



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL 183 OF 2003(2)**

**JOHN KYAI WAMBUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

The appellant was charged before Makueni Resident Magistrate in Criminal Case 172/03, with the offence of assault contrary to section 251 of the Penal Code. He pleaded guilty to the offence and he was convicted on his own plea of guilty and sentenced to serve 4 years imprisonment. He is aggrieved by both conviction and sentence and appeals against them.

When the appeal came up for hearing, the Learned State Counsel Mr. O'mirera conceded to the appeal on two grounds.

1. That the case in the lower court was prosecuted by P.C. Muasya who was not qualified as a prosecutor.
2. That the plea was not unequivocal. The State Counsel urged the court to order a retrial. The appellant opposed the prayer for a retrial as he claimed to have suffered and that the defect in the proceedings was not his doing but the courts.

I have scanned the record of appeal. I do agree with the State Counsel that the plea was not properly taken. The court never indicated in what language the charge was read. The court can not ascertain whether the appellant understand the charge at all.

Further the plea was not unequivocal. When the charge was read to the appellant, he explained that he had been charged for creating a disturbance in Criminal Case 145/03. The Magistrate never investigated to find out if the charge in Criminal Case 145/03 arose from the same transaction as the present one and what happened to the case in Criminal Case 145/03. The plea was obviously not properly taken and that renders the proceedings defective.

Upon perusal of the court record it is apparent that Police constable Muasya was the court prosecutor on the date of the plea. He is not a qualified prosecutor in term of provisions Section 85 (2) of the Penal Code and Section 88 of the Penal Code. A prosecutor is a police officer appointed by the Attorney General from the rank of Acting Inspector and above or an advocate of the High Court. In light of the recent Court of Appeal decision of ROY ELIREMA V. REPUBLIC CR.APPEAL 67/03, proceedings where an unqualified prosecutor takes part are rendered a nullity in the result that the proceedings before the lower court are a nullity. The conviction is therefore quashed and sentence set aside. Generally courts will order a retrial if the proceedings before the lower court are defective or illegal. That is the holding in the case of MANJI V. REPUBLIC 1966 EA 343.

The proceedings before the lower court were found to be defective since prosecution of the case was by an unqualified prosecutor. The plea too was unequivocal and therefore defective.

The complainant was a younger brother of the appellant. He was aged about 7 years. I believe the other witnesses would have been the appellants family members. The court finds that it will be easy to trace the

witnesses and the events will be fresh in their minds the offence having been committed in 2003.

The appellant was sentenced to 4 years imprisonment on 23.5.2002. So far he has served 1 year 5 months. There remains a balance of 2 years 7 months. The offence was one of assault. It was not aggravated in nature. The P.3 form is on the file. The appellant was given a custodial sentence following an unfavourable probation report.

In my view ordering a retrial in this case would be prejudicial to the appellant considering the nature of the offence. The court therefore declines to order a retrial.

The appellant is therefore set at liberty forthwith unless otherwise lawfully held.

**Dated at Machakos this 9th day of November 2004.**

**R. V. WENDOH**

**JUDGE**