REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 108 of 2007

JOHN MAINA KARIUKI…….....…..... APPELLANT

VERSUS

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Resident Magistrate's Court at Mukurweini in Criminal Case No. 326 of 2005 by V.W. NDURURU, - Ag. SRM)

J U D G M E N T

JOHN MAINA KARIUKI was charged with one count of attempted rape contrary to *section 141* of the Penal Code and an alternative count of indecent assault on a female contrary to *Section 141 (1)* of the Penal Code, all in the Resident Magistrate's Court at Mukurweini. All the offences were alleged to have been committed on 16th May, 2005 in Nyeri District. After a full trial of the case by three different Magistrates and at different times, the appellant was found guilty, convicted and sentenced to three years imprisonment in respect of the main count. The learned Magistrate correctly made no finding with regard to the alternative count. The appellant was aggrieved by the conviction and sentence. He therefore lodged the instant appeal through **Messrs Peter M. Muthoni & Co. Advocates**.

I need not set out the grounds of appeal as the appeal was conceded to by the state when it came up for hearing before me on 24th July, 2008. The state through **Ms Ngalyuka** conceded to the appeal on the grounds that the case was presided over by three Magistrates at different times without due observance of the mandatory provisions of *Section 200 (3)* of the Criminal Procedure Code. Upon conceding the appeal on that ground, the learned state counsel nonetheless urged me not to consider ordering a retrial on the grounds that the appellant had served a substantial portion of the sentence imposed before he was released on bail pending appeal.

Mr. Muthoni, learned counsel for the appellant welcomed the decision by the state to concede to the appeal. However he too was opposed to an order for a retrial. He advanced the following grounds in support of his position, that such an order will not meet the ends of justice, that the appellant would be prejudiced as he had already served almost a year in prison before he was released on bond pending appeal, and finally that the appellant's health status had deteriorated.

I have perused the record of proceedings. It is true that the appellant was tried by three different Magistrates to wit: **Ms. Mutuku, RM, R.B. Mecha, RM** and **V.W. Ndururu, RM. Ms. Mutuku** heard the evidence of PW1, PW2 and PW3. Thereafter **Ms. R.B. Mecha** took over the case in unexplained circumstances and handled it until the defence. At the defence hearing, **V.W. Ndururu** took over the case also in unclear circumstances. It is apparent that in taking over the case from the previous Magistrates, the incoming Magistrates were oblivious of the mandatory provisions of *Section 200 (3)* of the Criminal Procedure Code. It would appear that the in coming Magistrates simply walked into the proceedings and without informing the appellant of his rights under *section 200 (3)* of the Criminal Procedure Code proceeded to preside over the case. As a result, the appellant's rights to determine how the trial should proceed before the incoming Magistrate were breached. In the case of **KARIUKI VS REPUBLIC (1985) KLR 504,** the court held interalia:-

"……**Under** *Section 200 (3)* **of the Criminal Procedure Code (Cap 75) an accused person is entitled to demand that any witness be re-summoned and reheard and a duty is imposed on a succeeding**

Magistrate to inform the accused person of that right…….. The assumption of jurisdiction by the succeeding Magistrate without informing the appellant of his right was wrong and the trial by the succeeding Magistrate was a nullity….."

In the case of **RAPHAEL VS REPUBLIC (1969) EA 544**, a Tanzanian case in which the court was deliberating on the same provisions of the law stated:-

"…….**It is a prerequisite to the second Magistrate's exercising jurisdiction that he should appraise the accused of his right to demand that the witness or any of them be re-summoned and reheard under** *Section 196* **of the Criminal Procedure code….. If the second Magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and the trial is a nullity……"**

These two cases are on all fours with the circumstances obtaining in this case. Accordingly I find that the lack of compliance with *Section 200 (3)* of the Criminal Procedure Code by both **R.B Mecha** and **V.W. Ndururu** rendered the proceedings fatally defective and a nullity therefor.

As urged by the learned state counsel, I do therefore hereby declare the trial a nullity, and set aside the conviction entered and sentence imposed.

I must now consider whether to order a retrial. An order for retrial should not be made if it will cause injustice, hardship or prejudice to the appellant. Such an order should only be made in the interest of justice. It should not be made if it will accord the prosecution an opportunity to fill in gaps in their evidence and finally a retrial should not ordered unless the court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. See generally **FATEHALI MANJI VS REPUBLIC (1966) EA 343, AHMEDALI ALI DHARAMSHI SUMAR VS REPUBLIC (1964) EA 481, M'KANAKE VS REPUBLIC (1973) EA 67 and MWANGI VS REPUBLIC (1983) KLR 522.**

No doubt the offences with which the appellant was charged are serious as they touch on chastity of women. The mistake that has occasioned the nullification of the proceedings cannot be blamed or visited upon the complainant. However, I am of the view that the ends of justice will not best be served by an order of retrial. Something tells me that there is much more than meets an eye in this whole episode. There is no doubt that the appellant and complainant had some sort of relationship. The appellant was sentenced to three years imprisonment. He was doing jail term just before he was released on bond pending appeal on 6th February, 2008. Infact he served nine months of the jail term. In those circumstances can it really be said that should the appellant undergo retrial no injustice or prejudice will be occasioned to him? If the self same evidence on record was be tendered at the retrial, I doubt whether a conviction may result.

For all these reasons, I decline to make an order for the retrial of the appellant. Instead I order that he be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of September, 2008.

M.S.A. MAKHANDIA

JUDGE