IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 128 OF 2008

(From original conviction and sentence in Criminal Case No.111 of 2007 of the Senior Resident Magistrate's Court at Maralal – M.K. NYARANGO, SRM)

MICHAEL LENGUMON………....……………………APPELLANT

VERSUS

REPUBLIC………………………………………….RESPONDENT

JUDGMENT

This is an appeal from the decision of M. K. Nyarango, SRM, Maralal SRMCC 11/07. In the trial court, the appellant, Michael Lengumon was charged with the offence of unnatural offence contrary to **Section 162(1)** of the **Penal Code.**

It was alleged that on 23/3/07 in Samburu District, had carnal knowledge of S.L against the order of nature. He denied the offence and the case went to full trial whereby the prosecution called a total of 7 witnesses and the appellant gave an unsworn statement in his defence. He was convicted and sentenced to 21 years. He appeals against conviction and sentence. The grounds upon which he appeals are found in his petition of appeal and further grounds adduced in his written submissions as hereunder:-

1. **That the conviction was based on a single identifying witness;**

2. **The identification parade was unprocedural;**

3. **That the magistrate did not comply with Section 200 of the Criminal Procedure Code;**

4. **He did not understand the language of the court;**

5. **That the appellant's rights under S.72(3)(b) were violated;**

6. **That the prosecution case was not proved as required.**

Having perused the record of the lower court, I note that the case was heard by two magistrates. On 24/7/07, M. K. Nyakundi, SRM took the evidence of the complainant, S.L, a minor (PW1), P.L (PW2). On 23/10/07, M.K. Nyakundi, SRM took the evidence of Ngala Netuny Lagat (PW3) and the case was adjourned to 21/11/07. On that date the appellant appeared before M.K. Nyarango, SRM, who took over the hearing. There is nothing on record to show that Section 200 of the Criminal Procedure Code

was complied with. That section requires a magistrate who takes over proceedings partly heard by another magistrate, to inquire from the accused whether he wishes the court to proceed from where the preceding magistrate stopped, recall witnesses or cross examine them. Failure to comply with the said section vitiated the whole trial and it amounts to a mistrial.

So what next? Can this court order a trial? In the case of **Ahmed Sumar V Rep. (1964) EA 481**, the East African Court of Appeal set out what is to be considered before a retrial is ordered. The court said at page 483:-

"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 a conviction is vitiated 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. ….

We were also referred to the judgment in <u>Pascal Clement Baraganza V R (1951)EA 152</u>. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered when it is likely to cause injustice to an accused person."

The Court of Appeal applied the above principle in **Lolimo Ekimat V. R Criminal Appeal No. 151/2004** (unreported) where the court had the following to say:-

"There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

Though raised in the appellant's submissions, Ms Idagwa, learned counsel for the State did not address this ground of appeal.

I have perused the evidence adduced by the 7 prosecution witnesses and the defence of the applicant. So that the further hearing is not prejudiced, I will not go into an analysis of the evidence but on considering the potentially admissible evidence, a conviction may result from the retrial.

From the date of arrest on 2/5/07, the trial was concluded within one year as the appellant was convicted and sentenced on 29/4/08. He has been in prison for about 4 years now. He had been sentenced to 21 years. He has hardly served one quarter of the term. I also take into account the fact that the offence with which the appellant was charged is a very serious one, in which the complainant was a minor of 9 years old. The above considerations dictate that I order a retrial and I hereby do so.

I find it unnecessary to consider the other grounds of appeal. I therefore direct that the appellant be released from prison custody forthwith and placed in police custody to be produced before the Senior Resident Magistrate's Court, Maralal within ten (10) days of this day for a retrial before any other magistrate other than M.K. Nyarango, SRM or M. K. Nyakundi, SRM. Since this is a retrial the court should expedite the hearing. It is so ordered.

DATED and DELIVERED this 23rd day of March, 2012.

R.P.V. WENDOH

<u>JUDGE</u>

<u>PRESENT</u>:

The appellant in person - present

Mr. Nyakundi for the State

Kennedy – Court Clerk