REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 137 OF 2008

LESIIT J.

HUSSEIN IBRAHIM DAHIR…….....……APPELLANT
VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence of WAJIR Resident Magistrate Hon. Mr. INGUTYA S.R.M)

JUDGMENT

The appellant HUSSEIN IBRAHIM DAHIR was convicted by Wajir SRM'S court with one count of Rape contrary to section 140 of the Penal Code. He was sentenced to 30 years imprisonment.

The appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He sets out four grounds of appeal as follows:

1. **That I pleaded not guilty to the charge.**
2. **That the trial magistrate did not put into consideration the fact that the complainant is a married person and that the doctor who examined her did not mention me in connection with the matter.**
3. **That the honourable magistrate failed to consider the fact that there was a bad blood between the complainant and me and that former had hatched a plan to make me suffer for the rest of my life.**
4. **That the verdict of 30 years passed on me is too harsh and severe considering that there was no tangible evidence to uphold it.**
5. **That I am a father to two (2) school going children who depend on me for up keep.**

The state has conceded the appeal.

The facts of the case are that the appellant found the complainant walking from Tarbaj to Augaye. As the complainant knelt to pray, the appellant tied her up and raped her. While in the act a motor vehicle came and stopped and took both the appellant and complainant to Administration Police at Wajir D.C's office.

The doctor's report indicated complainant was mature aged 35 years, had a swelling around the nose and

inflammation of the cervical with discharge around genitalia.

The appellant's defence was that he did not commit the offence as there was no eye witness who testified in court.

I have carefully analysed and evaluated the evidence adduced before the lower court while bearing in mind the limitations accassioned to this court by reason of not seeing or hearing the witnesses.

This is the first appellate court and as such it is my duty as was stated in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). 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 findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

The appellant urged court to find that there was no corroboration for the complainant's evidence and order a retrial. He also urged that the sentence of 30 years was excessive.

Mr. Kimathi learned counsel for the state conceded to the appellant. Counsel urged that the offence was not proved because in his view, it was not possible that the complainant could have been able to hold onto the appellant while tied, when the vehicle approached them. Mr. Kimathi also urged that crucial witnesses were left out especially those who rescued the complainant.

If I understood Mr. Kimathi's submission, he was puzzled that a person whose hands were tied was still able to apprehend the offender. I agree that it sounds like stranger than fiction. However having perused the record of the lower court I am convinced that the appellant was of unsound mind.

The record shows that when the appellant was taken for plea before the court on 26th May 2006, the court was apprehensive of the appellant's mental status and he ordered for mental Assessment. When the Assessment finally came on 24th July 2006, he was found to be of unsound mind and an order made for him to be taken to Mathare Mental Hospital.

The appellant appeared in court next on 16th January 2007. The learned trial magistrate recorded that he was doubtful the appellant was of sound mind. The appellant appeared in court next on 16th January 2007. On 5th July 2007, the learned trial magistrate recorded that he was doubtful the appellant was of sound mind. He sent him back to Mathare Hospital on 26th July 2007. The appellant was taken to court on 2nd April 2008. The case was finally heard on 5th May 2008.

It was clear that the prosecution was experiencing difficulty getting its witnesses and finally had to close its case before calling very crucial ones.

I went into that length to demonstrate procedural flaws in the trial process of the appellant's case. The first flaw is the obvious disregard to the provisions of S.163(2) & 3 of the Criminal Procedure Code. The section provides:

"(1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Attorney-General.

(2) The Attorney-General shall thereupon inform the court which recorded the finding concerning that person under section 162 whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

(3) In the former case, the court shall thereupon order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it, and shall deal with him in the manner provided by section 164; otherwise the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody and thereupon he shall be released, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.".

After postponement of the appellants trial on the 24th July 2006 for reason he was of unfit to stand trial for being of unsound mind as envisaged under s.162 of the CPC, the learned trial magistrate should have required the Attorney General (or his nominee) to make an election in writing as required under s.163(2) of the CPC. Same requirement should have been met after each postponement of the trial on the basis of the appellant's unsoundness of mind to stand trial.

I have the full lower court record with me. I see no evidence, either in writing, or in court proceedings showing that the provisions of S.163 (2) of the Criminal Procedure Code were complied with. The provision of S.163 (2) is worded in mandatory words.

Failure to comply with the provision is a serious procedural defect. It also has an additional impact in that it denies the appellant a legal right to have the benefit of the Attorney General to reconsider whether to proceed with the charge facing him or not.

This court cannot imagine or presume how the Attorney General could have exercised his discretion in this case. I think that the persistent non compliance with these provisions rendered the proceedings a nullity. The appellant was of unsound mind, most probably even at the time he committed the offence. The court should have allowed him to enjoy all the benefits of the law accorded persons found to be of unsound mind at the trial. Accordingly I set aside the conviction and sentence in this case.

The issue to determine is whether to order a retrial There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic** H.C. Criminal Appeal No. 223 of 2003. They are as follows:-

"In the case of Ahmend Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to 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 a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in my view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

"We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a 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 interest of justice require it and should not be

ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of <u>Bernard Lolimo Ekimat Vs. Republic</u> Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

"There are many decisions on the question of what 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."

I have considered that the offence with which the appellant was charged was is a serious one. The conviction entered herein vitiated by a mistake of both the court and the prosecution. The court is to blame by failing to call for compliance to s.163 (2) of the CPC by the prosecution. The prosecution is to blame by ignoring the said prosecution. In such a circumstance a retrial may not of necessity be ordered in the instant case, I considered that the appellant was arraigned in court for this case on 26th May 2006. He was sentenced to 30 years imprisonment in 2008. The appellant was found to be of unsound mend before the trial. That caused a delay in the hearing and disposal of the case. The prosecution was unable to procure attendance of all its witnesses and was forced to close its case prematurely. I do decline to order a retrial. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Taking all these into account, I find that the interests of justice do not require a retrial to be ordered in this case.

I do decline to order a retrial. I order that the appellant be set at liberty forthwith unless he is otherwise held.

Dated, signed and delivered this 28th day of July 2011

LESIIT, J
<u>JUDGE</u>