



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL 30 OF 2002[1]**

**NZILO MULINGE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

The appellant was convicted of the offence of malicious damage to property contrary to section 334 (c) of the Penal Code by the District Magistrate I Kilungu Court. He was fined Ksh. 4,000/- in default 5 months imprisonment on 18.2.2000. He was aggrieved by the conviction and sentence against which he appealed. He paid the fine after serving some days in jail.

When the appeal came up for hearing the Learned State Counsel Mr. O'mirera conceded the appeal on grounds that the case was prosecuted by an incompetent prosecutor one Sergeant Mboi which rendered the proceedings a nullity. He said that he would not urge court to order a retrial because the evidence on record could go either way.

I have scanned the record of appeal and it is true the Sergeant Mboi prosecuted the case and that is contrary to Section 85 as read with section 88 (2) of the Criminal Procedure Code which provide that a prosecutor may be appointed by the Attorney General, police officers of the rank of Acting Inspector of police and above or Advocates of the High Court. Sergeant Mboi was none of these and was therefore incompetent to prosecute. In light of the recent case of ROY ELIREMA V. REPUBLIC CR.APP. 67/2003 Prosecution by an unqualified prosecutor renders that whole proceedings a nullity. I hereby declare the proceedings before the lower court a nullity. I therefore quash the conviction and set aside the sentence. Can the court order a retrial" The offence was committed on 15.6.2001. Trial of the case commenced on 27.8.2001 and was concluded on 28.2.2001 when the appellant was sentenced to fine or 5 months imprisonment. He served part of the sentence and paid fine on 8.11.2002. He has completed the sentence. Even if there was a retrial it would serve no purpose at this stage.

In the case of MAMJI V. REPUBLIC 1966 EA 343 the Court of Appeal held that a retrial will be ordered if the trial in lower court was illegal or defective and that the order should not be so as to prejudice the appellant and that evidence on reverse should be such that if trial ordered it may result in a conviction. The proceedings in the lower court were indeed defective but an order of retrial would prejudice the appellant as he has already served sentence. Besides the evidence on record is not such that a conviction may result. The court has no option but release the appellant at this stage with an order that the appellant be refunded his Ksh. 4,000/- which he paid as fine.

**Dated at Machakos this 20th day of December 2004.**

**R. V. WENDOH**

**JUDGE**



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