



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CR.APPEAL NO. 853 OF 2003

NAFTALI GUANTAI MUTHURA APPELLANT

VERSUS

REPUBLIC RESPONDENT

Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.853 of 2003 of the Chief Magistrate’s Court at Mombasa – J.H. Mshimba – DM.II (Prof))

Coram: Before Hon. Justice Mwera

Monda for the State

Miss Kayatta for Appellant – present.

Court clerk – Sango

R U L I N G

When the court was about to hear the 7-ground appeal herein filed by Mr. Oruko Advocate it was clear to all: the court, the State and the appellant that a P.C. Asuma did prosecute the case against the appellant contrary to Section 85(2) Criminal Procedure Code and that since that police officer was not of the rank of Assistant inspector of police or above the proceedings were a nullity (**see ROY RICHARD ELIREMA & ANR. VS. R. CR. A. 67/2002 C.A.**) So without more the learned State Counsel conceded the appeal but pressed for a retrial.

The learned State Counsel told the court that the evidence in the lower court was strong and those who testified would be found for the retrial. That the State would not be using this occasion to seal any loopholes in their case but that all that it was seeking was to see that justice was done.

Mr. Oruko expressed a view that the State would use the retrial to fill in the gaps, that formed the basis of the appeal now conceded. That such a move would definitely prejudice the appellant who had since conviction on 4.6.03 been on bond as per terms given by the lower court.

In this courts view in the light of the fact that a police constable did prosecute the appellant in the lower court, that was contrary to section 85(2), Criminal Procedure Code. A police constable is not of the rank of Assistant Inspector of police or above and thus cannot be a competent prosecutor duly appointed by the Attorney-General. Lower court proceedings are a nullity. On that account the appeal is allowed, having been properly conceded by the State Counsel.

On the issue of retrial, this court was told that the witnesses would be traced to testify again and that no prejudice will be caused to the appellant. And that the State would not use the retrial to bolster its case e.g. by sealing any loop-holes that it may have since noticed. The appellant had put forth such a claim and cited prejudice.

Under the law S.354 (3) Criminal Procedure Code, this is said about the powers of this court on appeal:

“354 (1) ----- (2) ----- (3) The court may then, if it considers that there is no

sufficient ground for interfering, dismiss the appeal or may –

(a) in an appeal from a conviction –

(i) reverse the finding and sentence, and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction; or -----.”

In this matter the appeal was against mainly conviction. Having found as it did above, the appeal was allowed so in normal situations the appellant ought to have the sentence against him set aside and he goes free. Should this court go all the way to that or ought the now accused person be retried before a competent court?

The charge in the lower court was one under S.251 Penal Code in that on 24.2.2003 at Hamisi Estate, Changamwe, the accused unlawfully assaulted one Martin Mutuma Kiambati occasioning him actual bodily harm. The lower court record shows that the complainant was accused’s matatu driver. Apparently the complainant brought back less money than the accused expected and so he hit his driver twice on the mouth causing the false teeth that the complainant wore to fall out onto the ground. A doctor examined the complainant and certified the injuries as “harm”.

The defence which again may only be alluded to in passing, at this stage mainly centred on the point that the accused did not assault anybody meaning/including the complainant.

In the circumstances of the case and in the light of the claim by the State that witnesses live in Mombasa and will be traced to testify, it is only fair, proper and in the interest of justice that the accused be tried by a competent court. The evidence on record justifies a retrial.

Accordingly the accused’s bond is extended. He should be charged by way of retrial in the next 14 days so that the trial magistrate determines the case as soon as possible on the law and evidence to be presented.

Delivered on 24th May, 2004.

J.W. MWERA

JUDGE