

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 332 of 2004

PATRICK MITHAMO GITHINJI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the conviction and sentence of P. C. Tororey, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 1139 of 2003 at Nanyuki)

JUDGMENT

The Appellant was charged before the lower court with a count of defilement of a girl under 14 years contrary to *Section 145 (1)* of the Penal Code. He also faced an alternative count of indecent assault on a female contrary to *Section 144(1)* of the Penal Code. He was convicted of defilement and was sentenced to life imprisonment. He preferred an appeal against conviction and sentence. When the matter came up before court the State conceded to the appeal because the proceedings at the lower court had been conducted partly by a Police Constable. Indeed the Court has perused the proceedings and it is correct that when the evidence of P.W. 1 and P.W.2 was recorded, prosecution was led by P.C. Muli. It is now well settled that where prosecution is undertaken by an unqualified person as per *Section 85* of the Criminal Procedure Code, such a trial is a nullity. This was well set out in the case of **ELIREMA -V- REPUBLIC [2003] 1 E. A. 50**. The Court of Appeal had the following to say:

“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution.....for one to be appointed as a public prosecutor by the Attorney-General one must be either an advocate of the High Court of Kenya

person employed in the public service not being a police officer below the rank of an assistant inspector of police. We suspect the rank of assistant inspector must have been replaced by that of an acting inspector but the code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.”

That being the position the conviction and sentence against the Appellant cannot stand. The Court therefore does hereby quash the conviction of the Appellant and does set aside the sentence against the Appellant. The State in conceding the appeal requested that the Court would order a retrial of the Appellant. State Counsel submitted that the case was serious and since it is not very old, the occurrences were in May 2003, that a retrial be ordered since witnesses can be availed. The court does hereby order that the case for retrial be mentioned on 8th October at Nanyuki Senior Resident Magistrate's Court for the court to set date for the retrial.

The Court has considered the submissions made by both the Appellant and the State Counsel. Indeed the offence was serious and because of the intimation that the witnesses will be available the Court does hereby order that the Appellant be retried. In the new trial the court trying the Appellant should take into account the sentence already served.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE