REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 975 of 1992

(From original conviction (s) and Sentence(s) in Criminal case No. 4311 of 1990 of the Resident Magistrate's Court at Thika (G.N. Gichongi DMII)

ANN NYAWIRA MBUGUA……..…...................................…………………….…..APPELLANT

VERSUS

REPUBLIC………..................................……………………………….…....RESPONDENT

JUDGMENT

ANN NYAWIRA MBUGUA was convicted on 30th June 1992 for the offence of **ASSAULT** contrary to **Section 251** of the **Penal Code**. She was sentenced to a fine of Kshs.7,000/- in default 5 months imprisonment. Being dissatisfied with the conviction and sentence she lodged her appeal on 17th August 1992 and on 3rd February 1994 it was admitted for hearing. The appeal has been pending ever since until it was called up through an administrative initiative by the court.

The Appellant raised six grounds of appeal through her advocate, **Mrs. Wahome**. When the appeal was finally heard on 4th October 2006, **Mrs. Wahome** argued an additional ground in which the conviction was challenged on grounds that the proceedings were defective. The learned counsel for the Appellant submitted that part of the proceedings were conducted by **Sergeant Kimanzi** and that it rendered the trial defective as the prosecution was not qualified to conduct the prosecutor of the case.

Mr. Imbali for the State conceded to the appeal on that ground. Counsel submitted that the proceedings were rendered a nullity due to that prosecution.

I have confirmed from the proceedings that indeed **Sergeant Kimanzi** led PW1, PW2 and PW3 to give evidence. The provisions of **Section 85 (2)** as read with **Section 88** of the **Criminal Procedure Code** are very clear that only a police officer of the rank of Acting Inspector or above is qualified to conduct prosecution on behalf of the State. **Sergeant Kimanzi** was not so qualified and therefore the proceedings were rendered nugatory. See **ROY ELIREMA & ANOTHER vs. REPUBLIC eKLR 2002**.

On the issue whether or not to order a retrial, among very important considerations is the question of whether if a retrial were ordered a conviction may result. See **MWANGI vs. REPUBLIC 1983 KLR 522**.

In the instant case, **Mrs. Wahome** submitted as per the six grounds of appeal, that the evidence adduced in court supported a finding of affray and not assault. Counsel submitted that the alleged assault took place in the Appellant's house. That there was only the evidence of the Appellant and the Complainant. That in defence the Appellant did not admit to having assaulted the Complainant but to having fought with her and that the learned trial magistrate misdirected himself when he found there was an admission to the charge.

I have perused the evidence on record and agree with the counsel for the Appellant that the Appellant did not admit to the assault at any one time. The Appellant admitted having fought with the Complainant in self defence after the Complainant started beating her. I find that the evidence adduced in court was contentious and that if a retrial were ordered it is unlikely to result in a conviction.

I have also taken into account the delay involved in this appeal which is over 14 years now. It would prejudice the Appellant if a retrial were ordered. I am satisfied that the interests of justice do not require a retrial.

I decline to order a retrial. I quash the conviction and set aside the sentence. If the Appellant paid any part of the fine ordered, the same should be refunded to her.

Dated at Nairobi this 11th day of October 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Wahome for the Appellant

Mr. Imbali for State

Wambui CC

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LESIIT, J.

JUDGE