

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE

Criminal Appeal 210 of 2003

**(From Original Conviction and Sentence in Criminal Case No. 239 of 2002 of the
Resident Magistrate's Court at Makueni: J. K. Kiia Esq. on 23.6.2003)**

MUTUKU MWOLOLO APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of House breaking and stealing contrary to section 304 (1) and Section 279 (b) of the Penal Code. In the alternative he faced a charge of Handling stolen property contrary to section 322 (1) of the Penal Code.

He pleaded guilty at the time of plea, was convicted and sentenced to serve 4 years plus 4 strokes on each limb of the main charge and sentences there to run concurrently. He was dissatisfied with the conviction and sentence and filed this appeal.

At the hearing of the appeal the Learned State Counsel Mr. O'mirera conceded the appeal on grounds that the plea was not properly taken as no conviction was entered after the plea and secondly that the prosecutor one Police Constable Muasya was an unqualified prosecutor and his prosecution of the case rendered the proceedings a nullity. The State urges court to order retrial.

The appellant agreed with the State Counsel on his submissions save that he opposes an order for retrial of the case.

I have looked at the record of lower court. I find nothing wrong with the way the plea was taken. A conviction was entered after the appellant admitted the facts to be true. The plea was properly taken.

The court does confirm that Police Constable Muasya was the prosecutor on the date the plea was taken. He was unqualified to prosecute any case and this offended provisions of Section 85 (2) and Section 88 of the Penal Code which provides that a prosecutor will be appointed from Advocates of the High Court or police officer of the rank of Ag. Inspector and above. Police Constable Muasya is none of these. In the very celebrated case of **ROY ELIREMA V. REPUBLIC CR. APP. 67/2003**, the Court of Appeal held that prosecution of a case by unqualified prosecutor renders the whole proceedings a nullity. The proceedings in the lower court are therefore declared a nullity and the conviction is therefore quashed and sentence set aside.

What next, can the court order a retrial? In the case of **MANJI V. REPUBLIC 1966 EA 343**, the Court of Appeal held that a retrial may be ordered where proceedings in the lower court are illegal or defective. As noted above he proceedings in the lower court were defective and this is a case where the court can consider a retrial.

In the case of **MANJI V. REPUBLIC** the Court of Appeal further held that a retrial will be ordered provided the accused will not suffer any prejudice. In the present case the appellant was charged with a serious offence of House breaking and stealing. He pleaded guilty and so he never stayed in remand. He was sentenced to prison on 23.6.2003 about 1 year 4 months now. He had been sentenced to 4 years imprisonment.

In the same case of **MANJI V. REPUBLIC** the Court of Appeal further held that a retrial will generally be ordered provided that the accused will not suffer any prejudice.

In the present case the appellant was charged with a serious offence of House breaking and stealing. He pleaded guilty to the offence and hence did not waste the court's time nor did he stay in remand for long. He was sentenced to prison on 25.6.2003 about 1 year 4 months now. He had been sentenced to serve 4 years imprisonment on each limb. He was not found to have any previous convictions. In my view this would have been a good case for a retrial but the sentence meted was on the higher side and sending the appellant for a retrial would be prejudicial. The sentence of 1 year 4 months so far served is sufficient. Appellant is hereby set at liberty unless otherwise lawfully held.

Dated at Machakos this 25th day of October 2004

R. V. WENDOH

JUDGE