



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO.66 OF 2003
APPELLATE SIDE

EPHANTUS KIMELI APPELLANT
-VERSUS-
REPUBLIC..... RESPONDENT

(Being an Appeal from the decision of L. W. Gitari Esq. Principal Magistrate and sentence given by W. N. Njage Esq. Principal Magistrate on 30th May 2003 in Eldoret Chief Magistrate's Court Criminal Case No. 9118 of 2002)

JUDGEMENT

This is an appeal from the judgement of L. W. Gitari Esq. Principal Magistrate and the sentence imposed by W. N. Njage Principal Magistrate in Eldoret on 30th May 2003. The appellant was charged and convicted of two counts of arson contrary to section 332 (a) of the Penal Code. He was sentenced to serve seven (7) years imprisonment on each count, sentences to run concurrently.

At the hearing of the appeal the learned Principal State Counsel Mr. Omutelema conceded to the appeal on the ground that the prosecution was partly conducted by an unqualified person PC Mwangi. I have perused the proceedings and found that indeed part of the prosecution was conducted by PC. Mwangi who led evidence for witnesses such as PW1, PW2, and PW3.

The learned Principal State Counsel therefore rightly conceded to the appeal. He however asked for a retrial.

The consideration to be taken into account by the court in ordering a retrial are whether there is sufficient evidence, whether the witnesses and exhibits will be available, the nature of the offence, the period already served in custody and generally whether the retrial will be in the interests of justice **(See Bernard Lolimo Ekimat –vs- Republic – Eldoret Criminal Appeal No.151 of 2004 – unreported).**

In our present case, the appellant was sentenced on 4th June 2003. I have considered that the offences are two counts of arson. The evidence on record is sufficient for a conviction. Though the learned Principal State Counsel has not addressed me on availability of witnesses and exhibits, I do not see anything that indicates that the same cannot be obtained. The two offences are serious offences. The appellant has been in jail for only two years of the 7 years concurrent jail terms. In those circumstances, I find justification in ordering a retrial. In my view, in the circumstances of this particular case, it is in the interests of justice to order a retrial.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence imposed by the learned Principal Magistrate. I however order a retrial of the appellant before a magistrate of competent

jurisdiction.

Dated and Delivered at Eldoret this 19th Day of May 2005

George Dulu

Ag. Judge

In the Presence of: