



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 72 OF 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 2764 of 2001 of the Chief Magistrate's Court at Nairobi (B. Olao – C.M.)

JOSEPH MUNGA KURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **JOSEPH MUNGA KURIA** was convicted of four offences as follows: -

One, **HANDLING STOLEN PROPERTY** contrary to Section 322 of the Penal Code. This was an alternative to the count of **CAPITAL ROBBERY** contrary to Section 296 (2) of Penal Code.

Two, **BEING IN POSSESSION OF FIREARMS** contrary to Section 4(2) (a) of the **FIREARMS ACT**, on two counts.

Four, **BEING IN POSSESSION OF AMMUNITION** contrary to Section 4(2) (a) of the **FIREARMS ACT**.

He was sentenced to six years imprisonment with hard labour in count 1 and five years imprisonment in each of the other counts. The sentences were ordered to run concurrently.

Being aggrieved by the conviction and sentence, the Appellant lodged this appeal citing several grounds of Appeal. On considering them, they were basically three grounds as follows: -

One, the evidence of the Police Officers should not have been taken on its own without corroboration.

Two, the Prosecution failed to prove that the Appellant had control over the firearms and ammunitions allegedly recovered at the kiosk where he was a mere employee.

Three that the sentences imposed were excessive in the circumstances of the case.

When the Appeal came up for hearing before me, **MR. MAKURA**, learned counsel for the Appellant notified the court that the State was conceding to the Appeal on the basis that the Prosecution of the case was by an unqualified Public Prosecutor. He relied on **Section 85(2)** and **Section 88** of the Penal Code.

I have perused the record of the trial court and I have confirmed that one, **CPL. OSIEMO**, did, on the 7th May 2002 lead the evidence of the witnesses PW6 and 7, in the case. He also stood in for the Prosecution during the ruling of a case to answer. On 13th September 2002, the record shows that one **CPL. KARIGITHU** conducted the prosecution case when the Appellant's defence was taken. In the light of the mandatory provisions of Section 85(2) as read with Section 88 of the Criminal Procedure Code; and in light of the Court of Appeal holding in the case of **ELIREMA & OTHERS vs. REPUBLIC C.A. No. 67 of 2002**, I declare the trial court proceedings invalidated. I quash the conviction and set aside the sentence.

The question remaining to be determined is whether an order for retrial should be made. **MAKURA** has informed this court to order for retrial on grounds the Appellant had not served a substantive part of the sentence, that the offence involved illegal possession of firearms and ammo and that witnesses would be available in the retrial.

The Appellant on his part urged this court to decline to order a retrial on humanitarian grounds. He said he was sick and was unable to release urine naturally. He showed the court a urine bag on a tube to prove his allegation. He said that he fell sick after his imprisonment and said he needed constant review by doctors through hospital appointments which he said the prison has not observed as required. He said that he was ready to serve his sentence had it not been for his sickness. He also submitted that he was facing a six years imprisonment term which, taking into account the 1/3 remission he was entitled to, he submitted he has already served half of it.

The conditions precedent before an order for retrial can be made are now well settled in our law. There are three conjunctive conditions as follows: -

1) The original trial must have been defective.

2) The interest of justice must require it.

3) The accused should not be prejudiced if the order is made.

I am guided by **MWAURA Alias KAMANDE & ANOTHER vs. REPUBLIC C.A. No. 58 of 1989**. I would state without hesitation that the first two conditions are met. However, I would hesitate concerning the third one. I have taken into consideration that the Appellant has served about 2 years imprisonment. Taking into account he would have served four years, as the Appellant rightly pointed out, if he met the requirements of the Prisons Act of course, he has served a large part of the sentence. That however, is not the primary consideration. I did consider his own personal condition. I saw he was on a urine bag with tubes and highly probably a catheter. That state alone, in my limited knowledge of medicine, would require constant medical care and review, which from his submission, which is unchallenged, is lacking in prison. I do find that in those circumstances, the order for retrial will cause prejudice to the Appellant. Accordingly I decline to order a retrial and order that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE

