



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, GITHINJI & DEVERELL, JJ.A.)

Criminal Appeal 196 of 2005
BETWEEN

JAMES MAINA NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at
Nyeri (Juma and Mitey, JJ) dated 1st March, 2002**

in
H.C.CR.A. NO. 2 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal from the decision of Juma and Mitey, JJ. on first appeal from the judgment of the Senior Resident Magistrate M. G. Rintari.

It is clear from the proceedings beginning on 7th July, 2000 that from the outset, the prosecutor was Senior Sergeant Kigera. He continued to appear as the prosecutor throughout the trial covering the evidence of the six prosecution witnesses and part of the trial within a trial until Inspector Muriuki took over as prosecutor on 21st September, 2000 the day on which the prosecution case was closed.

Senior Sergeant Kigera was not qualified under section 85 (2) of the Criminal Procedure Code Cap 75 to be a Court Prosecutor since he was a police officer below the rank of Assistant Inspector of Police.

It has been held that in cases in which an unqualified person acts as court prosecutor, in anything other than mentions, the proceedings are a nullity – see the case of **Elirema & Another v Republic** [2003] 1 KLR 537.

Mr. Orinda, learned counsel for the State, did not dispute the fact that the trial was a nullity but he submitted that, given the fact that the relevant events took place in July 2000 and the judgment was delivered on 1st March, 2002 a retrial should be ordered.

A retrial was opposed by Mr. M. Kahiga learned counsel for the appellant on the basis that the appellant was a young man intending to make a fresh start if given the chance and he had already spent 5

years in jail.

We have carefully considered this issue as to whether a retrial should be ordered and have come to the conclusion that it is not so long after the events giving rise to the charges against the appellant as to render a retrial impracticable.

We therefore order, pursuant to **Rule 31** of the Court of Appeal Rules, that the proceedings and respective judgments of the Chief Magistrate's Court at Nyeri in *Criminal Case No. 1990 of 2000* and High Court Criminal Appeal No. 2 of 2001 be set aside and that a retrial be conducted as soon as possible. The appellant is to remain in custody pending the outcome of the retrial or any order to the contrary by the trial court or the superior court.

Dated and delivered at Nyeri this 3rd day of November, 2005.

P. K. TUNOI

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR