REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 70 OF 2000

PHARIS MUTEMBEI MUTEGI ……………..........………………………… APPELLANT

versus

REPUBLIC ……………………………………………………………… RESPONDENT

CRIMINAL APPEAL NO. 71 OF 2000

CHRISTOPHER MUTWIRI NJOKA …………...............………………….. APPELLANT

versus

REPUBLIC ……………………………………………………………… RESPONDENT

CRIMINAL APPEAL NO. 18 OF 2001

ERUSTUS MUGAMBI MUTEGI …….............................……………………. APPELLANT

versus

REPUBLIC …………………………………….....……………….……… RESPONDENT

JUDGMENT

The three appeals mentioned above have been consolidated for hearing each appellant having appealed against his conviction and sentence. For the purpose of this judgment I may refer to the appellant in the first mentioned case as the first appellant, the appellant in the second case as the second appellant and the appellant in the third case as the third appellant. The First and Third Appellants appeared in persons while the Second Appellant was represented by an advocate Mr. Mogusu. The State Counsel Mr. Omwega represented the Republic.

These appeals having been filed before the Court of Appeal heard and decided Criminal Appeal No. 67 of 2002 at Mombasa, ROY RICHARD ELIREMA and VINCENT JOSEPH KESSY – versus – REPUBLIC, on 5th August 2003, the grounds of appeal filed in support of each appeal did not include the ground upon which the Court of Appeal decided that case at Mombasa.

But before the hearing of the three appeals, Mr. Mogusu filed and served Mr. Omwega with a supplementary ground of appeal stating:

“That the trial is NULL and VOID as it was conducted by an unqualified prosecutor.”

When the appeals opened for hearing before me therefore, Mr. Mogusu and Mr. Omwega agreed to confine themselves to that ground to dispose off the appeals without canvassing the original grounds which concern the merits or demerits of the evidence which was produced by the prosecution against the Appellants during the trial. At the same time Mr. Mogusu volunteered to represent all the three appellants on that issue.

I should point out that that complaint had not been raised before the trial magistrate. But as it was said in the case of Roy Richard Elirema, the issue raised is a point of law. The Court of Appeal said:

“If, for example, the magistrate had no jurisdiction to hear and determine the charges, we cannot refuse to deal with the matter because it was not raised either before the magistrate or before the High Court; each court is presumed to know its jurisdiction and it cannot be a valid answer for us to tell the appellants that they ought to have raised these issues before the two courts below. Of necessity, we have to deal with the points of law raised for the first time before us.”

I find myself in a similar situation. I cannot avoid dealing with the issue and I allowed the parties to rely on that ground.

Both sides agreed that the prosecutor throughout the hearing of the case, was Senior Sergeant Kalombi who, in terms of Section 85(2) of the Criminal Procedure Code, is not qualified to be a public prosecutor. They agreed that the trial was what they described as a “mistrial” and that therefore it cannot stand. As I will show later, strictly speaking the term “mistrial” should not be used in this category of cases. At the moment, I leave it at that.

Each party cited Criminal Appeal No. 67 of 2002, Roy Richard Elirema and Another, aforesaid, not only for declaring the trial in question before me a nullity but also on the issue of a retrial. While they were unanimous that the trial was a nullity, they disagreed on whether there should be a retrial of the appellants.

This reminds me of a similar situation which I faced in, High Court Criminal Appeals Number 415 of 2002 and Number 416 of 2002 where the appellants were John Kariuki Kamau and Paul Mwangi Maina respectively and the parties unanimously asked me and my learned sister Lady Justice Okwengu, to declare the trial a nullity but the parties disagreed on whether there should be a retrial.

As a result, we unanimously declared the trial a nullity but also disagreed on whether there should be a retrial, my learned sister holding that there should be a retrial and proceeding to order a retrial. On my part, I refused to order a retrial and would have proceeded to order immediate release of the appellants had my learned sister not convinced me that since she was not making a similar order for release, my order for release of the appellants could be inconsistent with the order she was making for a retrial. I therefore said that the appellants were to be subsequently handled in accordance with the order she would make with regard to the release or otherwise. Generally, however, a retrial can be commenced even where the suspect had been released from jail as he would simply be re-arrested or summoned and charged.

The two appeals which were before us when we disagreed on retrial were, like in the case of Roy Richard Elirema, against convictions and sentences under section 296(2) of the Penal Code. That is robbery with violence where death is the only lawful sentence.

In the three appeals before me now, the Appellant in the first case was convicted and sentenced under section 296(1) and section 123 of the Penal Code. Section 296(1) is robbery where the maximum sentence was by then 14 years imprisonment with twenty eight strokes of the cane. In section 123 the offence is escape from lawful custody where the maximum sentence was two years. The First Appellant was sentenced to three years imprisonment under section 296(1) and two years imprisonment under section 123. The Appellant in the second case, the second Appellant, convicted and sentenced under section 296(1) and section 123 of the Penal Code. He was sentenced to seven years imprisonment with seven strokes of the cane under section 296(1) and two years imprisonment under section 123. The Appellant in the third appeal, Third Appellant, was convicted and sentenced under section 123 and was sentenced to

two years imprisonment.

The learned State Counsel in urging the court to order retrial came up with a curious argument stating that the irregularity which was there was permitted by the court. He said that the trial court should have either stayed the proceedings on the ground that the court was not properly constituted or the court should have given the person who was prosecuting before it permission, under section 88(1) of the Criminal Procedure Code, to prosecute. Since the court did not do so, there should be retrial. He added that it has not been shown that the Appellants were prejudiced. They should be discharged and not acquitted.

In reply Mr. Mogusu said that it is not the business of the court to see that the prosecutor is qualified. It is the Attorney General's duty to do so. He added that if there had been a qualified Public Prosecutor, the appellants may not have been convicted. Mr. Mogusu wondered whether there was any law under which the appellants should be discharged instead of being acquitted. Many times courts have been made scapegoats. They have many times been blamed where people outside court should be blamed yet no finger is pointed at those people. Sometimes courts have invited blames upon themselves where courts should not be blamed. That will be the day when people of this country will know that courts do not prosecute for the Republic, for Plaintiffs, for Defendants or for any other party. Courts do not prosecute cases for them. Courts are there only to adjudicate in disputes between those parties and do so in accordance with the law.

As the Attorney General is blamed for using unqualified Public Prosecutors, courts cannot and should not be equally blamed for permitting unqualified public prosecutors to prosecute cases because while the law confers powers and impose duty upon the Attorney General to appoint public prosecutors, the law does not do the same to courts. Although a court may refuse to allow an unqualified person to prosecute before it as a public prosecutor, that court has no obligation under the law to do so. Where an unqualified person has prosecuted as a public prosecutor before a court therefore, failure by the court to disallow him prosecute should not be used as one of the grounds upon which a retrial should be ordered. As it is clearly illustrated in a passage from UGANDA Versus MILENGE AND ANOTHER, (1970) E.A. 269 quoted by the Court of Appeal in Roy Richard Elirema:

"It is essential to consider the powers such as the State Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence, and it is from this power that the practice has arisen for a prosecutor who does not desire to proceed with the prosecution against an accused person to offer during the course of the trial 'no evidence' or 'no further evidence.' This results in the evidence for the prosecution 'being closed' and the court then acts under section 209 (section 210 of the Kenyan Code) and if a case has not been Made out sufficiently to call an accused person to make his defence then the court dismisses the case and acquits the accused ……………………."

Their Lordship in the case of Roy Richard Elirema noted that from the above passage, it is clear that in a criminal prosecution, there must be a prosecutor to discharge certain functions, which functions cannot be discharged by the court before who the prosecution is being conducted. They added that that proposition is inherent in the fact that in Kenya the Administration of justice is operated on the "adversarial system" in which it is assumed (and this is important) that each party or side to the dispute knows best what its case is and can and must be expected or assumed to know best how to present its side of the case to the court. According to section 77(1) of the Current Constitution of Kenya, that court is to be "independent and impartial court established by law." If the court is to be as stipulated by that provision of the constitution, that court cannot at the same time perform the role of either the prosecutor or a defence counsel and therefore the role of prosecuting can only be performed by a prosecutor, whether public or private. It is in respect of a private prosecutor that section 88(1) of the Criminal Procedure Code may be invoked. It states:

"A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney General in this behalf shall be entitled to do so without permission."

What that provision means is simply this: When it comes to

“a public prosecutor or other officer generally or specially authorized by the Attorney General………………….”

a magistrate trying the case has no business giving permission. The magistrate gives permission only to a private person so that he, the person, becomes a private prosecutor and in that respect the permission of the magistrate becomes a condition precedent. It follows that it is not correct to say that the magistrate trying a case could have permitted a person purporting to prosecute as a public prosecutor to prosecute in that behalf. He has no power. He has no power, by virtue of that permission to convert a person purporting to prosecute as a public prosecutor, into a private prosecutor.

