

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 273 OF 2004

(From original conviction(s) and Sentence(s) in Criminal case No. 40 of 2003 of the Senior Principal Magistrate's Court at Kikuyu (M. W. Murage – S.R.M.)

FREDRICK KIARIE WANGONGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **FREDRICK KIARIE WANGONGU** was together with others, charged with the offence of **GREVIOUS HARM** contrary to Section 234 of the Penal Code. He was convicted and sentenced to 14 years imprisonment. Being aggrieved by the conviction and the sentence, the Appellant lodged this Appeal.

When the Appeal came up for hearing, the learned counsel for the State, **MISS GATERU**, indicated that the State was conceding to the Appeal. She submitted that the prosecution of the case was conducted by one **P.C. TOM**, who was unqualified under **Section 85 (2)** as read with Section 88 of the Criminal Procedure Code.

I have perused the proceedings of the trial court and did confirm that indeed the Prosecution was conducted by one, P.C. TOM under Section 85(2) and Section 88 of the Criminal Procedure Code any police officer below the rank of an Acting Inspector does not qualify to be appointed a public prosecutor. The conduct of the proceedings by **P.C. TOM** violated these provisions. As held in the notorious case of **ROY ELIREMA & ANOTHER vs. REPUBLIC Mom C.A. No. 67** of 2002, such contravention of the legal provisions rendered the entire proceedings defective. I declare the proceedings in the instant case invalid and do quash the conviction and set aside the sentence.

On the issue of retrial the submission of **MISS GATERU** were that there was sufficient and strong evidence to sustain a conviction. **MISS NJAGI**, learned counsel for the Appellant opposed any such order being made. She submitted that in fact, the evidence against the Appellant was by the Complainant above and that therefore, being uncorroborated was insufficient to base a conviction upon.

I have on my part thoroughly perused the evidence adduced before the trial court. It is important that before an order of retrial is made where the original trial, as in this case, was defective, the Appellate court must satisfy itself that a conviction would result going by the admissible and potentially admissible evidence. That was the holding of the Court of Appeal in the case of **MWANGI vs. REPUBLIC 1983 KLR 522**.

It is my considered view that there is sufficient evidence in the case that could, if properly considered in a retrial, result in a conviction. I am aware that **MISS NJAGI** submitted that the Prosecution failed to call 19 other witnesses in the case. That is the reason why the Court of Appeal held in the **MWANGI** case that, an Appellate court is entitled, in the issue of the merits of ordering a retrial, consider the potentially admissible evidence. **MISS NJAGI**'s point works in favour of the order for retrial being made and not against it. I have considered the Appellant's interest as well as the Complainant's interest in this case. On the part of the Appellant, he was sentenced to 14 years imprisonment and has served only six months. The offence he was charged with is quite serious. I do believe that no prejudice will be occasioned to the Appellant if the order for retrial were made.

On the Complainant's side, he suffered a serious injury. He is said to have had his life changed to his great disadvantage as a result of the effects of the injury suffered. I find that it is in the interest of justice that a retrial be ordered in the circumstances of this case. On that point, I am guided by **ROY ELIREMA's Case (Supra) MANJI vs. REPUBLIC 1966 E.A. 343 and SUMAR vs. REPUBLIC 1964 E.A. 481.**

Accordingly I order that a retrial be held in this case. In that regard I order that the Appellant be held in custody until 28th October 2004 when he should be produced before Chief Magistrate's Court Nairobi for plea to the charge in this case.

Dated at Nairobi this 21st day of October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE