



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 50 of 2004

JOSEPH KILANA ANDAVUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was tried, convicted and sentenced for burglary, and being in possession of Cannabis Sativa.

Being dissatisfied with both the conviction and sentence he preferred this appeal.

At the hearing of the appeal, counsel for the respondent conceded the appeal on the ground that part of the prosecution was conducted by an unqualified officer – P.C. Ogolla contrary to the provisions of Section 85 (2) of the C.P. C. counsel did not seek for retrial.

From the record, it is clear that P.C. Ogolla led PW1 and PW 2 in their evidence. The other prosecution witnesses were led by Inspector of Police Situma.

The trial being one, prosecution by P.C. Ogolla cannot be severed from the rest of the proceedings. The participation of P.C. Ogolla, being a contravention of a substantive provision of the law vitiates the entire proceedings before the subordinate Court.

In considering whether or not to order for a retrial the Court is guided by the consideration whether a retrial will serve the ends of justice and not fundamentally be prejudicial to the appellant.

The offence was committed on the night of 20th & 21st of May, 2003. Trial commenced on 24th June, 2003 and the judgment delivered on 12th May, 2004.

The trial took one year. The appellant has served more than 1/3 of the term. Given all these factors, it is my opinion that an order for a retrial will not serve the ends of justice but will be prejudicial to the appellant.

It is ordered that the trial before the lower Court was a nullity.

The appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith, unless otherwise lawfully detained.

Dated and delivered at Malindi this 6th day of September, 2005.

6.9.2005

Judgment delivered

Present

Mr.Odhiambo for Mr.Ogoti for the state.

Appellant in person.

CC: National Council for Law Reporting

W. OUKO

JUDGE