Moreover if he were to play that role, he would cease to be

“independent and impartial” because he would have converted a public prosecution into a private prosecution contrary to the wishes of the Republic which in the circumstances could surrender the case, if it could, to the magistrate to direct the private prosecution while at the same time adjudicating over the dispute.

To appreciate what I am saying section 88(1) should be read together with section 85 of the Criminal Procedure Code. The latter section state:

“85 (1) The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney General, by Writing under his hand may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for he purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney General.”

Provisions of section 86 of the Criminal Procedure Code are also useful. They state:

“A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under trial or appeal; and if a private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution, and the advocate so instructed shall act therein under his directions.”

It was with sections 85 and 86 in mind that the framers of this Criminal Procedure Code inserted section 88 and bearing in mind the current constitutional powers the Attorney General has under section 26 of the present Constitution of Kenya, there is no room for the court to play any part with respect to public prosecutors. Senior Sergeant Kalombi could not therefore get permission of the magistrate to prosecute even if he or the magistrate wanted to. Moreover, with Senior Sergeant Kalombi, even if the Attorney General wanted him to be a public prosecutor, the Attorney General could not appoint him because under subsection (2) of Section 85 a Senior Sergeant is not qualified to be appointed a public prosecutor. The Senior Sergeant was not therefore entitled to be appointed to work as a public prosecutor.

At this stage and before I leave this part of this judgment, perhaps it is better to say who the “Complainant” is. The term “Complainant” may not sometimes be understood in Criminal proceedings and it has even been said that retrials are necessary so that interests of complainants are taken care of.

Section 202 of the Criminal Procedure Code is the key provision. As the Court of Appeal in Roy Richard Elirema noted, there is no mention of a prosecutor, whether public or private. The parties named in section 202, for example, are the “complainant” and the accused person. If the “Complainant” is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “Complainant” in this context has been

interpreted to mean The Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic, and when a public prosecutor is present in a trial in the court, the "Complainant" is said to be present.

When there is talk of the interest of the "Complainant" therefore, I take it to mean the interests of the victim and not the interests of the Republic who, through the Attorney General's failure to comply with section 85(2) of the Criminal Procedure Code, has used unqualified persons as public prosecutors.

Having said all the above, I think it is now time to answer the question whether there should be a retrial of the Appellants now before me once their trial is declared a nullity. To do so I will first look at the case of FATEHALI MANJI versus THE REPUBLIC (1966) E.A. 343 where the Appellant was charged with theft of a self-starter. The prosecution alleged that it was stolen from a vehicle at Arusha on 6th June 1965 and that the Appellant had it in his possession eight days later when it was resold. The Appellant's defence was that he had purchased the self-starter from a shop in Nairobi on June 10th, 1965, and he produced a receipt. The prosecution led hearsay evidence without leave that the shop did not exist. The magistrate called a police officer from Nairobi whose evidence he accepted, to testify that the shop did not exist. The Appellant was convicted. On appeal to the High Court, leave was given to adduce additional evidence to establish the existence of the shop, and eventually the prosecution conceded that the police officer was in error and the judge ordered a retrial being influenced by the inadmissible evidence. The inadmissible evidence the High Court was influenced with was in certain papers filed by the prosecution without leave purporting to set out the evidence of witnesses which the prosecution intended to call for the purpose of establishing the falsity of the receipt produced by the Appellant at the trial. Although counsel for the appellant objected to the course proposed by the learned judge on the ground that it would permit the prosecution to put up a different case from that at the trial and be unfair to the Appellant, the learned judge ordered a retrial having regard to the papers filed by the prosecution without leave.

On further appeal to the Court of Appeal for East Africa, the question for decision was whether the order for retrial was justified or not. The Court of Appeal set out the general principles upon which a court should or should not order retrial stating that:

"……………. in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

One thing to note is that in the case of Fatehali Manji, the court of appeal set out the general principles upon which a retrial can be ordered. But straight away it can be seen that the general rule is restrictive.

"a retrial will be ordered only when the original trial was illegal or defective."

The use of the word "only " should be marked. The judgment proceeds to elaborate by saying a retrial

"will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial…………………"

The key words to mark are " it will not be ordered." Can that be described as fetering the court's power to order retrials? Has it really fetered the court's power? Yet the case of Fatehali Manji is accepted as a leading authority on the question of retrials. If that cannot be described as fetering the court's power and has not fetered the court's power, why not add to it one more incident where retrial "will not be ordered?" Add to it an incident where a trial is declared a nullity and conviction quashed and the sentence set aside on account of prosecution by an unqualified public prosecutor in disregard of section 85(2) of the Criminal Procedure Code if that turns out to be another principle. That is not too much. The court will still remain with its power to order retrials where the original trial was illegal or defective.

I should add that when the judgment in Fatehali Manji's case states that

"each case must depend on its own facts and circumstances……………"

that statement refers to the preceding statement that

"even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;"

meaning that in such a situation a retrial may or may not be ordered depending on the facts and circumstances of each case. That statement does not therefore apply to the situation where there is insufficiency of evidence or where the purpose is to enable the prosecution fill up gaps. In those two situations, it is mandatory that no retrials.

The second thing to note in the case of Fatehali Manji is that although the Tanzania law under which the case was conducted had given unlimited discretion to courts to order retrial, the court of Appeal felt there should be some restriction and went ahead to make some restriction. The scope of that restriction was not limited or exhaustive. It is open to additions.

As to what is "illegal trial", that judgment does not say. But I think an example would be where a trial is conducted in a court which has no jurisdiction. There was nothing wrong on the side of the prosecution. It was the court which had no jurisdiction. Nevertheless, the trial went on in that court. That is an illegal trial and a retrial would be ordered to take place in a court of competent jurisdiction.

A "defective trial" is a trial, for example, where the charge was vague or duplex or omnibus or where there was misjoinder of counts so that the Appellant was prejudiced during the trial and it was difficult or impossible for him to defend himself properly. In such a situation a retrial will be ordered with defects avoided to give the accused or appellant a fair trial.

The term "mistrial" has been used. That is a trial vitiated by some error or an inconclusive trial. An error is a mistake or inaccuracy. It is something one makes without one knowing that he is making it. It is something done unintentionally. When someone does what he already knows is wrong, that cannot be described as an error on his part. As I have said somewhere in this judgment the trial magistrate has no blame when the Prosecution uses an unqualified public prosecutor. The trial magistrate cannot therefore be said to have made an error. He made no mistake. The Attorney General, on the other hand, cannot be said to have made an error This is because he did something he knew was wrong. He cannot be said to have made a mistake. He decided to do a wrong thing knowing it was wrong and did it. That is no mistake and such a trial cannot be said to have been vitiated by some error.

Alternatively, such a trial cannot be said to have been inconclusive. It was fully concluded leaving the appellant only to appeal against the conclusion.

It means therefore that the term "mistrial" is not applicable to the category of trials in which the appeals before me fall and in those category of cases when the court, like in the case of Roy Richard Elirema, says that the trial was a nullity on account of a prosecution by an unqualified public prosecutor, that court is not meaning to say that there was a mistrial. A nullity is the state of there being nothingness, want of form or existence or force or efficacy. That is different from a mistrial.

Both terms "mistrial" and "nullity" were not used in the case of Fatehali Manji. The term "null" is not in that case.

Where a trial is null, legally, it means there was no trial. The court, like in Roy Richard Elirema's case or in the appeals before me now, was independent and impartial established by law which conferred upon the court competent jurisdiction. There was no defect in the charge. However, the trial became null because the prosecution was conducted by an unqualified public prosecutor. Since there was no trial, there is nothing which can be referred to as an "illegal trial" or a "defective trial" in terms of the decision

in the case of Fatehali Manji. That case therefore did not cover the category of cases affected by the Kenya Court of Appeal's decision in the case of Roy Richard Elirema. But since Fatehali Manji sets out the general principles upon which a court should or should not order retrial, it is important to discuss Roy Richard Elirema, Wilfred Shilingi and Silvester Keli Kakumi to see the principle that emerges from those three cases so that that principle can also be listed among the principles listed in Fatehali Manji.

In refusing to order a retrial of Roy Richard Elirema and his Co- Appellant, the Court of Appeal said:-

"We note that the alleged offence took place in January. That is a period of over four years. The main witnesses; i.e. the victims of the crime, were apparently citizens of Somalia and we do not know if they are still available in Kenya. The mistakes which have led to our quashing the convictions were entirely of the prosecution's making. There is still the issue of whether the offences were committed within Kenya or within Tanzania and hence whether the Kenyan courts had jurisdiction at all to try the appellants. We do not think it is necessary or expedient for us to decide that issue but in considering the question of whether or not we should order a retrial, we are entitled to take that factor into account. Taking all these matters into consideration, we do not think that it would be just to the appellants to subject them to a fresh trial."

