**Muchoki v Republic**

**Division:** Court of Appeal of Kenya at Nakuru

**Date of judgment:** 3 March 2006

**Case Number:** 62/03

**Before:** Omolo, O’kubasu and Githinji JJA

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Criminal procedure – Prosecution of criminal cases – Rank of competent prosecutor – Presence of a*

*competent prosecutor a prerequisite for a valid trial – Whether the prosecutor*

*was qualified – Record of trial proceedings – Use of phrase “Coram as before” – Meaning of the phrase*

*“Coram as before” – Section 85(2) – Criminal Procedure Code.*

**Editor’s Summary**

The appellant was charged in the Chief Magistrate’s Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He pleaded not guilty to the offence on 10 September 1999. The case was then fixed for hearing on 8 November 1999 with the usual mentions to take place every two weeks up till trial. When the matter was mentioned before an Acting Senior Resident Magistrate on 5 November 1999, the record of proceedings showed that a police sergeant was present in the capacity of a court prosecutor. The case came up for hearing on 8 November 1999 as scheduled and in the record of proceedings for that day it was indicated that the Coram was as before. The court then proceeded to take the evidence of the first prosecution witness. The appellant was eventually convicted as charged and sentenced. His first appeal to the High Court was unsuccessful. He now appealed to the Court of Appeal on the ground that trial was a nullity as it had been conducted by an unqualified prosecutor. Counsel for the respondent did not support the conviction and conceded that the prosecution had been conducted by an individual who was not competent to do so.

**Held** – For a criminal trial to be validly conducted, it was obligatory that there be a prosecutor, either public or private, charged with the role of deciding what witnesses to call, the order in which the witnesses would be called and whether to continue the prosecution; *Roy Richard Elirema and another v Republic* applied. The use of the phrase “Coram as before” in the record of 8 November 1999 had to be taken as meaning that when the trial commenced on that day, Coram was as on 5 November 1999. There was nothing on record to show clearly that there had been a competent prosecutor present and prosecuting the case. The proceedings of 8 November 1999 were therefore a nullity as the prosecutor was not of the rank specified in section 85(2) of the Criminal Procedure Code. As the counsel for the respondent had not asked for the retrial of the appellant, an order for retrial would not be made. Trial declared a nullity, conviction quashed and sentence set aside.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Roy Richard Elirema and another v Republic* [2003] 1 EA 50 – **AP**

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