



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Tunoi, O’Kubasu JJ A & Onyango Otieno, Ag JA)**

**CRIMINAL APPEAL NO 217 OF 2003**

**THOMAS OGAMBA NYAKUNDI**

**JAIRUS MOSE NYAKUNDI .....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENTS**

(Appeal from a judgment of the High Court at Kisii (Wambilyangah J)

dated 25th day of September 2002)

**JUDGMENT**

This is an appeal from the judgment of the superior court (Wambilyangah J) delivered on 25th September 2002. In the Memorandum of Appeal (which is stated to be petition of appeal) five grounds of appeal are set out but when the appeal came up for hearing on 25th November 2003, Mr Onsongo, counsel for the appellants, was of the view that the appeal could be decided upon one ground only which was to the effect that there was a mistrial before the Senior Resident Magistrate’s Court. The fourth ground of appeal stated:-

“4. The entire trial was a nullity as the court prosecutor was not a person entitled to prosecute on the basis of the provisions of section 85 (2) of the Criminal Procedure Code.”

The appellants herein, Thomas Ogamba Nyakundi and Jairus Mose Nyakundi 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 24th day of September 2001 at about 8.00 pm at Nyaigesa village Miruka sub location in Nyamira district of the Nyanza province jointly with others not before court while armed with pistols, pangas and rungus and other crude weapons they robbed Douglas Mongare Nyaundi of cash Kshs 5,157/= and a radio cassette make National Panasonic valued at Kshs 6,650/= all valued at Kshs 11,807/= and at or immediately before or immediately after the time of such robbery, used actual violence against him in order to obtain or retain the property so stolen. The trial commenced before the Senior Resident Magistrate, Mr K W Kiarie on 25th October, 2001. The prosecutor was PC Makori. It is recorded that three prosecution witnesses testified and the trial was then adjourned to 12th November 2001. There was, however, no hearing on 12th November 2001 as the trial was adjourned once again to 23rd November 2001, when Inspector Okoth (and not P C Makori) appeared for prosecution. Two witnesses were called by the prosecution and then the appellants defended themselves on oath.

They called two defence witnesses who also testified. Judgment was then reserved to 7th December, 2001, when the appellants were convicted as charged and each of them sentenced to death as mandatorily provided by the law. Their first appeal to the Superior Court was dismissed as already stated on 25th September, 2002. They now come before this Court by way of second appeal.

In this appeal a point of law has been raised to the effect that the entire trial was a nullity as the court prosecutor was not a person entitled to prosecute on the basis of the provisions of section 85(2) of the Criminal Procedure Code which 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.” (underlying provided)

According to the narrative we have given above as relates to the trial before the learned senior resident magistrate, the first portion of the prosecution was conducted by Police Constable Makori when three prosecution witnesses testified. The second portion of the prosecution was conducted by Inspector Okoth.

In view of the foregoing, Police Constable Makori did not, in law, have authority to prosecute as a public prosecutor as he was below the rank of Inspector of police. He was clearly not entitled to act as a public prosecutor.

It must follow, therefore, that the portion of the prosecution must be rendered a nullity, however, the part of the trial conducted by Inspector Okoth was valid. As there was only one trial and if any part of it was materially defective, the whole trial must, in our view, be invalidated.

This Court has dealt with this issue of prosecution by unqualified persons in its decision in *Roy Richard Elirema and Vincent Joseph Kessy v Rep* – Criminal Appeal No 67 of 2002 (unreported), which we would adopt in this appeal. We therefore declare that the trial of the appellants in which a police constable purported to act as public prosecutor is a nullity with the result that their conviction must be and is hereby quashed and the sentence of death passed on each appellant set aside.

What then must follow? Should we order a retrial or should we release the appellants? The alleged offence took place in September, 2001 in Nyamira district of Nyanza province. We have not been told that it would be difficult to trace the four main prosecution witnesses for a re-trial and since counsel for the appellants did not strenuously oppose a retrial, we are of the view that taking into account the circumstances of this case, the ends of justice would be served if we order a retrial. Accordingly, we order that there shall be a re-trial of the appellants. Meanwhile, the appellants who are to be re-tried on a non bailable offence are to be remanded in custody pending the retrial.

Dated and delivered at Kisumu this 28<sup>th</sup> day of November, 2003

**P.K.TUNOI**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO-OTIENO**

.....

**Ag JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**