

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 208 of 2004

(Appeal against the conviction and sentence in the District Magistrate's Court at Othaya in Criminal Case Number 120 of 2003 by T. K. Kimutai – R.M.)

PAUL MAHUGU NG'ARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Paul Mahugu Ng'aru hereinafter referred to as the Appellant was tried and convicted by the Resident Magistrate Othaya Court for the offence of indecent assault on a female contrary to **Section 144 (1)** of the Penal Code. He was sentenced on the 15th July 2004 to a term of 5 years imprisonment. Being dissatisfied the appellant has filed an appeal through the firm of Nderi and Kiingati Advocates raising 7 grounds.

The Principal State Counsel Mr. Orinda who appeared for the State has conceded this appeal on the grounds that the prosecution was conducted by an incompetent person.

I have perused the record of the lower court and I am satisfied that the prosecution was partly conducted by one Sgt. Musyoki, a person who was not competent under **Section 85 (2)** of the Criminal Procedure Code. In the circumstances the trial was a nullity and the appellant's conviction cannot stand. The State having indicated that it does not wish to proceed with a retrial, none will be ordered.

The upshot of the above is that I do allow the appellant's appeal, quash his conviction and set aside the sentence imposed.

The appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 6th day of February 2006.

H. M. OKWENGU

JUDGE