



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NYERI**

**CORAM: OMOLO, GITHINJI & WAKI, J.J.A.
Criminal Appeal 254 & 255 of 2003**

1. JOSEPH MURIUKI WACHIRA

2. STEPHEN MARETE MURIITHI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma &

Mitey, JJ) dated 13.8.200

in

H.C.CR.A. NO. 139 & 140 OF 2001)

JUDGMENT OF THE COURT

The appeals of **JOSEPH MURIUKI WACHIRA** and **STEPHEN MARETE MURIITHI** must be allowed on the principles laid down by this Court in the case of **ROY RICHARD ELIREMA & ANOTHER V. REPUBLIC [2003] 1 EA 50 (CAK)**. Right from the very beginning of their trial which started before a Senior Resident Magistrate at Nyeri on 17th July, 2000, their prosecution was conducted before the Magistrate by a Senior Sergeant Kigera and on that basis alone, we must allow their appeals against conviction on all the counts upon which each of them was convicted. We accordingly quash the convictions recorded against each appellant and set aside the various sentences imposed on each one of them.

Ought we to set the appellants at liberty as their learned counsel Mr. Muguku asked us to do? We are not inclined to do so. The offences were all alleged to have been committed between 20th and 21st March, 2000. The trial of the appellants commenced on 17th July, 2000 and was concluded by the judgment of the magistrate dated and delivered on 7th May, 2001. The judgment of the High Court dismissing their first appeals to that court was delivered on 13th April, 2003. The charges against the appellants were all very serious and if properly considered, the evidence available in the record before us could well result into a conviction. Mr. Orinda told us on behalf of the Republic that the witnesses could still be traced. In all the circumstances, we think we should order a retrial. Accordingly, we order that the appellants shall be tried de novo before a different magistrate on the self – same charges and for that purpose, we order that they shall remain in prison custody pending their production before a magistrate for their retrial.

Those shall be our orders in the two appeals.

DATED and DELIVERED at NYERI this 20th day of May, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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