

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 69 of 2004

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 915 of 2002 of
the Resident Magistrate's Court at Kitui E.K. Makori on 27/05/04)**

SAMUEL KILUNGYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant appealed against the conviction and sentence of 20 years arising from the charge of defilement. The state however conceded the appeal on the ground that the trial in any case was a nullity because the prosecutor was a police Sergeant who had no powers to prosecute. The state however, seeks for a retrial which the appellant does not oppose.

I have carefully considered the appeal. I agree with the state counsel, Mr. O'Mirera, that the charge was a serious one. The evidence on the record is probably sufficient to probably obtain a conviction if the accused is retried. The appellant has served 1 2/3 years out of the 20 years he is supposed to serve with hard labour. He does not oppose the order of retrial being given. It is my view, from these circumstances that in the interest of justice, this appeal should be allowed and a retrial be ordered. The appeal is accordingly so allowed. The conviction of the charge of defilement is quashed and the sentence of 20 years is hereby set aside. The appellant shall be retried by a Resident Magistrate who has jurisdiction at Kitui Law Courts, other than the honourable magistrate who tried the case earlier. The Criminal case No.915 of 2002 – Kitui be mentioned by the magistrate on 7/11/2005. Orders accordingly.

Dated and delivered at Machakos this 17th day of October 2005

D.A. ONYANCHA

JUDGE