



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

CRIMINAL APPEAL 104 OF 2006

MARTIN OMOLO OBONYO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from an order of the High Court of Kenya at At Kisumu (Mr. Justice I.C.C. Wambilyangah) dated 20th July, 2000

in

H.C.CR.A. NO. 95 OF 2000)

JUDGMENT OF THE COURT

Martin Omolo Obonyo, the appellant herein, was convicted of stealing stock contrary to **section 278** of the Penal Code and sentenced to seven(7) years imprisonment together with ten(10) strokes of the cane. The particulars of the offence were that on the night of 2nd and 3rd March 1998, at Jera sublocation, North East Ugenya Location, in Siaya District of the Nyanza Province, the appellant jointly with others not before court stole three heads of cattle valued at Kshs.25,000/- the property of Julius Okoth Were.

The evidence against the appellant was that of being found in possession of stolen animals and offering them for sale only a few hours after they had been stolen from the complainant's home. On being put to his defence the appellant opted to say nothing.

The appellant's appeal to the superior court was summarily rejected by Wambilyangah J. Hence the appellant now comes to this Court by way of second appeal, and by virtue of **section 361(1)** of the Criminal Procedure Code only matters of law fall for consideration.

The learned Senior State Counsel Mr. Musau, conceded this appeal on the ground that prosecution of the appellant in the trial court was conducted by one **Cpl. Wainaina** who was not qualified to do so.

We agree with Mr. Musau as the trial court's record clearly shows that when the appellant's trial commenced on 17th April 2000 one **Cpl. Wainaina** appeared as the prosecutor. The said Cpl. Wainaina, conducted prosecution to the close of the case when the trial magistrate reserved judgment which was delivered on 28th April, 2000.

Section 352 of the Criminal Procedure Code under which the appellant's appeal to the High Court was summarily rejected provides:-

“ (1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, and if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

Provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal except-

(1) in a case falling within subsection (2) of this section;

(2) Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a Judge that the evidence is sufficient, to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or led him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the Judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint.”

We have looked at the four grounds of appeal presented to the High Court by the appellant, and we are of the view that the appellant's appeal ought not to have been summarily rejected. Perhaps, it is appropriate to emphasize that the power to reject appeals summarily should be sparingly exercised especially in cases where an appellant had pleaded not guilty to the charge and a full trial conducted by the trial court resulting in a long custodial sentence. In such cases, it should be appropriate to allow an appellant to present his appeal so that the High Court may re-evaluate the evidence, assess it and come to its own conclusion.

As already stated, the appellant's trial was conducted by Cpl. Wainaina who was not a person qualified to conduct criminal prosecutions by virtue of **section 85(2)** of the Criminal Procedure Code which provides:

“The Attorney General by writing vide 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 the purpose of any case”

The effect of the foregoing is that to be appointed a Public Prosecutor one must be either an advocate of the High Court or, a person employed in the public service. In the case of a person employed in the public service that person if a police officer ought to be a police officer not below the rank of an Assistant Inspector of Police. In the present appeal the appellant's trial was conducted by **Cpl. Wainaina** who was below the rank of an Assistant Inspector hence unqualified person to conduct such prosecution.

The issue of who is a person qualified to conduct a criminal trial was considered by this Court in its recent decision in ***Elirema & Another v. Republic*** [2003] KLR 537 in which it was stated inter alia: -

“For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared annulity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.”

Had the issue of unqualified prosecutor been considered by the learned Judge of the superior court the appellant's appeal to that court would not have been summarily rejected but allowed to proceed to hearing at which his trial would have been considered and declared a nullity, on that ground. The appellants's

appeal to the superior court did not fall under the provisions of **section 352** of the Criminal Procedure Code and it was therefore improperly rejected under that section.

Since **Cpl. Wainaina** was not qualified to act as a prosecutor it follows that the trial of the appellant in which **Cpl. Wainaina** purported to act as public prosecutor must be declared a nullity. We now do so with the result that the conviction recorded against the appellant must be and is hereby quashed and the sentence of seven (7) years imprisonment together with ten (10) strokes of the cane set aside. We agree with the learned Senior State Counsel that since the appellant has been in prison since April 2000 a re-trial ought not to be ordered. In the circumstances, we order that the appellant be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 23rd day of June, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR