



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 116 of 2002

(From the original Criminal Case No. 272 of 1999 of Resident Magistrate's Court at Makueni)

MBOYA NDIVO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 115 'B' OF 2002

BEN KIMONDIU MUOKI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 114 'B' OF 2002

COSMAS KIIO KITILI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The three appellants **Mboya Ndivo, Cosmas kii Kitili and Ben**

Kimondiu Muoki were charged in CRC.272/99 in Makueni Resident Magistrate's court. In the first count, the three of them were charged with the offence of being present and consenting to the administering of an unlawful oath contrary to section 62(2) of the penal code.

In count 2, the three of them were charged with offence of abducting with intent to confine contrary to section 259 of the penal code. Thirdly they were charged with assault case either bodily harm contrary to section 251 of the penal code and lastly in count 4 malicious damage to property contrary to section 339 (1) of the penal code. The appellants were convicted on counts I III and IV and sentenced as follows:-

Count I - 5 years imprisonment each.

Count II - 3 years imprisonment with 2 strokes of the cane.

Count IV - 1 year imprisonment. The sentences were ordered to run concurrently.

The appellants being dissatisfied with these convictions and sentence filed these appeals which were consolidated and

proceeded as appeal No. 116 of 2002. The 1st appellant was represented by Kavila advocate while the 2nd and 3rd appellants presented their appeals personally.

When the appeal came up for hearing the learned state counsel conceded to the appeal on grounds that the lower court proceedings were conducted by Police Constable Otieno who was an unqualified prosecutor and pleaded with the court to order a retrial.

I have perused the record of appeal and it is true that Police Constable Otieno prosecuted the case before the lower court. The said Police constable Otieno was an unqualified prosecutor as his purported prosecution of the case contravened section 85(2) as read with section 88 Criminal Procedure Code. Section 85(2) provides that the Attorney General may appoint advocates as prosecutors or police officers of the rank of Ag (Assistant) Inspector and above. Police constable Otieno was none of the above and was therefore unqualified. In light of the heavy popular case of ROY RICHARD ELIREMA VERSUS REPUBLIC

CR. APP. 67 OF 2002, the effect of an unqualified prosecutor prosecuting a case is that the proceedings are rendered invalid and a nullity. The proceedings in the lower court are therefore invalid and I declare them as such. I therefore quash the conviction of the lower court and set aside the sentences meted against the appellants.

The next question is whether this court can order a retrial. The principles upon which a retrial can be ordered were well set out in the case of MANJI VERSUS REPUBLIC 1966 EA 343. It was held as follows:-

"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial should be ordered, each case must depend on its own

facts and circumstances and an order for retrial should only be made where the interests of justice require it."

From the holding of the court, the heavy consideration is determining whether or not to order a retrial is; whether the original trial was illegal or defective and secondly whether the interests of justice will require it.

In the case in consideration the trial having been conducted by an unqualified prosecutor was defective. It is therefore a case that can be considered for retrial.

Mr. Kavila for the 1st appellant was opposed to this court ordering a retrial on grounds that the appellant has already served 2 years of his sentence and ordering a retrial would count

to double and also that the appellant is entitled to remission which will be effected by an order for retrial.

The 2nd and 3rd appellants also opposed an order for retrial since they have served about 1/2 of their sentence and they have suffered during that time.

I have considered the submissions by the state counsel regarding retrial, the objections there to and have also read the record of appeal. I do note that the appellants were charged with very-serious offences indeed. That being the case justice would mean that the appellants be brought to book.

In considering a retrial the court also considers the merit of the prosecution case. In the case of MWANGI VERSUS REPUBLIC 1983 KLR 522 the Court of Appeal held that no retrial should be ordered unless the court is of the opinion that on a proper consideration of the admissible or partially admissible, evidence and conviction might result. I have scanned the evidence in this case and in my view the evidence on record is likely to result in a conviction.

In the case of ELIMA VERSUS REPUBLIC CA 110/91 the Court of Appeal considered whether not to order a retrial which is that no prejudice should be caused to the appellant. In the present case the appellants were arraigned before court for plea on 29.10.1999. The case was heard till 9.10.2002 when they were convicted. They were in remand for about 2 years. They were then sentenced on the same day i.e. 9.10.2002 so far they have served about 2 years. The total sentence to be served is 5 years imprisonment and I believe this will be subject to remission as pointed out by counsel unless for some good reason remission will not be given. Appellants have been incarcerated for over 1 1/2 years so far. I do not need to emphasize the fact that the defect in the trial was basically caused by the prosecution and by the court for failure to reject an unqualified prosecutor. In my view ordering a retrial will be subjecting the appellants to injustice of serving double jeopardy and the ends of justice will not permit a retrial. For the above stated reason alone I will order the appellants set at liberty and they should be set free forthwith unless otherwise held for any other lawful cause.

Dated, read and delivered at Machakos this 21st day of September, 2004.

Read, signed and delivered In the presence of:-

R. WENDOH

JUDGE