



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINA APPEAL NO. 198 OF 2003**

**(From Original Conviction and Sentence in Criminal Case No. 350 of 2003 of the Senior Resident Magistrate's Court at Kangundo: N. N. Njagi Esq. on 25.6.2003)**

**MICHAEL MUTHAMA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant was convicted for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code by the Kangundo Senior Resident Magistrate's Court in Criminal case 350/2003. He was sentenced to 3 years imprisonment. He is dissatisfied with the conviction and sentence as a result of which he has appealed.

At the hearing of the appeal the State Counsel conceded the appeal for reasons that the case in the lower court was prosecuted by an incompetent prosecutor one Police Constable Mbonge. Prosecution is supposed to be undertaken by police officers of the rank of Acting Inspector and above or advocates of the High Court as appointed by the Attorney General - Sections 85 and 88 (2) Penal Code. I have looked at the record of appeal which does confirm that Police Constable Mbonge was the prosecutor. In light of the Court of Appeal decision in **ROY ELIREMA V. REPUBLIC CR. APP. 67/03** where it was held that such prosecution by an incompetent prosecutor renders the proceedings a nullity. I will hold the same and declare the proceedings before the Kangundo court a nullity. Having declared the proceedings a nullity there is nothing before the court and I hereby quash the conviction and set aside the sentence.

The State Counsel urges the court to order a retrial on grounds the appellant has only served 1 1/2 years of his sentence of 3 years and that the offence was a serious one.

The appellant opposes a retrial as the sentence he is serving is already harsh and asks that it be reduced.

The court will generally order a retrial if the lower court proceedings are illegal or defect. In this case the proceedings are defective (**MAMJI V. REPUBLIC 1966 EA 343**).

An order of retrial will not be made if it will be prejudicial to the accused. I have read the evidence adduced before the lower court and it is my view that the admissible evidence is cogent and would be sufficient to sustain a conviction. The appellant was arraigned before the lower court on 25.4.2003. The trial was conducted on 25.6.2003 when appellant was sentenced to 3 years imprisonment. So far the appellant has served about 1½ years which is half of his sentence. The offence of obtaining by false pretences is a misdemeanour and carries a maximum sentence of 3 years. The appellant was said to be a first offender. In my view the sentence was harsh. The court should have considered non-custodial sentence before considering custodial sentence. Even though there is ample evidence on record that could result in a conviction and the fact that witnesses can be traced, I do find that the sentence so far served by appellant is more than adequate and I decline to order a retrial. The appellant is therefore set at liberty forthwith unless otherwise lawfully held.

Dated at Machakos this 7th day of December 2004.

**R. V. WENDOH**

**JUDGE**