IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 276 OF 2005

PETER NAMEMBA OKANGO …....…….... APPELLANT

AND

REPUBLIC ……...…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Makhandia & Kimatu, JJ.) dated 17th February, 2004

in

H.C.CR.A. NO. 531 OF 1996)

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JUDGMENT OF THE COURT

The appellant, ***PETER NAMEMBA OKANGO,*** and two others were arraigned before the Senior Principal Magistrate's Court at Busia in *Criminal Case No. 179 of 1994* in which they were jointly charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code. After a full trial, the three were convicted and sentenced to death as prescribed by the law. Their appeal to the superior court was dismissed and so the appellant now stands before us by way of a second and final appeal. Perhaps, it should be pointed out that the appellant's co-accused have passed away before reaching this Court and that is why it is only the appellant who is before this Court.

When the appeal came up for hearing before us on *3rd March, 2010*, Mr. A.O. Oyalo, appeared for the appellant, while Mrs. T.Ouya (Assistant Deputy Public Prosecutor) appeared for the State.

According to the record of the trial Court, part of the trial was conducted by Police Constable Wamalwa who was an unqualified person to conduct the prosecution trial. Hence the appeal has to be allowed (and was conceded by Mrs. Ouya) on that ground alone.

In conceding the appeal, Mrs. Ouya asked us to order a re-trial although she admitted that it would be difficult to trace the witnesses.

On his part, Mr. Oyalo pointed out that the appellant has been in prison since *1993*, which means he has been in custody for a period of over **16 years**. Mr. Oyalo also informed us that the death sentence had

been commuted to life imprisonment.

As already stated, the appellant's trial was vitiated by the fact that an unqualified person participated in the prosecution, hence rendering the appellant's trial a nullity. In ***ELIREMA & ANOTHER V. R. [2003] KLR 537*** at p. 544 this Court said:-

"In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provisions of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial Court, for if it does so there would be a serious risk of the Court losing its impartiality and that would violate the provisions of section 77(1) of the Constitution. For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an assistant inspector of police. We suspect the rank of assistant inspector must have been replaced by that of an acting inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside."

We therefore declare that the trial of the appellant in which a police constable purported to act as a public prosecutor is a nullity with the result that his conviction must be and is hereby set aside. It follows that the sentence of death which has been commuted to life sentence is also set aside.

Should we order a re-trial as we were asked by Mrs. Ouya? We note that the alleged offence took place way back in the last century – *21st November, 1993* at the Kenya-Uganda border town of Busia. It is now over sixteen years since the alleged offence took place. Mrs. Ouya admitted that it would be difficult to trace witnesses. The mistakes which led to our setting aside the conviction were entirely of the prosecution's making. In ***BERNARD LOLIMO EKIAMAT V. R.*** – *Criminal Appeal No. 151 of 2004* (unreported) this Court said:-

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable by courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

Taking into account the foregoing and the period the appellant has been in prison, we do not think it would be just to subject the appellant to a fresh trial. Accordingly, we refuse to order a retrial with the consequence that the appellant is to be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at NAIROBI this 12th day of March, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR