

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 41 OF 2003**

(From original conviction and sentence of the
Principal Magistrate's Court at Nyahururu in
Criminal Case No. 57 of 2003 – G.J.C. OMBITO)

ALICE WANGUI KIRONJI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Alice Wangui Kironji, was charged with the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code**. The particulars of the offence were that on the 14th of January 2002 at Olkalou Township the Appellant wilfully and unlawfully destroyed several properties valued at Kshs 54,000/= belonging to Kironji Muremwa Kironji. The Appellant pleaded not guilty to the charge. After a full trial the Appellant was convicted as charged. She was sentenced to serve a term of four years imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

At the hearing of this Appeal, Mr Koech, Learned State Counsel conceded to the Appeal on the sole ground that the Criminal Case facing the Appellant before the trial Magistrate's Court was prosecuted by an unqualified and incompetent police prosecutor. He therefore submitted that the proceedings thereto were a nullity. Mr Koech was however not insisting that the Appellant be retried. On his part Mr Kabaka, Learned Counsel for the Appellant submitted that the Appellant has been in prison since the 24th of January 2003 when she was imprisoned by the trial magistrate. He further submitted that if the Appellant were to be retried, it would constitute a miscarriage of justice.

I have perused the record of the trial magistrate. I have noted that the proceedings thereto were conducted by Sergeant Migwi and Sergeant Kiama. They are Police Officers of a rank lower than that of an Assistant Inspector of Police. They were not therefore authorised to prosecute criminal cases in a Magistrate's Court in accordance with the provisions of **Section 85(2) and 88 of the Criminal Procedure Code**. In **Roy Richard Eliremah & Anors –versus- Republic C.A. Criminal Appeal No. 67 of 2002 (Mombasa) (unreported)** it was held by the Court of Appeal that where such a Police Officer prosecutes a criminal case before a Magistrate's Court, the proceedings thereto will be a nullity. I do declare the proceedings before the trial magistrate in this case to be a nullity as a consequence of which the Appeal is allowed, the conviction quashed and the sentence imposed set aside.

The issue that is left for the decision of this Court is whether or not to order for a retrial. The Appellant was sentenced to serve a term of four years imprisonment on the 24th of January 2003. The Appellant was a first offender. So far she has served one year and ten months of imprisonment of the custodial sentence imposed. The maximum term of imprisonment for the offence of malicious damage to property under **Section 339(1) of the Penal Code** is five years imprisonment. Even though the sentence imposed by the trial Magistrate was legal, considering the circumstances of this case (*i.e. the fact that the Appellant is the wife of the complainant of nineteen years*), the Appellant ought not to have been sentenced to serve such a long term in prison. The Appellant was a first offender. There were no aggravating circumstances to warrant the trial magistrate to sentence the Appellant to such a harsh custodial sentence. It is the finding of this Court that even though the evidence adduced by the prosecution against the Appellant was overwhelming, in the circumstances of this case an order for a retrial would not serve the ends of justice. The Appellant has repaid her debts to the society for the period that she has already served in prison.

The order that commends itself to me is to order that the Appellant be discharged. The Appellant is consequently set at liberty unless otherwise lawfully held.

DATED at NAKURU this 23rd day of November 2004.

L. KIMARU

AG. JUDGE