REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 2 OF 2013

LESIIT, J

GALGALO JILLO DUBA…….…….....APPELLANT

V E R S U S

REPUBLIC.....…….....…RESPONDENT

JUDGEMENT

1. The Appellant Galgalo Jillo Duba was arraigned before the Moyale Senior Resident Magistrate's court on 23rd August, 2012 with one count of attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act. The particulars of the charge were that on the 20th August, 2012 in Moyale District within Marsabit County the Appellant willfully and unlawfully attempted to commit an indecent act which could cause penetration with his genital organ into the genital organ of H A a child aged 10 years.
2. The Appellant was convicted after a full hearing. He was sentenced to 10 years imprisonment on the 29th November 2012.
3. Being aggrieved by the conviction and sentence the Appellant filed his appeal on 14th January 2013. The Appellant hired the services of Ms. Nelima advocate who filed a supplementary petition and grounds of appeal on 23rd July 2014. The grounds of appeal in both petitions are as follows:

Appellants Grounds

1. **That the learned trial magistrate erred in law and facts by failing to note that the said victim was taken to hospital for medical examination after 72 hours contrary to the law.**

2. **That the learned trial magistrate erred in law and facts in putting me into jail for 10 years with no evidence to link me with the commission of crime in question.**
3. **That the learned trial magistrate erred in law and facts by failing to observe that no any exhibit produced to court to prove that there was a kind of such crime e.g underpants. That the learned trial magistrate erred in law and facts in conducting the trial partially and irregularly.**

4. **That the learned trial magistrate erred in law and fact by failing to give due consideration to my defence.**

5. **That since am relying on memory to compile my grounds of appeal and it is too hard to**

recall all that transpired during the time of my trial I beg to be furnished with the trial proceedings to appropriately recognize more grounds at the time of hearing of my appeal.

Advocates grounds

a. **That the trial was a nullity as the same was conducted by a prosecutor below the rank of assistant inspector of police contrary to section 86(2) of the Criminal Procedure Code.**
b. **That the evidence of the prosecution fell below the required proof of beyond reasonable doubt**.
c. **That the accused was not properly identified as the circumstances were not favourable to positive identification.**
d. **That the conviction was against the weight of evidence.**
e. **That the learned magistrate erred in law and in fact in disregarding the defense of the appellant**

4. The state was represented by Mr. Mulochi, learned Prosecution Counsel who did not oppose the appeal.
5. I have considered this appeal and being a first appellate court I have re-analyzed and re-examined the entire evidence adduced before the trial court by both the prosecution and defence. I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses and I have given due consideration for the same.
6. I am guided by the court of Appeal case of **Okeno V. Republic** 1972 EA 32 which set out the duties of a first appellate court as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424.

7. Miss Nelima relied on Ground 1 of the Supplementary grounds of appeal in which counsel urged that the trial was a nullity for reason the prosecution was conducted by a prosecutor who was below the rank of an Inspector of Police as prescribed under section 85(2) of the CPC. Counsel urged that one Sergeant Manora conducted the prosecution at the date of plea and equally on the date the Appellant gave his defence. Ms Nelima cited **Komo V. Republic (2010)1 KLR 256** and urged the court to acquit the Appellant on that ground.
8. On the issue of whether the trial was a nullity section 85(2) of CPC provides:

"85(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case."

9. Before the amendment of Act No. 7 of 2007 and Act No. 12 of 2012, S85(2) of the CPC provided that person to be appointed as Public Prosecutors should either be an advocate or a person employed in the Public Service as a police officer of a rank not below that of an Assistant Inspector of Police.
10. In the instant case the prosecution was led by Sgt. Manore on the 23rd August, 2012 when the plea was taken. He also prosecuted the case on 16th November 2012 when PW5's evidence was taken and during the ruling in the case which placed the Appellant on his defence was delivered. He was the prosecutor on 27th November, 2012 when the defence was taken.
11. Sgt. Manore was a Police Officer of a rank lower than an Acting or Assistant Inspector of police.

Unser Section 85(2) and section 88 of the CPC Sgt Manore was not authorized to prosecute the case before the trial magistrate.

