



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CR. APPEAL NO. 132 OF 2003

MARK BELDER KASAINA APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was tried and convicted for the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the charge are that on the 29th day of November, 2002 at Sango area Webuye township in Bungoma District within western province unlawfully assaulted Alice Mukhwana thereby occasioning her actual body harm. The appellant was sentenced to serve six years imprisonment.

The appellant was represented by Mr. Wekesa who raised a legal point which should be disposed of first before critically considering the substance of the other grounds. It is pointed out that the prosecutor who conducted the prosecution's case was of a rank of below an inspector which cannot entitle him to conduct prosecutions as a public prosecutor under section 85 (2) of the criminal procedure court. The learned Senior statecounsel did not address his mind to this point but concentrated on the other grounds advanced by the appellant in support of his appeal.

I have perused the record presented to me. The same discloses the fact that the prosecution presented the evidence of four witnesses in support of its case. On 6th February 2003, the prosecution was conducted by one corporal Nyongesa in which part of the evidence of the complainant Alice Mukhwana Shiundu who testified as P.W. 1 was taken. The remaining part of the prosecution case was conducted by one inspector Muiruri.

To begin with, corporal Nyongesa is not authorized to prosecute under Section 85 (2) of the criminal procedure code. The question which remains to be answered is whether this defect will render the whole case before the trial court null and void ab initio as to invalidate the part conducted by inspector Muiruri? I think the answer can be sourced from the decision of the court of appeal in the case of **ROY RICHARD ELIREMA &**

VINCENT JOSEPH KESSY VS REPUBLIC CRIMINAL APPEAL

NO. 67 OF 2002.

In that appeal the court of appeal was faced with a near similar situation in which part of the prosecution's case was conducted by a police corporal and part of it was conducted by an inspector. The court of appeal had this to say:

“But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot say that we can se parate one part of the trial and hold it valid while at the same time holding that the other parts are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated.”

Going by the above decision is clear that the trial became invalid in view of the incompetence of the prosecutor. I will not consider the other grounds which set out the merits and the demerits of the evidence tendered to the trial court so that I do not prejudice the mind of the trial magistrate should I order for a retrial of the case.

The consequential order is that the appeal is allowed with the result that the conviction is quashed and the sentence set aside.

I note that the offence took place on 29th November 2002 just about 1 year 8 months. The appellant was convicted and sentenced on 15th September 2003. He has served just over a period of ten months of the six years slapped on him. I am bringing up these issues because I am bound to take into consideration if I am convinced that a retrial is the best in promotion of justice. The offence to me appears serious and the same took place recently. I think a retrial should be ordered which I hereby do.

In the final analysis therefore, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant should be rearrested and be taken before another magistrate with a competent prosecutor to be charged a fresh. It is directed that the trial should be given priority to avoid a further delay which may occasion a miscarriage of justice on the part of the appellant.

DATED AND DELIVERED THIS 30th DAY OF July 2004

J.K. SERGON

JUDGE