



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Criminal Appeal 255 of 1996**

**JULIUS OTWOMA MAKOMERE .....APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

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

The appellant, JULIUS OTWOMA MAGOMERE, was one amongst a total of twenty five persons who were charged with five counts of robbery with violence contrary to *section 296 (2)* of the Penal Code.

The said 25 accused persons were taken before the magistrate's court, for plea, on 22<sup>nd</sup> July, 1994.

After the prosecution had called 14 witnesses, they closed the case. Thereafter, the learned trial magistrate gave consideration to all the evidence that had been adduced, and she held that the said evidence had established a prima facie case against only 4 of the accused.

The appellant, who was the 1<sup>st</sup> accused before the trial court, was one of the four who were put on their defence.

Thereafter, when the 4 accused had given their respective defences, the learned trial magistrate acquitted two of the accused; convicted the 2<sup>nd</sup> accused for the offence of handling stolen property contrary to *section 332 (2)* of the Penal Code; and convicted the appellant on one count of robbery with violence contrary to *section 296 (2)* of the Penal Code. The appellant was also convicted on all the other 4 counts of handling stolen property contrary to *section 332 (2)* of the Penal Code.

In respect of the offences of handling stolen property, the appellant was sentenced to imprisonment for two years, on each of the 4 counts. The trial court also ordered that the appellant would receive 2 strokes of the cane on each of the said 4 counts.

Meanwhile, for the offence of robbery with violence, the appellant was sentenced to suffer death as prescribed by law.

The record of the proceedings before the trial court reveals that the sentences were handed down on

26<sup>th</sup> September, 1996.

When the appellant's appeal came up for hearing on 16<sup>th</sup> June, 2008, the learned state counsel informed the court that he was not supporting the conviction, because the prosecution had been conducted by an unqualified prosecutor.

A perusal of the record of the proceedings reveals that at the time the plea was being taken, on 22<sup>nd</sup> July 1994, the prosecutor was Corporal Mwangala.

As the taking of a plea marks the commencement of criminal proceedings, it ought to be conducted in the presence of a qualified prosecutor.

The record also shows that on 20<sup>th</sup> January, 1995 and on 22<sup>nd</sup> March, 1995, amongst other dates, the prosecutor was Senior Sergeant Okumu.

On the days when the case was simply mentioned, if no substantive proceedings took place, the case cannot be deemed to have been prosecuted. We say so because the process of having the accused persons brought before the court every 14 days, for mention, is simply an administrative function of the court, for keeping tabs on the accused persons.

However, on days when the prosecutor was Senior Sgt. Okumu, and he did more than simply mention the case to fix the next date, he may very well have been involved in the prosecution of the case. An example of such a date is 28<sup>th</sup> December 1994, when Senior Sgt. Okumu sought, and the trial court granted an order for the withdrawal of the case against the 16<sup>th</sup> accused.

The record shows that on 4<sup>th</sup> April, 1995, the prosecutor Senior Sgt. Okumu led PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 in their evidence-in-chief.

Then on 5<sup>th</sup> April, 1995, Senior Sgt. Okumu led PW9 and PW10 in their evidence-in-chief. During that session, PW10 produced the items which were the subject matter of the case, as exhibits.

Then on 27<sup>th</sup> June 1995, Senior Sgt. Okumu led PW2, who had been recalled, in her evidence-in-chief.

Finally, on 30<sup>th</sup> April 1996, when the four accused persons who had been put on their defence, put forward their respective defences, the prosecutor was, once again, Senior Sgt. Okumu.

In effect, Senior Sgt. Okumu played a very active role in the prosecution. Yet by virtue of his rank, he was not a qualified public prosecutor, as he was below the rank of an Assistant Inspector of Police, as stipulated in *section 85 (2)* of the Criminal Procedure Code, prior to the amendment which was introduced by *Act No.7* of 2007.

ELIREMA & ANOTHER V. REPUBLIC [2003] 1 E.A. 50 noted that police officers below the rank of Assistant Inspector were not entitled to act as public prosecutors.

Therefore, when unqualified persons, such as they, acted as prosecutors, the trial was rendered a nullity.

In like manner, the proceedings before the trial court herein, which were conducted substantially by an unqualified prosecutor, were rendered a nullity. Accordingly, there is no foundation for the conviction or the sentence. The conviction is thus quashed and the sentence set aside.

The learned state counsel, Mr. Daniel Karuri, did not seek an order for retrial. We find that decision to be in order, as the appellant had already been behind bars for about 12 years since his conviction.

Indeed if it is taken into account that the trial commenced in July 1994, and given the fact that the charges with which the appellant had been charged were not bailable, it means that the appellant has been in custody for almost 14 years.

During his stay in jail, the appellant lost sight in both his eyes. He is now blind.

Having given consideration to all the circumstances prevailing, we find that an order for retrial would not be in the interest of justice. We say, not because we do not appreciate the seriousness of the offences, in which a life was lost. However, as the offences were allegedly committed over 14 years ago, it is unlikely that the witnesses will be readily available.

Even assuming that the appellant may have played a role in the commission of the offence, in our considered view, which is partly informed by his blindness, it is about time that the matter was laid to rest.

Accordingly, we shall not order that the appellant be re-tried. Instead, it is ordered that he be set at liberty forthwith unless he is otherwise lawfully held.

*Dated, Signed and Delivered at Kakamega this 18th day of June, 2008*

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**MBOGHOLI-MSAGHA**

**JUDGE**

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**FRED A. OCHIENG**

**JUDGE**