REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 67 of 2004

ISAAC WANYONYI NYONGESA.....APPELLANT

VS

REPUBLIC .....RESPONDENT

(Arising from Original SIRISIA RM CR. NO.313 of 2003)

JUDGMENT

The appellant herein – one Isaac Wanyonyi Nyongesa was married to the complainant Beatrice Khisa Nasimiyu. It was alleged that on the night of 16.6.1996, he quarreled her and beat her up very badly as a result of which she was later taken to hospital and hospitalized for a while. She told the trial court that the said beating affected her spinal cord and even as at the time of the trial, she still had not healed completely.

Following the said beating, the appellant was arrested and charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He denied the charge. The matter went to full hearing after which he was found guilty and convicted. He was sentenced to serve 2 years imprisonment. Being dissatisfied with that conviction and sentence, he preferred this appeal. He was released on bail pending appeal a few days later. He filed his appeal through Onchiri & Co. Advocates. He cited 7 grounds of appeal in what he calls a "***Memorandum of Appeal"*** which I must say is unknown in the Criminal Procedure Code. I noted however that ground 2 of the appeal is to the effect that trial before the subordinate court was prosecuted by an unqualified prosecutor in contravention of the provisions of section 85 (2) of the Criminal Procedure Code.

The appeal was allowed on that ground alone since it is now settled law following the case of ***ELIREMA & ANOTHER -VS- REPUBLIC (CR. APPEAL NO.67 of 2002)*** that any proceedings conducted by a prosecutor who is not a qualified prosecutor under section 85 (1) of the Criminal Procedure Code are a nullity.

Having allowed the appeal, the court invited submissions on the issue as to whether a retrial should be ordered or not. That now is the subject of this ruling. Should the appellant be retried for the said offence or not? There are many decisions on the question of what appropriate case would attract an order of retrial but basically, the principle that has been acceptable to court 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 the interests of justice require it.

In the case of ***BRAGANZA -V- R [1957] EA 152*** the Court of Appeal for East Africa held as follows:

"***A retrial should not be ordered unless 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 interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."***

A few years later, the same court in ***AHMED SUMAR –V- REPUBLIC [1964] EA 481 at page 483*** in considering the same issue as to whether to order a retrial or not held that:-

"***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."***

In our case, we can confidently say that the nullification of the trial before the trial court has been caused by the prosecution. Reason being that the duty to appoint qualified prosecutors and to ensure that cases are lawfully prosecuted lies squarely on the shoulders of the Attorney General and not on the court. The prosecution was therefore to blame for this mistake. If we were to apply the principle laid down in the ***AHMED SUMAR CASE [SUPRA]*** then we would not order a retrial of the appellant. Be that as it may, as stated earlier, the court must also go further and consider the peculiar circumstances of each case as pointed out by the Court of Appeal in ***BENARD LOLIMO EKIMAT -V- R in CRIMINAL APPEAL NO.151/2004.***

In this case, I have gone through the evidence adduced before the trial court. I have no doubt in my mind that the evidence adduced before the trial court was cogent and sufficient to support the conviction against the appellant. Under different circumstances,

I would not fault that conviction. What disturbs me however is that the incident is said to have taken place in 1996. The P3 form was completed on 29.9.2003 which is 7 years later. Indeed, it was completed after the appellant had already been charged and taken to court. From the proceedings, it also came out that the appellant had been charged earlier before Kimilili Court but that case was withdrawn under section 87 (a) of the Criminal Procedure Code. This left me wondering "***on the strength of which P3 form had he been charged?"***

The issue for this court to consider is whether it will be fair and just on the part of the appellant for him to be subjected to a 3rd trial over the same subject matter for an incident that happened about 11 years ago. I appreciate that he did not serve the sentence and was thus not incarcerated. From the P3 form on record, the degree of injury was classified as "***harm"*** and this negates or contradicts the complainant's assertion that she had still not recovered 7 years down the line.

My considered view in this matter is that it would not be in the interests of justice to subject the appellant to another trial. This appeal is therefore allowed entirely. There will be no retrial. The conviction in the trial court is hereby quashed and the sentence of 2 years imprisonment set aside.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 19th day of June, 2007 in the presence of:- Mr. Situma for Onchiri for the appellant and Mr. Ndege for the State.