That was the Court of Appeal's first judgment of this nature. It was delivered on 5th August 2003 by a Bench of three judges consisting of Omolo J.A., Tunoi J.A. and Lakha J.A.

Later on the same date the same Bench decided a similar case CRIMINAL APPEAL NO. 210 OF 2002 where the Appellants were WILFRED SHILINGI, EDWIN LUNDI and ANDREW OKUNGU –versus – REPUBLIC stating:-

"For the same reason we have given in our judgment in the appeals of Roy Richard Elirema and Vincent Joseph Kessy, Mombasa Criminal Appeal NO. 67 of 2002, we allow the appeal of Wilfred shilingi, Edwin Lundi and Andrew Okungu, and we quash all the convictions recorded against each one of them and set aside the sentence imposed on each of them. We equally do not think that it would be right for us to subject them to a new trial some four years after the offences charged against them were allegedly committed. The mistakes which occurred during their trial and which have led to our quashing the convictions were all of the prosecution's making. There is absolutely no reason why the Attorney General should not appoint qualified public prosecutors to conduct the Republic's cases in the courts. Accordingly, we refuse to order a re-trial …………………………………."

Their Lordships went ahead to order immediate release of the Appellants. The reasons they had given were reasons for refusing to order retrial. They were not reasons for ordering retrial.

Two days later, a different Bench of the Court of Appeal also sitting at Mombasa granted a retrial in another similar case. It was CRIMINAL APPEAL NO. 142 OF 2002 where the Appellant was SILVESTER KELI KAKUMI – versus – REPUBLIC and it was decided on 7th August 2003 by their Lordships Kwach J.A., O'Kubasu J.A. and Waki J.A. Not much is said in that judgment. It simply says:-

"The trial of the appellant was conducted by a police corporal. In view of the decision of this court in Criminal Appeal No. 67 of 2002 ROY RICHARD ELIREMA AND ANOTHER v REPUBLIC that trial was a nullity. We quash the conviction and set aside the sentence. In view of the gravity of the offence charged we order that the appellant be re-arrested, charged and tried before another court of competent jurisdiction with a competent prosecutor."

Although the short judgments in Wilfred Shilingi's case and Silvester Keli Kakumi's case do not reveal the nature of the charge which faced Appellants in those two cases and the sentences imposed, the head lines in the relevant judgments, the strength of the bench in the High Court and the Court of Appeal in addition to what was said in respect of each case suggest that the charge in each case was robbery under section 296 of the Penal Code. While Wilfred Shilingi's case appears to have been under subsection (2) of section 296 of the Penal Code and therefore the sentence imposed had to be death, Silvester Keli Kakumi's case appears to have been under subsection (1) of section 296 of the Penal Code and therefore the sentence imposed had to be less drastic than the death sentence. I am led to this conclusion from the

fact that the High Court Bench which heard Silvester Keli Kakumi's case consisted of a single judge in the person of a Commissioner of Assize and a single judge is, in the present legal practice in Kenya, not taken to be wise or good enough to hear a criminal appeal where the appellant was charged, convicted and sentenced under section 296(2) of the Penal Code. That being the position therefore, or even assuming that Slivester Keli Kakumi had been charged, convicted and sentenced to death under section 296(2) of the Penal Code, what specific grounds do we derive from the Court of Appeal's three decisions in those three cases to justify a retrial of the Appellant whose appeal had been a nullity in terms of the Court of Appeal's decision in the case of Roy Richard Elirema's case? In Roy Richard Elirema's case, there is no specific ground given as the court in that case in refusing retrial never gave a ground upon which retrial could be ordered. A similar situation obtained in Wilfred Shilingi's case. The court did not give any ground upon which a retrial could be ordered. It is only in Silvester Keli Kakumi's case where a specific ground for ordering a retrial was given and that ground was stated to be:

"the gravity of the offence charged."

Nothing was said about the length the charge had taken, the availability of witnesses or exhibits, the jurisdiction of the court etc. I have indicated above that the offence charged in Silvester Keli Kakumi's case could most probably have been under section 296 (1) if not under section 296 (2) of the Penal Code. I add that it could even have been under a lesser drastic section of the Penal Code than section 296 (1). In those circumstances, what "gravity" was there in the offence charged in that case which surpassed the "gravity" in the offences charged in Roy Richard Elirema's case and Wilfred Shilingi's case which were under section 296 (2) so as to oblige the court to order retrial in Silvester Keli Kakumi's case? The Court of Appeal in Silvester Keli Kakumi's case never attempted to answer that question before ordering retrial and therefore the question remains unanswered to-date.

