REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 165 OF 2002

HASSAN MOHAMMED ………………………………...……. APPELLANT

VERSUS

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

JUDGMENT OF THE COURT

On 4/11/2004, I released the appellant herein after allowing his appeal and reserved reasons for reaching that judgment to 2.12.2004. The appellant's memorandum of appeal which should read Petition of Appeal dated 15.8.2002 and duly filed in court sets out four grounds of appeal against the judgment/sentence passed by the Principal Magistrate in Criminal Case No. 443 of 2001 and delivered on 2.4.2002. The following are the four grounds of appeal:-

1. The learned magistrate erred in law and in fact in that he believed the evidence of PWI and PW2 without proper analysis and particularly as they said they acted on information.

2. The learned magistrate erred in law in that he failed to consider the possibility that the appellant could have been framed by the witnesses.

3. The learned magistrate erred in law and infact in that the whole case of the prosecution is against the weight of evidence.

4. The sentence imposed upon the accused is excessive and extremely harsh in the circumstances particularly considering the fact that the appellant is sick and was so sick even during the hearing of the case.

On 23.9.2004, the appellant obtained the leave of this honourable court to file a supplementary grounds of appeal which were filed on 24.9.2004 comprising the following two grounds:-

1. The learned Principal Magistrate erred in the law and in fact in that he allowed an unqualified person to prosecute the appellant in this case.

2. The learned Principal Magistrate further erred in that having an unqualified person not above the rank of the Police Inspector, he proceeded to convict the appellant.

The appellant herein was charged in count one with being in possession of a firearm without a firearms certificate contrary to section 4(2) of the Firearms Act, Cap 114 Laws of Kenya, namely that on the 12.4.2001 at Muimui area in Meru Central District within the Eastern Province was found in possession

of an AK 47 rifle S/No. KE 94677P without a Firearms Certificate. In the second count, the appellant was charged with being in possession of ammunition without a firearms certificate contrary to section 4(2) of the Firearms Act Cap 114 Laws of Kenya namely that on the 12.4.2001 at Muimui area of Meru Central District within Eastern province, was found in possession of thirty (30) rounds of 62mm special without a Firearms Certificate.

Hearing of the case commenced on 22.11.01 and the prosecutor was shown as Ngugi Irungu but there was no indication of the rank of the prosecutor. On 30.4.2001, the prosecutor was shown to be IP Irungu so the court can safely say that Irungu was an Inspector of police. During the hearing however, it was not indicated who between Irungu and Ngugi whose rank was not indicated was the prosecutor.

The evidence against the appellant was that on 11.4.2001 PWI PC Guyo Galgalo received a report while he was at Isiolo Police Station that there was a person in Bula Pesa Isiolo who had a gun. Acting on that information, he went to Bula Pesa Isiolo in the company of other officers and found the appellant and others sleeping in the house and on interrogation the appellant admitted he had guns and that he took PWI and other police officers to Muimui area in Meru where he showed the police officers where he had buried the guns and on digging an AK 47 rifle together with a magazine containing 38 rounds of ammunition were recovered. The appellant was then subsequently charged with the offences. On 13.4.2001, one Simon Mulu Ndambuki, then DCIO Isiolo recorded a charge and caution statement from the appellant in accordance with the judge's rules. The statement which the appellant did not dispute was admitted in evidence as P exhibit VIII. In his unsworn statement, the appellant denied that he voluntarily led the police to the place where an AK 47 rifle was recovered. He alleged that the police took him to a bush after taking him from his home and forced him to dig a certain place from where a gun was recovered. The appellant called no witnesses. The appellant was found guilty as charged and on 5.8.2002 he was sentenced to serve ten (10) years imprisonment on each of the two counts and the sentences to run concurrently.

