



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.91 OF 2004**

**(From original conviction and sentence of the Principal Magistrate's Court at Nyamira in Criminal Case No. 481 of 2003 –P. M. MULWA ESQ., R.M)**

**BEN OMANWA NYANGAU ALIAS OMBEGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellants BEN OMANWA NYANGAU were convicted with three others by District Magistrate's Nyamira on two counts of assault c/s. 251 Penal Code. Each was sentenced to 2 years imprisonment in each count. He has now appealed against both sentence and conviction.

Mr. Kemo the State Counsel conceded to the appeal and said it was conducted by an unqualified person. Prosecution is shown to have been conducted by a P. C. Makori. S.85 (2) C. P. C. States that only a police officer of a Rank of an Ass. Police Inspector may prosecute cases. Indeed P.C. Makori applied to be allowed to prosecute and the court allowed the application but that did not make him a qualified person to prosecute. S.85 (2) provides that as A.G. cannot appoint a person who is below the rank of a police officer of a rank below that of Ass. Inspector to prosecute. Likewise I think the court should also not allow such a person to prosecute for to do so is to defeat the spirit of that Section. When the act talks of any other person I believe it means any other person but not a police officer below that rank.

I therefore find that the prosecution was conducted by an unqualified person and was therefore a nullity. I quash the conviction and set aside the sentence. Accused is discharged.

As the State did not apply for retrial I will not order one. Appellants have already been in prison for 3 months.

It is so ordered.

**KABURU BAUNI**

**JUDGE.**

**21/7/04**