



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI

CRIMINAL APPEAL 222 OF 2002

1. DANIEL K. INGUTE
2. PATRICK ASEMBO
3. PAUL MALALA OWUOR..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya

Nairobi (Mbogholi & Mutitu, JJ.) dated 13<sup>th</sup> August, 2003

in

H.C.CR.APPEAL NO. 42 OF 1997)

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**JUDGMENT OF THE COURT**

The appellants herein, *DANIEL K. INGUTE*, *PATRICK ASEMBO* and *PAUL MALALA OWUOR* were arraigned before the Chief Magistrate's Court at *Kakamega* in *Criminal Case No. 473 of 1995* in which they were jointly charged with robbery with violence contrary to *section 296(2)* of the Penal Code. The particulars of the offence were that on the night of *7<sup>th</sup> and 8<sup>th</sup> March, 1995* at Nang'eni Sub-location West Wanga Location in Kakamega District of the Western Province jointly with others not before court, while armed with dangerous weapons namely pangas, simis, rungus and Somali swords robbed *Peter Chuma Khabakha* of his property namely one bicycle, utensils and clothings all valued at *K.Shs.10,000/=* and at or immediately before or immediately after the time of such robbery used actual violence on the said *Peter Chuma Khabakha*.

The appellants faced a second count in which they were jointly charged with arson contrary to ***section 332(a)*** of the Penal Code. This second count alleged that during the same night and at the same place jointly with others not before the court they willfully and unlawfully set fire to the dwelling house of ***Peter Chuma Khabakha***.

They were also jointly charged on the third and fourth counts with assault causing actual bodily harm contrary to ***section 251*** of the Penal Code.

The appellants were arraigned before the trial court on 3<sup>rd</sup> April, 1995 when the appellants took their pleas before the learned Principal Magistrate (Mrs. G. Ndenda). The appellants denied the charges and hence the case had to be fixed for hearing. The hearing of the trial did not commence until 1<sup>st</sup> September, 1995 when the case file was placed before a Senior Resident Magistrate and one Senior Sergeant Okumu appeared for prosecution. That appears to have been the beginning of problems in the prosecution of the appellants. The record of the trial court shows that on that day (1<sup>st</sup> September, 1995) the charges were read and explained to the three accused persons (the appellants herein). Each appellant denied the charges and the case was then fixed for hearing on 18<sup>th</sup> September, 1995. Come that date and the file was placed before a Senior Resident Magistrate for hearing. Sgt. Okumu appeared for the State. The hearing did not, however, commence and the trial was adjourned to a later date (13<sup>th</sup> October, 1995) when Sgt. Okumu again appeared for the State. After several adjournments, the trial finally commenced before the learned Senior Principal Magistrate (C. Kanyangi, Esq.) on 20<sup>th</sup> February, 1996 when Inspector Mwangi appeared for the State. The said Inspector Mwangi conducted prosecution of the appellants up to the close of the prosecution case when the appellants were put to their defence.

During the defence case which commenced on 17<sup>th</sup> October, 1996 one, Boiyo, appeared for the State. It was not clear from the record whether this Boiyo was a man or a woman but more importantly of what rank was this Boiyo. The defence case was adjourned after the appellant **Daniel Khaswen Ingute** (1<sup>st</sup> appellant) and **Patrick Asembo Wamukoya** (2<sup>nd</sup> appellant) had defended themselves. On 22<sup>nd</sup> October 1996 **Paul Malala Oduor** (3<sup>rd</sup> appellant) defended himself in a sworn statement. He was cross-examined by the prosecutor. The record shows that the prosecutor on that day was Sgt. Okumu.

We have gone into the issue of prosecutors in the trial court since we are of the view that this appeal will be disposed of on that one issue of whether there was a qualified prosecutor. This issue was carefully and fully considered by this Court in the celebrated case of **ELIREMA & ANOTHER V. REPUBLIC [2003] KLR 537** in which the Court considered **Sections 77(1)** of the Constitution and **sections 85** and **86** of the Criminal Procedure Code and went on to state:-

***“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must 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”.***

In view of the foregoing, we have no alternative but to declare the appellants trial a nullity. It might be argued that part of the trial was conducted by a qualified prosecutor. That however would not validate the trial since there was only one trial and if any part of it was materially defective the whole trial must be invalidated.

The next matter to consider is whether or not a retrial should be ordered in this case. The learned Senior State Counsel (Mr. J. Kaigai) conceded that Sgt. Okumu was an unqualified prosecutor and for that reason he conceded that the trial was indeed a nullity. He however,

asked for a retrial on the ground that this was a case in which life was lost and it was his view that evidence against the appellants was overwhelming.

On his part, Mr. Nabutete, the learned counsel for the appellants, submitted that as the appellants have been in custody for about **12 years** they should be discharged rather than being put through a retrial.

Whether a retrial should be ordered or not depends on the circumstances of each case. In this appeal, we have deliberately avoided dealing with the evidence that was adduced before the trial court since we had in mind the final orders that we were to make. We have considered the entire record and it would appear that this is a matter that should be thoroughly and properly heard. It is for that reason that we are of the view that in the interest of justice we order a retrial.

For avoidance of doubt, we wish to point out that as the superior court's attention was not drawn to this serious issue of an unqualified prosecutor conducting prosecution in the trial court, we hereby declare the trial of the appellants in Chief Magistrate's Court at **Kakamega Criminal Case No. 473 of 1995** a nullity. The result is that all the convictions recorded against the three appellants must be and are hereby quashed and the sentences set aside.

As we have ordered a retrial of the appellants, we further order that they be produced before court for a retrial before another magistrate competent to hear the matter as soon as is reasonably practicable and at any rate the matter should be listed for mention within **fourteen (14) days** with a view to fixing an early hearing date. Those shall be our orders.

*Dated and delivered at NAIROBI this 20<sup>th</sup> day of December, 2007.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**