**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, AZANGALALA & J. MOHAMMED, JJ.A)**

**CRIMINAL APPEAL NO. 133 OF 2013**

**BETWEEN**

**JOHN FAUSTINE KINYUA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Nairobi (Mbogholi, J) dated 31st July, 2012*

*in*

***HC. CRA. NO. 305 OF 2009)***

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**JUDGEMENT OF THE COURT**

**[1]** John Faustine Kinyua, the appellant in this appeal was charged with the offence of fraudulent acquisition of public property contrary to **section 48** of the Anti-Corruption and Economic Crimes Act, No 3 of 2003 (ACEA) as read with **section 48** of ACEA. The particulars in support of the charge stated as follows;-

> **"On or about 12th June 2006 in Kenya Reinsurance Corporation Offices situated in Nairobi within Nairobi Province, being a person employed by a public body, to wit Kenya Reinsurance Corporation as Director of Finance and Corporation Services, fraudulently acquired public property by instructing Mr. Isaack Kiprop Tugume, a cashier with the said Corporation, to credit to his account with Ksh 1,835,978.00 being proceeds of cheque no 002492 paid by Trident Insurance Co. Ltd as 18% compulsory treaty shares, which sum was meant for Kenya Reinsurance Corporation."**

He pleaded not guilty to the charge. After a fairly lengthy trial that included oral evidence by about 18 prosecution witnesses and defence evidence by two witnesses, the appellant was found guilty, convicted and sentenced to a fine of Ksh 800,000/= and in default a custodial sentence of 3 years imprisonment. There was a further fine of Ksh 3,666,956/= imposed upon the appellant in the event that he did not serve the custodial sentence.

**[2]** Aggrieved by the conviction and sentence, the appellant appealed before the High Court. The appeal

was allowed resulting to the conviction being quashed and the sentence was set aside. However, the court ordered a retrial of the case by a court of competent jurisdiction. This order of retrial is the one that has provoked this second appeal. The appellant has raised 4 grounds of appeal which can be summarized as follows;-

a. The Judge failed to take cognizance of the fact that the appellant will suffer serious prejudice and that his fundamental rights will be violated if convicted and sentenced to a custodial sentence on re-trial.

b. The appellant's constitutional right to fair trial was compromised in the earlier trial and led to a miscarriage of justice and a retrial would cause more injustice.

c. The mistakes arising in the lower court proceedings are wholly blamed on the prosecution and the court and the burden of a retrial will be borne by the appellant.

d. The Judge failed to analyze the whole evidence tendered, assess the impact of the trial and appreciate the propriety of a retrial in the circumstances.

**[3]** During the hearing of this appeal, Mr. Mawira, learned Counsel of the appellant, submitted that the order for a retrial is prejudicial to his client; the Judge having concluded that the proceedings were flawed due to errors that were committed by both prosecuting counsel and the trial magistrate, there remained no justification for a retrial; the learned Judge faulted the trial court for conducting part of the trial on a day set for mention and while the appellant was confined at Karen Hospital where he had no legal representation; the trial court also transferred the matter to Mombasa Law Courts without notice or an order of the court. All these procedural errors according to counsel were committed by the trial court. According to counsel for the appellant, these procedural errors prejudiced the appellant. Moreover, according to him, the learned Judge failed to re evaluate the evidence as mandated by law as the first appellate court. Counsel contended that had the learned Judge re-evaluated the entire evidence as mandated by law, he would have drawn independent conclusions that an order for retrial was not suitable in the circumstances.

**[4]** Counsel further referred to the evidence that demonstrated no money was lost; the subject cheque was banked with Kenya Reinsurance Corporation and even if it was allegedly deposited for the benefit of the appellant, he never withdrew any money thus a retrial if properly directed cannot result in a conviction. He further submitted that the appellant was serving a sentence by the time of the appeal and he had served 2 months of the sentence when on appeal the conviction was quashed and sentence set aside. In counsel's view, in the event of a retrial, if the same will result to a conviction and sentence, the appellant will suffer double jeopardy having served a portion of the sentence. Counsel relied upon a list of authorities on the principles that guide the court on whether to order a retrial, among them; **Ahmedi Ali Dharamsi Sumar V Republic** (1964) E.A. 481. In that case the predecessor of this Court held, *inter alia;*-

> **"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person."**

And in the case of: **Fatehali Manji V Republic** (1966) E.A. 343, the same Court held 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 interests of justice require it."**

In conclusion counsel for the appellant urged us to find, a retrial in the circumstances of this case will

give the prosecution an opportunity to fill the gaps in their evidence which will contravene the appellant's rights to a fair trial and urged us to allow the appeal.

