



**REPUBLIC OF KENYA**

**IN THE HGH COURT AT NAIROBI MILIMANI LAW COURTS**

**CRIMINAL CASE 122 OF 2003**

**From Original Conviction And Sentence In Criminal Case No. 8150 Of 2002 Of The Chief Magistrate's Court At Kibera**

**KYALO KINGOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, KYALO KINGOO, was convicted for ROBBERY contrary to section 296(1) of the Penal code, and then sentenced to 3 years imprisonment. At the hearing of the appeal, the learned State Counsel, Mr. Olengo, notified the court that he was conceding the appeal. His reason for so deciding was the fact that prosecution before the lower court had been conducted by an unqualified public prosecutor.

From the record, it is evident that the trial was conducted by SGT Mathenge. Pursuant to the provisions of Section 85(2) of the Criminal Procedure Code, the Attorney General was only empowered to appoint Public Prosecutors either from amongst advocates or alternatively from amongst persons employed in the public service, not being a police officer below the rank of Assistant Inspector of Police. In the light of the foregoing statutory provision, SGT Mathenge did not have the requisite qualification for appointment as a public prosecutor. It is for that reason that he is deemed to have been unqualified.

In ROY RICHARD ELIREMA & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO. 67 of 2002 (At Mombasa) the Court of Appeal held that if a prosecution was conducted by an unqualified public prosecutor, the entire proceedings were rendered a nullity. Therefore, in line with that decision by the Court of Appeal, I do hereby declare that the trial of the appellant before the Resident Magistrate Court, at Kibera, was a nullity. Consequently, the appellant's conviction is now quashed and the sentence that was meted out is hereby set aside.

In his wisdom, the learned State Counsel, Mr. Olengo notified the court that he was not seeking a retrial. The main reason for that is the fact that as at the date when this appeal was heard, the appellant had already served over a half of the 3 year jail term, which he had been sentenced to.

The record shows that the sentence was meted out on 31st January, 2003.

Therefore, as at the date when this appeal was heard, the appellant had been in jail for some 23 months. Given that the total sentence was for 36 months, if there was no remission, and 24 months, if the appellant benefited from remission, I wholly agree with the respondent's decision, not to seek a retrial. It would have been very prejudicial to the appellant if he were to be retried. I therefore direct that the appellant be set at liberty, unless he is otherwise lawfully held.

**Dated at Nairobi this 31 Day of Jan 2005**

**FRED A. OCHIENG**

**AG. JUDGE**

**Delivered in the presence of**

**For the State**

**Appellant in person present**

**Mr. Odero Court Clerk**