REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 146 OF 2001

CONSOLIDATED WITH

CRIMINAL APPEAL 67 & 75 OF 2001

(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in Criminal Case No. 530 of 1999)

VALENTINE NYABICHA ONDIEKI……...……..…..1ST APPELLANT

ALEX OPERE OJURA……..…….…..….2ND APPELLANT

WILLIAM NYAUSI BIRUNDU……...……...3RD APPELLANT

VERSUS

REPUBLIC……...….....……..…….RESPONDENT

JUDGMENT

The appellants, Valentina N. Ondieki (1st appellant), Alex Opere Ojura *(2nd appellant*) and William Nyausi Birundu (3rd appellant) were charged with the offence of trafficking in Narcotic drugs contrary to **Section 4 (a) of the Narcotic and Psychotropic Substances Control Act (Act No. 4 of 1994).** The particulars of the charge were that on the 5th of October 1999 at Narok Township in Narok District, the appellants (*in the company of others)* were jointly found trafficking 753 kilogrammes of *Cannabis Sativa (bhang*) in motor vehicle registration number KAL 712R Nissan with a street value of Ten Million shillings in contravention of the said Act. The appellants pleaded not guilty to the charge and after a full trial, they were found guilty as charged.They were sentenced to serve life imprisonment. They were also each fined one million shillings. Being aggrieved by their conviction and sentence, the appellants each filed a separate appeal against their said conviction and sentence. At the hearing of the appeal, the three separate appeals filed by the appellants were consolidated and heard as one.

At the hearing of the appeal Mr Konosi, Learned Counsel for the 1st appellant submitted that the criminal case facing the appellants had been prosecuted by a police officer – Sergeant Elima – who was not competent to prosecute criminal cases before the trial magistrate's court. He further submitted that no useful purpose would be served if retrial is ordered in view of the fact that the exhibits which the prosecution relied on in support of the charge against the appellants had been destroyed. He further submitted that the motor vehicle which had been ordered forfeited to the State be returned to the owner.

Mr Koech, Learned State Counsel, agreed with the submissions made by Learned Counsel for the 1st appellant as regard the nullity of the proceedings before the trial magistrate's court. He however submitted that the appellants ought to be retried in view of the overwhelming evidence which was

tendered by the prosecution against them in the vitiated trial. He argued that the said evidence, if adduced in the retried case, is sufficient to secure a conviction. He admitted that the exhibits were destroyed after the trial.However, this was not an impediment to a retrial since the exhibits were analysed by the Government Chemist who found the said exhibits to be cannabis sativa – a narcotic drug as defined by **the Narcotic drugs and Psychotropic Substance**s Act.

Having considered the submissions made in this appeal, it is not disputed that the criminal case facing the appellants before the trial magistrate was prosecuted by Sergeant Elima. He is a police officer of a rank lower than that of an Assistant Inspector of police.He was thus not authorised to prosecute criminal cases before a magistrates' Court as provided by **Section 85(2) and Section 88 of the Criminal Procedure Code**. In **Eliremah & Anor –vs- Republic [2003]KLR 537, t**he Court of Appeal held that where such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto will be a nullity. I hereby declare the proceedings of the trial magistrate in respect of which these appeals arose to be a nullity as a consequence of which the appeals filed by the appellants are hereby allowed, the convictions quashed and the sentences imposed set aside.

The issue that remains for determination by this court is whether or not to order the appellants ought to be retried. According to the appellants, the exhibits which were produced in evidence in the criminal case against them at the trial magistrate's court, were destroyed upon the conclusion of the said criminal case. They submit that if a retrial is ordered, no useful purpose would be served as the prosecution would be unable to produce an exhibit in support of the charge against them. The State on the other hand made submissions to the effect that there was overwhelming evidence adduced in the vitiated trial which evidence, if adduced during retrial, would enable a magistrate's court to convict the appellants.Learned Counsel for the State submitted that the fact that the exhibits were destroyed would not be an impediment to the State securing the conviction of the appellants as the said exhibits were analysed and found to be cannabis sativa, a narcotic drug as defined by the **Narcotic drugs and Pychotropic Substances Ac**t. It was his submission that the analyst's report would produce his report during trial and based on the said report the prosecution could secure the conviction of the appellants.

The principles to be considered by the court when determining whether or not a retrial should be ordered were restated in the case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal held at page 6 that;

> ***"In the case of Ahmed Sumar v Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:***
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> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".***
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> ***The court continued at the same page paragraph H and stated: "We are also referred to the judgment in Pascal Clement Braganza v R [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***
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> *There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where*

*interests of justice required it.***”**

In the instant appeals, it has been stated that the exhibits which the prosecution relied on to secure the conviction of the appellants in the vitiated trial were destroyed. The State has submitted that it would be able to secure the conviction of the appellants by relying on the Government Analyst Report to establish that the cannabis sativa that were found in possession of the appellants were narcotic drugs within the meaning of the **Narcotic and Pychotropic Substances Act,** the destroyed exhibits notwithstanding.This court wonders how the prosecution can establish that the appellants were trafficking 753 kilogrammes of narcotic drugs without the benefit of the actual drugs being produced as exhibits in court. The production of the Government's Analyst's report will only prove that a small portion of the said drugs which were allegedly found in possession of the appellants were sent for analysis and found to be narcotic drugs within the meaning of the said Act. It will not establish the fact that the appellants were trafficking the said drugs.I agree with the submission made by the appellants that no useful purpose would be served if a retrial is ordered. The prosecution would be unable to prove the charge against the appellants. Furthermore it will occasion miscarriage of justice on the part of the appellants to be subjected to a retrial after serving four and a half years in prison.

In the circumstances therefore I order that the appellants be discharged. They are ordered set at liberty and released from prison unless otherwise lawfully held. The motor vehicle which was forfeited to the State (if still in existence) is ordered released to the owner, upon production of proof of ownership.

It is so ordered.

DATED at NAKURU this 5th day of October 2005.

L. KIMARU

JUDGE