It is against that conviction and the sentence that the appellant appealed. The appeal was conceded by Mr. Oluoch who appeared for the respondent on the grounds first that the prosecution was conducted by an incompetent prosecutor, thereby rendering the trial illegal. Mr. Olouch submitted that he would not urge this court to order a retrial on the ground that the only tangible evidence against the appellant was based on the repealed section 31 of the Evidence Act. He submitted that while section 31 of The Evidence Act was good law then, it was no longer good law and therefore that a retrial based on such evidence would not be in the interests of justice. That he would nor urge the court to order a retrial since he believed that the appellant had paid adequately for any misdeeds that he may have committed by the period he had spent in jail and that the prosecution's error should not be visited upon the appellant. Mr. Gituma for the appellant relied on the provisions of section 85 of the Criminal Procedure Code which provides as follows:-

> "**85. (1) The Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya 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 or police, to be a public prosecutor for the purposes of any case."**

The release of the appellant on 4.11.04 was mainly on the strength of the above provisions, and especially sub-section (2) of section 85. I am fortified in my findings by the Court of Appeal case of ELIREMA & ANOTHER V. REPUBLIC (Court of Appeal sitting in Mombasa) in which the learned Judges of appeal declared as a nullity a criminal trial conducted by a public prosecutor holding the rank of Corporal for being persons ineligible to be appointed public prosecutors under section 85(2) of the Criminal procedure Code. In that case, the petition of appeal to the Court of Appeal raised issues that had neither been raised during the first trial appeal nor at the trial. The appellant's trial in the lower court had been conducted by two corporals and in considering whether or not the two corporals were eligible prosecutors, the court of appeal said:-

"Going by the provisions of the code………….. it is clear that the Attorney General has no power to appoint a police officer below the rank of an Assistant Inspector to be a public prosecutor …………… The two corporals were clearly acting as public prosecutors. They did not for example ask the trial magistrate to give them permission under section 88(1) of the code, to prosecute as private persons. They were clearly not entitled to act as public prosecutors ……………. We were not told that the Attorney General had appointed them as public prosecutors, but even if the Attorney General had purported to do so, such appointment would not be legally admissible or tenable so that for all practical purposes the two officers were not entitled to act as public prosecutors."

In the present appeal, apart from the fact that the court did not indicate who of IP Irungu and PC Ngugi conduced the prosecution, there is no evidence that PC Ngugi was duly appointed by the Attorney General to act as public prosecutor (though such appointment would have been illegal). There is also no evidence to show that PC Ngugi was entitled to act as a public prosecutor and therefore the prosecution became a nullity.

The trial magistrate should have been aware of this and stopped the case from proceeding further in the absence of a prosecutor above the rank of an Assistant Inspector to conduct the prosecution. On the basis of the above authority, I have no hesitation in confirming the action I took on 4.11.2004 of releasing the appellant forthwith upon conclusion of the hearing of the appeal on the ground that the prosecution in the lower court was conducted by an incompetent prosecutor.

Having found as a fact that the trial in the lower court was a nullity, the conviction against the appellant cannot stand. I accordingly quash the conviction and proceed also to set aside the prison term of ten (10) years imprisonment as the sentence had no legs to stand on in the face of the conviction having been quashed. I therefore say no more about the sentence.

On the issue of retrial, even if I had found that the prosecution was proper and the sentence justified I would not have ordered a retrial for two reasons: one is that Mr. Olouch for the state did not ask for a retrial. Secondly, a retrial would prejudice the appellant's rights under section 77(1) of the Constitution which provides as follows:-

"77(1) 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."

To subject the appellant to a retrial at this stage would cause him prejudice. The appellant has been behind bars for 3 ½ years and the mistake by the prosecution of allowing an ineligible prosecutor to conduct the case against the appellant should not be visited upon the appellant. To order a retrial at this state cannot be said to be affording the appellants fair hearing within a reasonable time.

For the above reasons, I allow the appeal, quash the conviction and set aside the ten (10) year term of imprisonment. It is so ordered.

Dated and delivered at Meru this 9th day of Dec. 2004.

RUTH N. SITATI

Ag JUDGE

9.12.2004