



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL 239 OF 2002**

**JAMES NYAMAI KITIVI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The appellant, Dr. James Nyamai Kitivi, was charged before the Senior Principal Magistrate's Court, Machakos in Criminal Case 892/02 for the following offences:

Malicious damage to property Contrary to Section 339 (1) of the Penal Code and Trespass upon private land Contrary to Section 3 (1) of the Trespass Act. After a full hearing the appellant was convicted of both offences and sentenced to Kshs.10,000/= fine in default 12 months imprisonment on count I and fine of Kshs. 500 in default 3 months imprisonment on Count II. The appellant is aggrieved by both convictions and sentences and preferred this appeal.

Before the appellant's counsel could argue the grounds of appeal, the state conceded to the appeal for reasons that the lower court proceedings were conducted by Corporal Ngela, who was an unqualified prosecutor and the state counsel invited the court to declare the proceedings a nullity. He however urged the court to order a retrial.

A cursory look at the lower court record does confirm that Corporal Ngela, was on record as the prosecutor. Under Section 85 (2) as read with Section 88, Criminal Procedure Code, the Attorney General is empowered to appoint prosecutors from the rank of acting inspector of Police and above or Advocates of the High Court. Corporal Ngela was obviously none of the above and not qualified to prosecute. This court hereby orders the lower court proceedings a nullity, quashes the convictions and sets aside the sentences.

The next question is whether the court can order a retrial. As properly put by counsel for the appellant and held in the case of **MANJI versus REPUBLIC 1966 E.A 343**, a court will generally order a retrial if the original trial is defective or illegal. The proceedings before the lower court were defective and this court can order a retrial on that basis.

There are however other considerations before a retrial can be ordered. Before ordering a retrial the court should be satisfied that the witnesses who testified can be traced. It was Mr Kilonzo's argument that the witnesses were casual workers, did not hail from Athi River and may not easily be traced. One was said to be from Kitui. There is no evidence that the witnesses who testified hailed from outside this court's jurisdiction. If they are in Kenya they can be summoned. In the case of **ROY ELIREMA versus REPUBLIC C.APP 67/02**, the Court of Appeal found that the witnesses hailed from Tanzania outside this court's jurisdiction and may not be easily traceable and declined to order a retrial. This is a different

scenario.

In the case of *MWANGI versus REPUBLIC 1983 KLR 522*, it was held as follows:

***“A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, a conviction might result.”***

This court has therefore got a duty to look at the evidence on record to see if it is worth ordering a retrial or not. The court does not normally act in vain. PW4 purported to produce photographs of the scene of the offence as an exhibit. The photographs were accompanied by a report. PW4 was not from scenes of crime. He did not take the photographs or process taken. There was no application made to have PW4 produce the photographs instead of the officer who took them and prepared the report. The photographs were wrongly admitted in evidence. Besides, the witnesses at the scene denied that they were photographs of the scene. The witnesses present however all recalled how the appellant came and cut the wire belonging to complainant's plot. It was in broad daylight and proof of an offence of malicious damage to property would not necessarily be based on photographs alone. The complainant confirmed that her fence was destroyed and with the evidence adduced by the prosecution witnesses, I am convinced that the admissible evidence on record might lead to conviction.

In the case of *MERALI & OTHERS versus REPUBLIC 1971 E.A 221*, the Court of Appeal held among others, that a retrial may be ordered if the interests of justice require it and if no prejudice is caused to the accused. The same court also made the same finding in the case of MANJI already referred to. The basic consideration is that justice has to be done to all and each case has to be considered on its own peculiar facts and circumstances. In this case the appellant was convicted and sentenced on 14/4/02. It is about 3 years since. If he had been serving sentence he would have completed over 2 years ago. Besides, the offences which the appellant faced were both misdemeanors. Even though the appellant paid fine and was not in prison I find that the prayer for a retrial comes late in the day. Litigation has to come to an end and on that basis this court declines to order a retrial.

Accordingly, the appellant is set at liberty forthwith unless otherwise lawfully held. The fine of Kshs.10,500/= paid to the court be refunded to the appellant forthwith.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 12<sup>th</sup> day of October 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**