**[5]** On the part of the State, Mr. O'Mirera, learned counsel, opposed the appeal. He was of the view that the prosecution was not to blame for the procedural errors that led to part of the proceedings that were conducted in the hospital or the transfer of the case file to Mombasa where the trial magistrate had been transferred. Counsel drew our attention to the proceedings that clearly demonstrated that the appellant was uncooperative and used every reason to scuttle the hearing and conclusion of the matter. The prosecution closed its case, after which, the appellant was placed on his defence and that is when the appellant adopted a difficult stance. After making several applications to scuttle the defence hearing and failing to attend court for hearing of defence case on several occasions, the trial magistrate decided to proceed with defence hearing in the hospital. According to counsel for the State, the record shows in the undesirable conduct of the appellant. In his view, there is compelling evidence that supported the charge, therefore the retrial will not be used by the prosecution to fill gaps in its case.

**[6]** The trial magistrate was eventually transferred to Mombasa and the records show that the appellant agreed to complete his defence hearing in Mombasa.

Although counsel for the State supported a retrial, he submitted that it should proceed from the defence as the prosecution evidence has no procedural errors or flaws. Counsel urged us to consider the conduct of the appellant which is the one that frustrated the trial and contributed to inordinate delay in concluding his own defence. This delay, according to counsel, cannot be blamed on the State. He contended that the evidence on record strongly supports the charge and that the matter involves public funds which the appellant must be brought to account. Counsel urged us to dismiss the appeal and order a retrial before an appropriate court and give proper directions on when the appellant should appear before the said court.

**[7]** As forestated, this is a second appeal which by dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, means it is only matters of law that fall for consideration by this Court unless it is demonstrated that the two courts below failed to consider matters they should have considered or that they considered matters they ought not to have considered or that looking at the entire case, their decision was plainly wrong in which case this court will consider such omissions or commissions as matters of law. See ***Chemagong vs. Republic,*** (1984) KLR 213 at page 219, where this Court held:

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic, 17 EACA146)"**

**[8]** We should also point out the outcome of the appeal before the High Court the subject of this appeal is the order for a retrial. There was no re evaluation of the evidence, and rightly so, because an in-depth re-evaluation and analysis of the evidence would have prejudiced a retrial. The single point of law that we have to address is whether an order for a retrial should be set aside. The guiding principles on whether or not to allow a retrial are well settled in a long line of authorities by this Court and its predecessor the East Africa Court of Appeal. A re-trial should not be ordered where the conviction is set aside because the evidence was insufficient to establish the charge, or for the purpose of enabling the prosecution to fill up gaps left in their evidence at the first trial. See the case of **Ahmed Sumar v Republic**; (supra) per DUFFUS JA. See the case of **Makupe *v* Republic,** Criminal Appeal No. 93 of 1983 where the Court posited :-

> **"In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the 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 particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to**

**cause an injustice to the appellant (or accused).”**

**[9]** It is not at all contested that the problem that was identified was with the proceedings that were conducted after the closure of the prosecution’s case.

This is what the learned Judge posited in a pertinent portion of his judgement;

> “...**What is disturbing in these proceedings is that, whereas the doctor confirmed the appellant was able to communicate and follow proceedings, this matter had been listed for mention on that day and not for hearing. On that morning counsel had appeared for the appellant as the record would show but on that afternoon at Karen Hospital counsel was absent. There is no record to show whether or not the court gave the appellant an opportunity to dispense with his counsel or to proceed in person. It is a constitutional right for a party, and in this case the appellant, to be represented by counsel. Whether or not Karen Hospital was a court in the circumstances of this case is also an issue which ought to have been resolved by the learned trial magistrate.**
>
> **With respect, the appellant was not accorded a fair trial. There are many other issues that have been pointed out but for good reason, I shall not address in this judgment. What then should be the order of this court? Where a party is denied a fair trial, the consequences are that the trial should be declared a nullity unless no prejudice was occasioned to the appellant. In this case, I find and hold that that prejudice went to the root of this trial. Accordingly, the proceedings of the entire trial must and are accordingly quashed in the circumstances.**
>
> **That notwithstanding, it does not mean that there was no evidence against the appellant. The learned counsel for the Republic has asked for a retrial in the event that the court finds the proceedings were irregular. Generally, whether a retrial should be ordered or not must depend on the circumstances of the case. A Retrial would be ordered where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, the length of time that may have elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the conviction were entirely the prosecution making or not – See Muiruri vs. Republic [2003] KLR 552.”**

