



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 102 of 2004**

SALIM ISSAH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi, Mutitu, JJ) dated 29/7/03 In H.C.CR.A. NO. 176 OF 2001)

JUDGMENT OF THE COURT

SALIM ISSAH, the appellant herein, was arraigned before the Senior Principal Magistrate's court at Kibera in Criminal case No. 6986 of 2000 on a charge of robbery with violence contrary to section 296(2) of the Penal Code on 22nd August, 2000, when the appellant pleaded "Not guilty" to the charge. His trial commenced on 27th October, 2000 before *Miss Siganga* (a Senior Resident Magistrate) and the prosecutor was Inspector of Police *Kyaa*. The trial magistrate's record shows that after the first two prosecution witnesses (*Benjamin Kaloki* (PW1) and *John Muindi Anzere* (PW2) had testified the trial of the appellant was on several occasions adjourned until 17th January, 2001 when it resumed before the same trial magistrate. The prosecutor was the same Inspector *Kyaa*. The third prosecution witness *APC Benard Masinde* (PW3) testified and the prosecution closed its case. The trial magistrate then ruled that as the prosecution had established a *prima facie* case the appellant had a case to answer. The appellant, on being put to his defence opted to make unsworn statement. Before the appellant could make his unsworn statement the trial was adjourned to 26th January, 2001 when the appellant defended himself in an unsworn statement. But on that day (26th January, 2001) while the trial magistrate was the same (*Miss Siganga*) there was a different prosecutor in the name of Police *Constable Kenduiwo*.

We have given the foregoing narration of the appellant's trial because this appeal can easily be decided on one main ground viz that the prosecution was undertaken by an incompetent person contrary to the provisions of section 85(2) of the Criminal Procedure Code (Cap. 75 Laws of Kenya).

Section 85(2) of the Criminal Procedure Code provides:-

"The Attorney General by writing under his hand may appoint any advocate of the High Court or person employed in the public service not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case".

The effect of the foregoing provision is that to be appointed a Public Prosecutor, one must be either an advocate of the High Court or a person employed in the public service. In the case of a person employed in the public service, that person, if a police officer, ought to be a police officer not below the rank of an Assistant Inspector of Police.

As already stated at the commencement of this judgment the trial of the appellant commenced before the learned Senior Resident Magistrate on 27th October, 2000. The prosecutor was one *Kyaa* who was described as an Inspector of police, but towards the end of the trial when the appellant gave unsworn statement the prosecutor was *Police Constable Kenduiwo*.

From the foregoing it is clear that the trial of the appellant was conducted by *Inspector Kyaa* and *Constable Kenduiwo*. While *Inspector Kyaa* was qualified to conduct the trial, *Police Constable Kenduiwo* was not. Since *Constable Kenduiwo* was not qualified to act as a Prosecutor the trial of the appellant in which he (*Constable Kenduiwo*) purported to act as public prosecutor must be declared a nullity. Since this was one trial, the fact that an unqualified person (*Constable Kenduiwo*) conducted part of the trial, it must follow that the entire trial must be declared a nullity.

The issue of who is qualified to conduct a criminal trial was considered by this Court in its decision in the case of *ELIREMA & ANOTHER V. REPUBLIC* [2003] KLR 537, in which it was stated:-

“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”.

In that same case of *ELIREMA* (supra) this Court said:-

“It is, however, true that an inspector Wambua also conducted part of the prosecution. But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (i.e. the part conducted by Inspector Wambua) while at the same time holding that the other parts (i.e. the parts conducted by Corporals Kamotho and Gitau) are invalid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated”.

In the present appeal we would apply the foregoing and declare the appellant’s trial a nullity with the result that the conviction recorded must be and is hereby quashed and the sentence of death passed on the appellant set aside.

In view of what we have already stated we did not find it necessary to consider the submissions of *Mr. Ondieki* the learned counsel for the appellant and particularly so in view of the fact that *Mr. Kaigai* the learned Senior State Counsel conceded the appeal. In conceding the appeal *Mr. Kaigai* stated that the main issue to be considered was whether a retrial ought to be ordered. He was of the view that since there was contradiction in the evidence of the complainant the state would not insist on a retrial.

Taking all these matters into consideration we do not think it would be just to subject the appellant to a fresh trial. Consequently we order that the appellant, *SALIM ISSAH*, be released from prison forthwith unless otherwise lawfully held. Order accordingly.

DATED and DELIVERED at NAIROBI this 2nd day of February, 2007.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR