

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 127 of 2009

(From original conviction and sentence in Criminal Case No. 321 of 2002 of the Chief

Magistrate's Court at Nakuru – H. Wasilwa {SRM})

SAMUEL KAMAU WAITHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **Samuel Kamau Waithaka** was charged with **defilement of a girl** contrary to **section 145(1)** of the **Penal Code**. The particulars of offence as stated in the charge sheet read as follows: On the 9th day of February 2002 in Nakuru District within Rift Valley Province (*the appellant*) had carnal knowledge of S.W.K a girl of the age of four years. The appellant was tried at the Chief Magistrate's Court Nakuru and was, on the 1st August, 2006 convicted on the charge and sentenced to 25 years imprisonment with hard labour.

Aggrieved by both the conviction and sentence he filed this appeal citing five grounds as stated in the petition of appeal dated 1st August 2006. The state opposes the appeal. Although not raised in the original petition but included in the written submissions filed and referred to as a supplementary ground of appeal, the appellant has raised the issue of the prosecution's case having been conducted by an unqualified person contrary to the law. This is a ground that court would consider in its own notion even if not raised by an appellant, since the same goes to the validity of the proceedings and judgment under challenge. The appellant invited this court to note that a police Sgt by the name Winnie conducted the prosecution's case contrary to **section 85(2)** of the **Criminal Procedure Code**.

Although **section 85(2)** of the **Criminal Procedure Code** has since been amended under **Act No. 7 of 2007** which removed the limitation as to the rank of a police prosecutor, this trial was conducted in the year 2002 under the old law. The law then in force provided under **section 85(2)** as follows:

“The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.”

The appellant has cited the celebrated decision of **Eliremah & Anor. vs. Republic [1985]KLR 537** to support this ground of appeal. Although he recognizes the fact that an acquittal is not automatic the appellant has asked the court not to order a retrial on the basis that it would not be in the interests of justice to do so since the same would only amount to giving *‘the careless prosecution a chance to correct there (sic) mistake’* to the prejudice of the appellant. I have examined the record of the lower court and do note that the said Sgt. Winnie is recorded to have acted as the prosecutor in the case and she is the one who led PW1 to PW4 in giving their testimonies. Although one Chief Inspector Obore is shown to have taken over later in the proceedings that does not, in the view of the court, validate the proceedings herein. As was stated in the case of **Nyakundi & Anor vs. Republic [2003] KLR 704**, if any part of a trial is materially defective the whole trial must be invalidated in view of the fact that there was only one trial. I accept the appellant's position that his trial was a nullity and his appeal succeeds on that ground. However considering the evidence, which I have carefully examined, analysed and re-evaluated I am of the view that the same is capable of supporting a conviction. There is a minor victim of this offence and it is neither her fault that the prosecution was conducted by unqualified person. The victim in the case is equally entitled to the protection of the law and due process. This court must, therefore consider her interests as well in deciding the way forward. The appeal being successful on the above ground, the conviction of the appellant is hereby quashed and sentence set aside. However, in view of what is stated above, I order that there be a retrial before any other magistrate than Hon. H. Wasilwa, Hon. M. Onditi and Hon. H. Nyaga, shown in

the record to have participated one way or another in the previous proceedings.

Dated signed and delivered at Nakuru this 13th day of November, 2009

M. G. MUGO

JUDGE