



REPUBLIC OF KENYA  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**CRIMINAL APPEAL 114 OF 2006**

**PASCAL OUMA OGOLA ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kisumu (Tanui & Gacheche, JJ) dated 6<sup>th</sup> March, 2003*

**in**

**H.C.CR.A. NOS. 303 – 306 OF 2001)**

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**JUDGMENT OF THE COURT**

This is an appeal from a conviction and sentence of the High Court of Kenya at Kisumu (B. K. Tanui and J.W. Gacheche JJ) dated 6<sup>th</sup> March, 2003 in Criminal Appeal No. 304 of 2001.

The appellant is Pascal Ouma Ogola. Mr. D. I. Musau Senior Principal State Counsel appeared for the State. At the outset of the hearing Mr. Musau stated that he would concede the appeal due to persons unqualified to act as prosecutors having so acted at several stages in the proceedings.

The record makes it clear that the evidence of PW1 was led by P.C. Wanyonyi and the evidence of PW4 was led by Corporal Nyongesa. We agree with Mr. Musau that in these circumstances the trial was a nullity following the decision of this Court in *Elirema & Another v. Republic* [2003] KLR.

We have considered whether or not we should order a re-trial. The alleged offences were committed on 9<sup>th</sup> February, 2000 and the appellant has already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal to the superior court were as to identification and recognition in circumstances in which both the State Counsel and the court found not to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Musau that this is not a suitable case in which to order a re-trial.

We therefore order that the judgment of the superior court delivered on 6<sup>th</sup> March, 2003 be and is hereby

set aside and we quash the conviction and set aside the sentence imposed on the appellant.

The appellant Pascal Ouma Ogola shall be set free unless otherwise lawfully held.

*Dated and delivered at Kisumu this 23<sup>rd</sup> day of June, 2006.*

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**