

REPUBLIC OF KENYA

IN THE HIGH COURT OF KE NYA AT KISII

CRIMINAL APPEAL NO.28 OF 2004

(From original conviction and sentence of the Senior Resident Magistrate's Court at Oyugis in Criminal Case No.274 of 2001 –N. N. NJAGI ESQ., S.R.M)

**SAMSON OTIENO OLOTO APPELLANT
VERSUS
REPUBLIC RESPONDENT.**

JUDGMENT

Appellant, GEORGE OCHIENG NYAKWE was charged and convicted with six others on three counts, two of assault causing actual bodily harm c/s.251 Penal Code and one of malicious damage to property c/s 339 (1) Penal Code. They were all convicted on the three charged and fined shs.3000/= in default 6 months imprisonment on Count 1, shs.1,000/= i/d 1 month imprisonment in count 2 and shs.3000/- i/d 6 months imprisonment in count 3. His appeal is against both conviction and sentence.

At the commencement of the hearing, the State Counsel pointed out that the trial in the lower court was conducted by a police constable, a person not qualified to prosecute.

Indeed the proceedings show clearly that the prosecution was conducted by a police constable in the case of ROY RICHARD ELIREMA & VINCENT JOSEPH KESSY VS. R. C.A. Criminal Appeal No.67 of 2002 (unreported) and in the case of THOMAS OGAMBA NYAKUNDI & ANOTHER VS. REPUBLIC CA. Criminal Appeal No.217 of 2003 (unreported) the Court of Appeal held that a trial by an unqualified person is a nullity.

I therefore find the trial in the lower court was a nullity. I quash the appeal and set aside the sentence imposed. If the appellant had paid the fine the same be refunded.

**KABURU BAUNI
JUDGE**

Signed, dated and delivered on 19th July 2004.