



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 128 OF 2013

FREDRICK KARIMI MUCHIRAAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (L. W. Gitari) at Kerugoya, Criminal Case

No. 176 of 2002 dated 14^h January, 2004)

JUDGMENT

1. **FREDRICK KARIMI MUCHIRA**, was charged with defilement contrary to **Section 145 (1)** of the **Penal Code** (now repealed) before **Kerugoya Principal Magistrate's Court Criminal Case No. 176 of 2002** where he was convicted and sentenced to serve 14 years in jail with hard labour. He was aggrieved by the conviction and preferred this appeal which unfortunately took so long to prosecute owing to what the Appellant's counsel termed as factors beyond his control.

2. The Appellant had raised Eight grounds in his petition but at the hearing of the appeal the Appellant's counsel hinged the appeal on just 3 grounds namely:

(i) That the prosecution of the appellant was largely conducted by unqualified person contrary to Section 85 of the Criminal Procedure Code.

(ii) That the charge sheet upon which the appellant was tried and convicted was defective.

(iii) That Section 200 of the Criminal Procedure Code was not complied with when there was change of magistrate after all the prosecution witnesses had testified.

3. This Court has noted that the 2nd and the 3rd ground relied on by the Appellant were not among those raised in the petition of appeal dated 21st January, 2004. The Appellant never sought for leave under **Section 350(2)** to either amend his petition or include a new additional ground in the appeal. The grounds will not as such be considered in this appeal as they are an after thought and the law does not permit the same to be considered. The Section (350(2) reads in part;

“.....the appellant or his advocate shall not be permitted at the hearing of the appeal to rely on a ground of appeal other than those set out in the petition of appeal.

This Court notes as a matter of law that the counsel who represented the Appellant in the trial court is the

same advocate who represented him also in the appeal and cannot claim that he was unaware or sure of the grounds of the appeal to be relied on in this appeal.

4. The only ground for this Court to consider in this appeal as such is the fact that the prosecution at the lower court was conducted by unqualified person as the prosecutor was a police constable while the law then provided that the mandate to prosecute by the Attorney General of Kenya could be delegated to a police officer of the rank of assistant inspector of police and above.

5. The Appellant's counsel citing the cases of **PETER MWANGI MBOGO & ANOR –VS- R [2005] eKLR** and Court of Appeal decision in **PAUL KOBIA M'IBAYA –VS- R (C.A.C.R.A. NO. 267 OF 2003 AT NYERI)** urged this Court to find that the proceedings at the trial that led to the conviction of the Appellant were a nullity because part of the proceedings were conducted by a P.C. Mwangi. I have looked at the proceedings at the trial court and noted that indeed part of the proceedings were conducted by one P.C. Mwangi as the prosecution case was conducted by him and it is only the defence and submissions part that was conducted by one Githinji – an inspector of Police. I found it a bit odd that the Appellant then duly represented did not raise an objection at trial about the incompetency of the prosecutor, but nevertheless in the light of what transpired it is clear that part of the proceedings and the significant part of it, at that were a nullity in view of provisions of the law and in view of the authorities cited.

6. Having found part of the proceedings a nullity especially the part that placed the Appellant on his defence, there was nothing to put him on his defence in the first place. In view of this, I do hereby quash the conviction and set aside the sentence.

This is a case that is fit in view of the circumstances to go for a

retrial but given the passage of time which is over 13 years now it is unlikely that any justice will be achieved by an order of retrial. For this reason and this reason alone, I decline to order a retrial and order that the Appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kerugoya this 23rd day of July, 2015.

R. K. LIMO

JUDGE

23.7.2015

Before Hon. Justice R. Limo

Court Clerk Mbogo

Magee for appellant present

Omayo for Respondent present

COURT: Judgment signed, dated and delivered in the presence of Magee for the appellant and Omayo for State.

R. K. LIMO

JUDGE

23.7.2015