



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Appeal 66 of 2004**

DAVID KIMEMIA NJUGUNA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from original Conviction and Sentence in Criminal Case No. 147 of 2002 of the Senior*

*Principal Magistrate's Court at Murang'a dated 3<sup>rd</sup> April 2003 by Mr. G. K. Mwaura – SRM)*

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

DAVID KIMEMIA NJUGUNA was arraigned before the principal magistrate, Murang'a on one charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The particulars of the charge were that “**on the 1<sup>st</sup> day of December 2000 at Gachocho trading centre in Maragua District of the Central Province unlawfully killed John Mwangi Nganga.**”

The appellant pleaded not guilty to the charge.

After the trial, the learned trial magistrate convicted the appellant of the offence. The court then proceeded to sentence the appellant to 10 years imprisonment. It is against that conviction and sentence that the appellant now comes to this Court by way of appeal.

**Ms Ngalyuka**, learned counsel for the state conceded to the appeal on the grounds that part of the prosecution was conducted by an unqualified police prosecutor. Counsel submitted that **P.C. Machuka** led P.W.8 in his evidence thereby, rendering the proceedings a nullity as the provisions of section 85(2) as read with section 88 of the Criminal Procedure Code were thereby contravened. **Mr. Nyachoti** learned Counsel for the appellant supported the learned state counsel's contention.

I have on my part confirmed from the record that indeed **P.C. Machuki** led part of the prosecution of the case on behalf of the prosecution and consequently the mandatory provisions of section 85(2) as read with section 88 of Criminal Procedure Code with regard to the qualifications of Public Prosecutors in a criminal case were indeed violated. I agree with the learned state counsel that the proceedings were defective and a nullity therefor. As to who is a qualified public prosecutor in criminal cases, one only needs to revert to the law as succinctly stated by the court of appeal in the notorious case of **Elirema & others v/s Republic (2003) KLR 537**.

Accordingly I set aside both the conviction and sentence imposed by the learned magistrate on the appellant. **Ms Ngalyuka** did not urge me to order a retrial on the basis that the appellant had already served half of the sentence imposed. Accordingly prejudice would be occasioned to the appellant in the event of a retrial. The appellant as already stated welcomed the state's gesture.

The principles applicable in determining whether or not to order a retrial are now settled. A retrial should only be ordered where the original trial was defective or a nullity. See **Ahmed Juma v/s Republic (1964) EA 581**. No order for a retrial should be made if it will cause a person to suffer prejudice. See **Muyimba v/s Uganda (1969) EA 433**. Most importantly an appellate court is enjoined not to order a retrial unless upon consideration of admissible or potentially admissible evidence it is of the opinion that a conviction may result. See **Mwangi v/s Republic (1983) KLR 522**.

I have taken all these principles into consideration and have applied them to the facts and circumstances of this case. Much as I am satisfied upon consideration of the available evidence that a conviction may result if I ordered a retrial, and if the self same evidence adduced before the lower court was to be adduced in the retrial, I am not however inclined to make such an order. The appellant has been in prison for the last 4½ or so years since his conviction. That period is substantial and if a retrial was to be ordered, I have no doubt at all that prejudice and injustice will be occasioned to the appellant. There is no assurance from the state that it will readily avail witnesses in the event that a retrial is ordered.

The offence committed was serious as it led to the lose of an innocent life. However the scales of justice have to be balanced. If a retrial was to be ordered in the circumstances of this case, we may be faced with the complaint that the appellant's constitutional right to a fair trial within reasonable time was violated as the offence was committed as long ago as 1<sup>st</sup> December 2000. It is for these reasons that I decline to make an order for retrial. Instead I order that the appellant be set at liberty forthwith unless otherwise held for lawful reasons.

*Dated and delivered at Nyeri this 26<sup>th</sup> day of October 2007*

**M. S. A. MAKHANDIA**

**JUDGE**