On the other hand, what meaning does one attach to the phrase:

"the gravity of the offence charged."

No doubt the meaning is relative to one's perception attached to that phrase; so that while the Court of Appeal Bench which decided the case of Roy Richard Elirema and the case of Wilfred Shilingi could see no "gravity of the offence charged" under section 296(2) as a reason to warrant re-trials in those cases, the Court of Appeal Bench which decided the case of Silvester Keli Kakumi could see "gravity of the offence charged" to warrant a retrial even though the charge was also under section 296(2) or was under a lesser drastic provision such as section 296(1) or other even much more lesser drastic provisions of the law. Moreover, it is being added that the interests of the "complainant" must be taken into account, yet there is a "complainant" in every criminal case.

In those circumstances, it seems to me, with all due respect, that the Court of Appeal's decision in Silvester Keli Kakumi and those who are pleading the interests of the "complainant" are trying to take away the good that the Court of Appeal had given in its decisions in the case of Roy Richard Elirema and the case of Wilfred Shilingi. That way there is likely to be no improvement because the law will not be clear and the prosecution will always be, as they have already started, asking for re-trials in every appeal declared a nullity on the basis of section 85(2) and courts will be granting those requests as the phrase "gravity of the offence charged" is so generous that it will and can be used and accepted in almost every situation. The appeals before me in this judgment vindicate what I am saying. The appellants were convicted and sentenced under section 296(1) and/or section 123 of the Penal Code. The gravity of the charge under section 296(1) is less than the gravity of the charge under section 296(2) and the gravity of the charge under section 123, where the maximum sentence is two years imprisonment or a fine which is not excessive, is much more less than the gravity of the charge in section 296(2) yet in all the appeals I am being asked to order retrials. Add to that the factor of the interests of the "complainant." That way, where is the case which will not have retrial? One small factor to note about the case of Silvester Keli Kakumi is that one of the Court of Appeal judges on the Court of Appeal bench handling that appeal had been, while still in the High Court, one of the two judge High Court bench which had heard and determined the High Court appeal in the case of Roy Richard Elirema, a decision which the Court of Appeal bench which heard the appeal from Roy Richard Elirema and another had over-turned two days

earlier without ordering a retrial.

In any case, a relevant question to ask is: What mischief is the Court of Appeal's decision in Roy Richard Elirema's case as made clearer in the same court's decision in Wilfred Shilingi's case, trying to stop? The mischief is not to stop or facilitate retrials and the question of fetering the power of this court in ordering retrials is neither here nor there. The mischief is not the avoidance or refusal by courts to grant retrials. The mischief is not a refusal by courts to look into the interests of complainants (victims) and or accused persons, both of them innocent sufferers, in trials subsequently nullified because of prosecutions by unqualified public prosecutors. The mischief is simply this: To stop the Honourable the Attorney General from using unqualified public prosecutors to prosecute criminal cases in our courts. To succeed, that stoppage should be done without allowing loopholes, like retrials, through which the Attorney General is being encouraged to continue using unqualified public prosecutors with the knowledge that when original trials are nullified, retrials will be ordered. It is the allowing of such loopholes that will lead to grave injustice to the victim and the Accused as it will cause more missaries to them in varied ways and definitely there will be no fair trial. The law must be made clear with defined boundaries known to everybody and the Attorney General must be told in no uncertain terms that this is the law. It should not be ambiguous. He has had too much time to correct the situation. He has had many years to do so and did not have and does not have to be told by the court to do so. He has not corrected it. He did not have and does not have to be told by the court to do so. But if the court must tell him, then he should not be allowed any more time to relax as the situation now calls for instant stoppage which can only be achieved by allowing no re-trial where a trial is a nullity because of prosecution by an unqualified public prosecutor and here I am not talking about an ordinary person. I am talking about a person who, according to section 26 of the Current Constitution of Kenya, is not only the Principal Legal Adviser to the Government of Kenya but also in charge of all criminal prosecutions in the country. Having used unqualified public prosecutors in the country's courts for so many years, why should he be given the opportunity to retry the affected accused persons when they did not contribute to his complecency with regard to his compliance with section 85(2) of the Criminal Procedure Code? There is completely no good reason.