12. I have considered the argument of Ms Nelima that the prosecutor in the trial before the trial court was not qualified to prosecute under section 85(2) of the CPC. I agree with the learned Appellant's counsel. Sgt Manore was not qualified to prosecute the case. That rendered the trial declared a nullity. That is in line with the court of Appeal decision **Elirema V. Republic 2003 KLR 53** where a trial conducted by an unqualified prosecutor was a nullity. I accordingly declare the trial before the trial magistrate a nullity.
13. In similar circumstances the Court of Appeal in **Bernard Lolimo Ekimat V. Republic CA No. 151 of 2004** considered whether a retrial could be ordered due to a defect in the trial for which the prosecution is to blame and held thus.

"**In the case of Ahmed Sumar V. Republic (1964) EA 481, at page 483, the predecessor of this court stated as follows:**

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where the conviction is initiated by a mistake of the trial court for which the prosecution is not to blame. It does not in our view follow that a retrial should be ordered."

14. The learned trial magistrate in this case was to blame for allowing an unqualified prosecutor to conduct the prosecution of the case. The conviction in this case is vitiated not for a gap in the evidence or a defect for which the prosecution is to blame. This court has therefore to consider whether a retrial is appropriate order to invoke in this case.
15. The court of appeal has given guidance on the issue when a retrial can be ordered in a case where the trial was defective. I will quote of the case of **Brajanza v. Republic (1957) EA.**

"**Whether the order of re-trial was right, it was only necessary to hold that, on a reasonably possible view of its meaning, the statement might be a confession which could, even if uncorroborated, support a conviction. Since we did so hold we considered that the order for retrial could not be said to have been wrongly made.**

It only remains to say that, since the retrial will take place, it would clearly be undesirable that we should give our own views as to the meaning which should be attributed to the statement, or as to the effect of other evidence on which the crown relies. It is possible that on the re-trial there may be more evidence against the appellant than was produced at the first trial. That is not either a reason against ordering a retrial or a reason in favour of it. The order was not made on the basis that the crown had failed to prove its case the first time, but might be able to do so the second time, and it could not properly have been made on that footing. We say no more than that there was evidence on the record indicating that on a retrial conviction might eventuate.

And in **Pius Olina and Another V. Republic CA 11 OF 1991** it was held:

"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are Ahmed Sumar v Republic, (1964) EA 481; Manji v. the Republic (1966 EA 343; Mujimba v. Uganda, (1969) and Merali and others v. Republic, 1971 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is cased to the accused. Whether an order for trial should be made ultimately depends on the particular facts and circumstances of each case."

In **John Kamau Njoroge 2006 Eklr** where it was held;

1. **There were no reasons for interfering with the concurrent findings of fact made by the trial**

court and the High Court on the first appeal.

2. **The discrepancy between the charge sheet and the evidence concerning the name of the place where the robbery occurred did not go to the substance of the charge or occasion any failure of justice.**
3. **On a charge of robbery with violence under the Penal Code, section 296(2), the fact that the weapon or instrument used in the robbery is not described a dangerous or offensive weapon does not generally speaking make the charge defective. It is sufficient if the weapon is described in the charge and shown by evidence to have been intended for use to cause injury. It is also sufficient if the other ingredients of the offence are proved.**
4. **In this case, the robbers were more than one and though perhaps the non firing home-made gun could not be classified as a dangerous or offensive weapon, the Somali sword which the appellant and his accomplice had was such a weapon.**
5. **The evidence against the appellant was overwhelming and he had been properly convicted.**

16. On the question whether I am of the opinion that a conviction may result upon a consideration of the admissible and potentially admissible evidence if a retrial were ordered. The conviction was based on identification made at 10 pm. PW2 who said he identified the Appellant as he ran away said he saw him with the aid of a torch which he (the Appellant) was carrying. The complainant had no torch. She did not say which part of the assailant she saw since she was seeing him as he ran away. Further the complainant did not say on what basis she identified the Appellant as the assailant. Failure to disclose that basis in her evidence in chief is fatal to the prosecution case. To order a retrial may lead to the prosecution closing gaps in its evidence. This will cause injustice to the Appellant.
17. The identification by PW2, the complainant's brother required corroboration as it was not positive. This is because as it was made under unfavorable conditions of lighting. PW2 also saw the back of the assailant. That identification was of very poor probative value.
18. I find that on a consideration of the admissible or potentially admissible evidence, a conviction may not result if a retrial were ordered. I decline to order a retrial
19. I order that the trial was a nullity and accordingly quash the conviction and set aside the sentence. The Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF SEPTEMBER, 2014.

J. LESIIT

JUDGE