**[10]** The above excerpt of the judgement clearly demonstrates the illegalities or defects that were associated with the trial court such as conducting the hearing during a mention, at a hospital when the appellant was not represented by counsel and for transferring the file to Mombasa Law Court without a proper court order and the prosecution was not to blame. All this happened after the defence had closed its case. The next issue is whether the appellant will be prejudiced by an order of re-trial or as it was put by the appellant’s counsel his client will be denied a fair trial. The record shows that the appellant was employed by Kenya Re-Insurance Corporation as a Director of Finance and Corporation Services at the material time.

**[11]** On the 15th May 2006, Trident Insurance Company Limited issued cheque No. 002492 in the sum of Kshs. 1,835,978 to Kenya Re-Insurance Corporation being settlement for certain premium adjustments. The cheque and a letter forwarding it were received at Kenya Re-Insurance Corporation Ltd. On the 29th May 2006, the appellant who was in possession of the said cheque, is alleged to have drawn his personal cheque No. 83000919 for a sum of Kshs. 164,022, making it a total sum of Kshs 2,000,000 and deposited it to Kenya Re-insurance Corporation Ltd. He then took the bank slip to Isaac Kiprop Tugumo, an accounts assistant and cashier and instructed him to credit his mortgage account.

A receipt was generated to that effect showing the appellant had paid the said sum in his mortgage account.

**[12]** This issue was brought to the attention of the Kenya Anti-Corruption Commission. They investigated the case and the appellant was charged as forestated. We do not wish to belabour the point whether the prosecution’s evidence is sufficient to sustain a conviction. That is the province of the trial court as every

case is determined according to its own peculiar circumstances and on its own merit. Nonetheless on the face of the evidence, we do not think the prosecution's case was hopeless as counsel for the appellant submitted.

**[13]** The trial court is also faulted for transferring the matter to Mombasa Law Courts upon the magistrate's transfer without making a valid court order. Going through the record of proceedings, we cannot but sense the frustrations the trial magistrate faced in getting the appellant to co-operate and complete the trial. In our view, this would explain why the trial magistrate transferred the case from Nairobi to Mombasa where she had been transferred and thereby overlooking an obvious jurisdictional issue as the offence occurred in Nairobi where the appellant was charged. It is not lost to us that the trial magistrate's focus was on completing the case, and in the process she committed procedural errors which could have been avoided. Nonetheless although the appellant stated that he had no problem to travel to Mombasa Law Court to finish his defence, when it was convenient for him he turned around, and faulted the procedure of transferring the matter outside the territorial jurisdiction.

**[14]** We find the appellant will not be prejudiced by a re-trial. As regards the availability of witnesses and documents, the complainant is a State Corporation with perpetual succession. The alleged offence of fraudulent acquisition of public property is a matter of public interest as it involves a public body which is a custodian of public resources. A re-trial will also serve the ends of justice as both the complainant and the appellant will have an opportunity through court room process to acquit themselves. A Tanzanian case which we find persuasive addressed prosecution of matters that touch on the wider public, that is the case of;- **Rashid v Rep [2011] 2 EA** where at page 354, Rutakangwa, Mbarouk and Bwana, JJ.A discussed the question of setting an appellant free on the basis of a procedural technicality and stated;-

> ***"We take it to be our unavoidable duty to do justice to all parties in any case. Should the prosecution, indeed the public, be punished because of the trial magistrate and the public prosecutor being remiss in their duty? We think not. If there is a right, the law should always provide a remedy. The remedy here, in our considered view, would be an order for a retrial, if the interests of justice so required."***

**[15]** Finally, we have not been told that it will be difficult to trace the records relied upon during the trial, that the main witnesses for the prosecution cannot be found. There is therefore no reason why the trial should not proceed.

In the upshot, we find no merit in this appeal. It is dismissed with the result that the appellant should be presented before the Chief Magistrate's Criminal Court at Milimani within the next seven (7) days.

**Dated and delivered at Nairobi this 4th day of November, 2016.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

**.....**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***DEPUTY REGISTRAR***