In my view therefore the Court of Appeal's decision in Roy Richard Elirema's case as made clearer in Wilfred Shilingi's case is the decision to be followed and in so far as Silvester Keli Kakumi's case is inconsistent with the other two cases and introduces uncertainity on the issue of retrial, the decision in Silvester Keli Kakumi's case on that issue be disregarded. A good law must be ascertainable in order to serve the society satisfactorily and the argument that the court should not feter its power should be used carefully if certainty must be in our law. Such argument should not be used to create unpredictable situations.

It is in the Court of Appeal's decision in the case of Wilfred Shilingi that the Court brings out the main and full reason for refusing to grant a retrial. That reason is that:

"The mistakes which occurred during their trial and which have led to our quashing the convictions were all of the prosecution's making. There is absolutely no reason why the Attorney General should not appoint qualified public prosecutors to conduct the Republic's cases in the courts. Accordingly, we refuse to order A retrial ……………"

That is the main and full reason for refusing retrials. Other reasons like the length the charge has taken, the gravity or seriousness of the offence charged, the merits and demerits of the case, availability of witnesses and exhibits, interest of the victim or the missaries caused to him, the jurisdiction of the court, are all mere peripheral reason which should not be used to entitle the Attorney General to retrials. He has to pull up his socks so that the Republic avoids causing missaries and injustice to victims through prosecution by unqualified public prosecutors. It is important that the law is made tight upon the Attorney General so that the suffering of the few to-day, if any, gives way to no more suffering of anybody, on this account, in the future for ever and ever.

Where, therefore, a criminal trial is declared a nullity by a court on account of a prosecution by an unqualified public prosecutor and the proceedings or conviction quashed and the sentence, if any, set

aside, the accused person or the appellant or the applicant affected should be set at liberty and face no retrial.

That is on the basis of case law. I now turn to look at the current Constitution of Kenya as well as other legislation on the issue of retrial. Starting with section 77 of the Constitution which makes provisions to secure protection of the law and is found in Chapter V providing for the Protection of Fundamental Rights and Freedoms of the Individual, I will look first at subsection (5) which states as follows:

"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

Closely related to that provision of the Constitution is section 354(3) (a) (i) and (c) of the Criminal Procedure Code which states:

"(3) The Court ………….. may –

(a) in an appeal from a conviction

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or

(ii) ……………………………………

. (iii) …………………………………… .

(b) …………………………………………………… …………

(c) in an appeal from an acquittal …………… hear and determine the matter of law and thereupon …………………… remit the matter with the opinion of the High Court thereon to the subordinate court for determination whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, ………………………………………."

These are the provisions which give the court power to order retrials. Section 354(3) (a) (i) and (c) of the Criminal Procedure Code puts into effect section 77 (5) of the Current Constitution of Kenya herein also referred to as the Constitution. In paragraph (a) (i) of subsection (3) of section 354 of the Criminal Procedure Code when it is said: "or order him to be tried by a court of competent jurisdiction"

it appears as if the trial is ordered because the original trial was not in a court of competent jurisdiction, meaning the original trial was illegal. If so, then it could be said that in relation to a conviction, a retrial can only be ordered where the original trial was in a court which had no jurisdiction.

If that observation is not correct, then let me say that both paragraph (a) (i) and paragraph (c) of subsection (3) apply to convictions or acquittals only. They apply where the question is whether the appellant, on the basis of the evidence before the trial court, was properly convicted or properly acquitted. They concern the merits of the evidence before the trial court. In other words, they apply where the trial in which the conviction or acquittal was done exists. They do not apply where there was a purported trial which was null and has been declared a nullity by the superior or appellate court without consideration of the merits of the evidence before the trial court. Those provisions have no application and that is why they do not mention the words "null" or "nullity". I have said that the trial or proceedings, in the trial court having been null and the court having declared that trial a nullity, it means nothing remains, including the charge sheet or information, whichever may have been used, and therefore there is no case to be remitted to the lower or trial court for a retrial. It further means that there remains no lawful cause to continue holding the affected Appellants or accused persons in detention hence the imperative to set them free so that if the Attorney General later decides to charge them a fresh, he may do so when they are free persons

and has to institute the proceedings by a fresh charge in a completely new and separate criminal case, supported by fresh witness statements.

The term retrial will however still be there because even though the original trial is nullified and therefore, legally, it is as if no trial took place, in reality and in practical terms, there was a trial, call it a purported trial, and we cannot escape that practical or naked truth. It is the institution of a fresh criminal prosecution, after the original trial has been nullified, that the Attorney General should be stopped from doing, whether he starts a fresh criminal prosecution, wrongly, using the charge sheet and other documents previously used in the nullified trial or starts fresh criminal prosecution correctly using completely new documents in a new and separate criminal trial. In view of what I have stated above, he should be stopped because there is no law entitling him to institute such retrial.

