REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Case 20 of 2004
(From the original conviction and sentence in Criminal Case No. 21697 of 2001 of the Chief Magistrate's Court at Makadara)

WILFRED MWATHI IRUNGU ……...…..……..APPELLANT

VERSUS

REPUBLIC ……..……..……. RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 21 of 2004

DAVID GICHURU MUTURI ……..…….……. APPELLANT

VERSUS

REPUBLIC ……..…….…… RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 22 of 2004

UMI ATHUMANI ……..…….…….. APPELLANT

VERSUS

REPUBLIC ……..…….…… RESPONDENT

JAMES OSORO CHARLES …….……..….. APPELLANT

VERSUS

REPUBLIC …….…… RESPONDENT

CONSOLATED WITH

Criminal Appeal 23 of 2004

JAMES GICHO GICHOHI ……..…… APPPELLANT

VERSUS

REPUBLIC …….……..……..…….ESPONDENT

CONSOLATED WITH

Criminal Appeal 23 of 2004

WILLIAM KAMAU GITHINJI …….…… APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

CONSOLATED WITH

Criminal Appeal 23 of 2004

ESTHER KYEMBA .....……..…..…… APPELLANT

VERSUS

REPUBLIC …….…….. REPUBLIC

CONSOLATED WITH

Criminal Appeal 23 of 2004

WANJAU KARIGI ……..…….……... APPELLANT

VERSUS

REPUBLIC ...……..…….. RESPONDENT

JUDGMENT

The Appellants, **WILFRED MWATHI IRUNGU, DAVID GICHURU MUTURI, UMI ATHUMANI, JAMES OSORO CHARLES, JAMES GICHO GICHOHI, WILLIAM KAMAU GITHINJI, ESTHER KYEMB**A and **WANJAU KAR**IGI were jointly charged with the offence of malicious damage to property contrary to Section 339 of the Penal Code. The particulars of the charge were that on the 21st day of October, 2001 at Pioneer Estate within the Nairobi area Province, the Appellants jointly with others not before Court, willfully and unlawfully damaged a house under construction of Mr. George Michael Ngacha valued at Kshs.800,000/=. The Appellants were subsequently tried and convicted of the offence by the Resident Magistrate at Makadara Law Courts, Nairobi. Upon that conviction the Appellants were sentenced to a fine of Kshs.100,000/= in default to serve twelve months imprisonment. The Appellants were aggrieved by the conviction and sentence and therefore opted to individually and separately lodge Appeals against the said conviction and sentence.

When the Appeals came before me for hearing, Mr. Ngare, Learned Counsel for the Appellants applied that the separate Appeals be consolidated for ease of hearing and as they emanated from the same Criminal case in the Lower Court. Mr. Mungai Learned State Counsel supported the Application. In the result and by the consent of the parties, an order of consolidation involving all the Appeals was made.

At the very commencement of the hearing of the Appeal, the Learned State Counsel aforesaid drew by attention to the fact that prosecution of the Appellants before the Learned Resident Magistrate was partly conducted by a person who was not qualified to conduct such prosecution to wit: Police Constable

Radack. He was therefore conceding to the Appeal on that sole ground. In the case of ***ELIREMA & ANOTHER VS REPUBLIC (2003) I.E.A***. 50 the Court of Appeal stated the position as follows:-

> ***"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 the Assistant Inspector of Police must have been replaced by that of an acting Inspector but the code has not been amended to confirm to the Police Act.***
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> ***Kamotho and Gitau were not qualified to act as prosecutor 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 convictions against the two Appellants must be and are hereby quashed and the sentences set aside."***

It is of course, in view of the foregoing authority that I think Mr. Mungai conceded the Appeal. Mr. Mungai did not wish to ask for a retrial of the Appellants on the grounds that on 11.

6. 2002, the trial Court took submissions of the defence Counsel in the absence of 2 accused persons contrary to Section 194 of the Criminal Procedure Code. Counsel further submitted that this was case of malicious damage to property in which more than 100 people were involved.

However in the aftermath, only the Appellants were arrested and charged. No reasons were given by the prosecution for this selective treatment of the Appellants. Finally, Learned State Counsel submitted that being a case of malicious damage and with the passage of time, the evidence has been tampered with. The Court cannot be able to visit the locus in quo.

In response, the Learned Counsel for the Appellants welcomed state's move. He prayed that the Appeal be allowed, conviction quashed and the sentence imposed set aside. Counsel further pleaded that the fine imposed on each Appellant if paid should be refunded to the Appellants. I have perused the trial record and noted that P.C. Radack conducted most of the prosecution case. In view of the decision in Elirema's case (supra), it follows that P.C. Radack did not qualify to act as a prosecutor and consequently the trial of the Appellant must be declared a nullity. I do declare it so with the result that the Appellants' convictions must be and are hereby quashed and the sentences passed on them set aside.

As regards an Order for retrial, I agree with the Leaned State Counsel that it will not be in the interest of justice to make such an order. The Learned trial Magistrate committed a serous irregularity when she heard the submissions of the defence Counsel in the absence of the two accused persons. This was in contravention of Section 194 of the Criminal Procedure Code.that the trial Magistrate complied with the requirements before the exceptions to the Section can be invoked. This omissions was fatal. Secondly, this being a case of malicious damage to property, if a retrial is ordered, there may be need for the Court to visit the locus in quo to satisfy itself that indeed the property belonging to the Complainant was damaged. From the record, some photographs showing the extent of damage to the property was introduced in evidence. However, that alone is no proof that indeed the property was damaged.

There would be need for the Court to visit the Locus in quo so as to satisfy itself as to the extent of the damage. I am certain that following the conviction of the Appellants, the Complainant proceeded to repair the alleged damage. In the result even if the Court was to visit the scene, it will not be able to see the nature and extent of the damage to the property. In those circumstances it will be an exercise in futility to order a retrial as the evidence has since been tampered with.

In view of the foregoing, I allow this Appeal, quash the conviction and set aside the fine of Kshs.100,000/= imposed on each and every Appellant. The Appellants are set at liberty forthwith. I also direct that the fine of Kshs.100,000/= imposed on each Appellant, if paid should forthwith be refunded.

Dated at Nairobi this 26th September, 2005.

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M. S. A. MAKHANDIA

JUDGE