



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
APPELLATE SIDE  
HIGH COURT CRIMINAL APPEAL 171 OF 2003**  
(From Original Conviction(s) and Sentence(s) in Criminal Case No. 320 of 2002 of the  
Resident Magistrate's Court at Yatta: P.T NDIKIKA. on 15/5/03)

**CORNELIUS NTHUKA KIMAKO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant was charged with the offence of Arson Contrary to Section 332 of the Penal Code before the Yatta Court in Criminal Case No. 320/02. After the trial he was convicted and sentenced to four (4) years imprisonment. He is dissatisfied with the said conviction and sentence which prompted this appeal.

The appellant filed six grounds of appeal. He did not wish to be present at the hearing of the appeal.

The learned State Counsel Mr O'mirera conceded the appeal on grounds that the case was prosecuted by one Sergeant. Kanyonda who was not a qualified prosecutor as per provisions of Section 85 (2) and Section 88 of the Penal Code which provides that a prosecutor will be appointed by the Attorney General from police officers of the rank of Ag. Inspector of Police and above and also Advocates of the High Court. The purported prosecution of the case by Sergeant Kanyondo rendered the proceedings before the lower court a nullity. This is in light of the case of **ROY ELIREMA Versus REPUBLIC CR. A. 67/03** . The proceedings in the lower court are a nullity and this court therefore quashes the conviction and sets aside the sentence.

The learned State Counsel urges the court to order a retrial because the offence is serious. Witnesses are available, and appellant has been in prison since 15/5/03 which is hardly a ¼ of his sentence of four (4) years and lastly that there is evidence on record which is correctly applied by court, may result in a conviction.

As was held in the case of **MANJI Versus REPUBLIC 1966 E.A 353** , a retrial will generally be ordered if the trial in lower court is illegal or defective. I find that this is a case where proceedings in the lower court were defective and a retrial can be considered. The offence was committed on 7/5/02. The appellant was arraigned in court on 17/5/02 and trial took a year from 15/5/03 when the appellant was convicted and sentenced. He has so far served one (1) year five (5) months of his sentence leaving a balance of about two (2) years seven (7) months to be served. In total he has been incarcerated for two (2) years five (5) months.

The offence was committed in his home. The family of appellant were the witnesses. If a retrial were

ordered I believe those witnesses would be available and the evidence would still be clear in the minds.

I have scanned through the evidence on record and it is my view that if a trial is ordered there is sufficient evidence on record upon which the court may convict the appellant.

Having considered all the above the question is whether the appellant would be prejudiced by an order of retrial. As held in the case of *MANJI Company* a retrial will not be ordered if the appellant will be prejudiced. As noted earlier the appellant has been in prison for one (1) year five (5) months in addition to that one year in custody total is 2 years 5 months. If a trial is ordered, it will again take time to prosecute the case.

It is my considered view that having been incarcerated for long, he is bound to be prejudiced and the court is reluctant to order a retrial. For that reason, the court orders that appellant be set at liberty unless otherwise lawfully held.

Dated, read and delivered at Machakos this 9th day of November 2004.

**R.V. WENDOH**

**JUDGE**