Moreover, as I am saying this, I note that not only is Kenya a member of the United Nations but the country has also ratified the "International Covenant On Civil And Political Rights" adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16th December 1966 and brought into force on 23rd March 1976, in accordance with Article 49.

Article 14(7) of that Covenant states:

"No one shall be liable to be tried or punished again for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

In these appeals although the conviction by the trial court can be said not to have been

"in accordance with the law and Penal Procedure of" this country because it was done without compliance with section 85(2) of the Criminal Procedure Code, the subsequent quashing of that conviction by the High Court following nullification of the trial in the trial magistrate's court can, for the purpose of Article 14(7) of the Covenant, be deemed to be an acquittal done

"in accordance with the law and penal procedure of" this country. Hence the appellants become not liable to be tried or punished again.

Furthermore, by using an unqualified Public Prosecutor, the Attorney General was contravening section 77(1) of the Current Constitution of Kenya which states:

"If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

That provision is similar to Article 10 of the United Nations Universal Declaration of Human Rights which states:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Emphasis are mine and are meant to point out that there can be no fair hearing in a trial where the prosecutor is unqualified to prosecute as his prosecution is rendered incompetent and the trial a nullity thereby prejudicing both the victim and the accused person in contravention of the protection which section 77(1) of the Constitution mandates should be afforded to persons charged with criminal offences. There can be no fair trial when an accused person, who may or may not have been on bond, passes through the rigour of a full trial, convicted, sentenced and pays a fine or committed to jail where, as a result, begins to serve the sentence or waits, in agony for his sentence to be executed, only to be told at the conclusion of a taxing appeal that his trial was a nullity and that therefore he should face a retrial. He goes through the rigour of a full retrial facing sufferings similar to those which he had gone through during the original trial. He is convicted or acquitted. Such contravention of the Constitution is very serious and the perpetrator should not be granted retrials as that encourages him to continue thereby

causing grave injustice to more and more accused persons. To conclude this judgment therefore, the principle that emerges from my discussions of Roy Richard Elirema's case, Wilfred Shilingi's case, Silvester Keli Kakumi's case as well as my discussion of the law applicable, is that a retrial will not be ordered where a criminal trial is declared a nullity by the court and the conviction quashed and the sentence set aside on account of prosecution by an unqualified public prosecutor for the following reasons:-

First, the mistakes which occur during such trial leading to the quashing of the conviction are all of the prosecution's making and there is absolutely no good reason why the Attorney General should not appoint or was not appointing qualified public prosecutors to conduct the Republic's cases in the courts. (see Roy Richard Elirema & Another versus Republic as made clearer in Wilfred Shilingi and Two others – versus – Republic).

Second, there is no law, at the moment, providing for retrial where the original trial has been declared a nullity and the relevant conviction quashed and the sentence set aside. Third, such a retrial contravenes section 77(1) of the Current Constitution of Kenya and Article 10 of the Universal Declaration of Human Rights as well as Article 14(7) of the International Covenant On Civil And Political Rights.

That is the principle together with the three grounds sustaining it. It constitutes a third category to be added to the two categories found in the case of Fatehali Manji (ibid) where a retrial will not be ordered so that in summary, putting Fatehali Manji's case together with what emerges from my discussion of Roy Richard Eliréma's case, Wilfred Shilingi's case, Silvester Keli Kakumi's case as well as the applicable law, the position is that no retrial will be ordered:-

(a) "where the conviction is set aside because of insufficiency of evidence;" (Fatehali Manji) or

(b) "where the purpose" is to enable "the prosecution to fill up gaps in its evidence at the first trial;" (Fatehali Manji) or

(c) where the first trial is declared a nullity and the conviction quashed and the sentence set aside on account of prosecution by an unqualified public prosecutor. (Roy Richard Elirema category of cases)

From the foregoing therefore and on the basis of principle (c) in the summary above, I do hereby declare the trial of the Appellants in the Senior Principal Magistrate's Court Criminal Case No. 3819 of 1999 at Embu, a nullity, allow the appeal of each Appellant before me in this matter, quash his conviction and set aside the sentence or sentences imposed upon him.

I do refuse to order retrial of any of the Appellants and proceed to order that each Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated, delivered and signed at Embu this 15th day of December 2003.

J.M. KHAMONI

JUDGE

Present: All Three Appellants

Mr. Mogusu for All the Appellants

Mr. Omwega for the State