



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**HIGH COURT CRIMINAL APPEAL 265 OF 2003**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No575 of 2001 of the Resident Magistrate's Court at Yatta M. Maundu ( Esq.) on 3/9/03**

**SIMON MASINDE NZIOKI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

Simon Masinde Nzioki was charged with the offence of Assault Causing Actual Bodily Harm Contrary to Section 251 of the Penal Code. He was convicted and sentenced to serve 2 years imprisonment on 3/9/03. He was dissatisfied with the conviction and sentence against which he appeals.

At the hearing of the appeal the state counsel conceded the appeal on grounds that the case in the lower court was prosecuted by an unqualified prosecutor. Under Section 85 and 88 (1) of the Criminal Procedure Code a qualified prosecutor is appointed from an advocate of the High Court or a police officer of the rank of Acting Inspector and above. Sergeant Kanyonda who prosecuted the case was none of the above. It is now trite that any proceedings conducted by an unqualified prosecutor is a nullity (**See ROY ELIREMA versus REPUB LIC Criminal Appeal 67/03**). I hereby declare the proceedings before the lower court a nullity and consequently quash the conviction and set aside the sentence.

The State Counsel urged the court to order a retrial. The appellant was totally opposed to such an order for reasons that he has been in jail for a long time since June 2001, he is sick, has a family who depend on him and prays that the court orders that he be released. The court will normally order a retrial if the proceedings in the lower court are illegal or defective. In the present case the proceedings are defective. To order a retrial the court has also to ensure that the accused is not prejudiced by such order of retrial.

I have read the record of appeal. The admissible evidence on record is likely to result in a conviction if a retrial is ordered. I believe that since the complainant was the appellant's brother, the witnesses would readily be available. However, the court notes that the accused was sentenced to two years imprisonment, he has so far served just over a year since 3/9/03. This was an offence of assault which is a misdemeanor and carries a maximum sentence of five years. The injuries sustained were not serious or aggravated in nature. In fact if the appellant had not been serving sentence this would have been a good case for Probation or Community Service. I find that the one year served will suffice in the circumstances and there is no reason why the court should order a retrial in this matter. I accordingly, order that the appellant is set free of this charge and there will be no retrial. There is evidence that he is serving another seven years sentence which he should continue to serve.

**Dated at Machakos this 15th day of December 2004**

**R.V. WENDOH**

**JUDGE**