked the Court to give him the benefit of doubt as he was not party to the prosecution of the case by an unqualified Prosecutor.

Over time it has been held that retrial should not be ordered if it may result in prejudice against an Appellant. That whether or not to order a retrial depends on the facts and circumstances of each case. That an Order of retrial is discretionary. That no retrial should be ordered unless the Appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result (see generally **FATEHALI MANJI VS REPUBLIC (1966) E.A. 343, SUMAR VS REPUBLIC (1964 E.A. 481 AND MWANGI VS REPUBLIC (1983) EA 522**)

Having evaluated the evidence on record, I am of the considered view that the order of retrial will not meet the ends of justice. Indeed the evidence on record was such that a conviction should not have resulted in the first place. PW1, the Complainant testified that:-

“.....As I went to another club, I saw accused being evicted from a bar. The door was locked. Accused then removed a panga and asked me if I wanted to be cut by a panga. I told him no and told him I would buy him all the beer he wanted. We went to a club I bought beer for him. Meanwhile we called Police. Police took too long. We decided to search him. We recovered a panga. This panga is in Court....”

From the recorded evidence it is difficult to say whether the threat to cut the Complainant with a panga was serious or was said in jest. The Appellant did not say that unless the Appellant bought him beer, he would cut him with a panga. One also wonders why the Complainant offered to buy the Appellant beer when he had not even asked him to do so. The Complainant could as well have refused and moved on. In any case, the Complainant testified further in cross-examination by the Appellant that:-

“I told manager to call police. There were about 10 people. They were patrons you were drunk when I met you.....”

Could one person with a panga have held 10 persons hostage? I do not think so. In any event none of those 10 people were called as witnesses to corroborate the evidence of the Complainant. Further the Appellant was said to be drunk by the Complainant’s own testimony. If that be the case, can the Appellant be held responsible for his actions whilst under the influence of alcohol? I do not think that carrying a panga perse or being found in possession of one does by itself mean that one must be preparing to commit a felony. People carry pangas all the time and for various reasons some of which are genuine. In the instant case it was well beyond 1 a. m. in the night when the Appellant was found with the panga. He could have been carrying the same for his own security. Further from the evidence it is not possible to tell what sought of felony, the Appellant was preparing to commit.

I have also carefully considered the defence advanced by the Appellant. In my view, the defence was plausible and ought not to have been dismissed as baseless. It is most likely that there was a bar brawl involving the Appellant and some of the patrons whose drinks he had poured accidentally.

I think that in the circumstances of this case the evidence tendered was tenuous and to order a retrial may afford the prosecution an opportunity to feel up the gaps in their evidence as pointed out above. This will be prejudicial to the Appellant. In the event then, I make no order for a retrial. The Appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 14th day of July 2005.

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M. S. A. MAKHANDIA

JUDGE