REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 92 OF 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No.424 of 2002 – H.Wasilwa [S.R.M.])

HOSEA TANUI MAARAL…..……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant, Hosea Tanui Maaral was charged with the offence of **Rape contrary to section 140** of the **Penal Code**. The particulars of the offence were that on the 24th February 2002 at C F S, the appellant, jointly with another not before court, had carnal knowledge of J T without her consent. The appellant was alternatively charged with the offence of indecent assault on a female contrary to **Section 144(1)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, jointly with another not before court, the appellant unlawfully and indecently assaulted J T by touching her private parts. The appellant pleaded not guilty to the charge. After full trial, he was found guilty as charged on the main count and was sentenced to serve sixteen years in prison with hard labour. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

The appellant had raised several grounds of appeal challenging his conviction and sentence. However, at the hearing of the appeal, Mr. Njogu, learned State counsel conceded to the appeal on the sole ground that the appellant had been convicted in a criminal trial that was prosecuted by an unqualified police prosecutor. He urged the court to allow the appeal but order the appellant to be retried. He submitted that the prosecution had adduced overwhelming evidence in the vitiated trial. He submitted that the prosecution could still trace the witnesses who would be in a position to testify in the retried case. He maintained that the ends of justice would be met in this particular case by this court ordering the appellant to be retried. Mr. Kipkenei for the appellant, while welcoming the conceding of the appeal, was opposed to the appellant being retried. He submitted that the evidence that was adduced by the prosecution in the vitiated trial was not sufficient to sustain a conviction. Mr. Kipkenei poked holes at the evidence that was adduced by the prosecution in the vitiated trial. He submitted that the appellant had been in prison for the past three years and if he were to be retried it would subject him to suffering. He urged the court to discharge the appellant.

I have read the proceedings of the subordinate court. I have noted that a substantial part of the criminal case facing the appellant was prosecuted by Sergeant Winnie. She was a Police Officer of a rank lower than that of an Assistant Inspector of Police. She was thus not authorised to prosecute criminal cases before a magistrate's court in accordance with the provisions of **Section 85(2)** of the **Criminal Procedure Code**. In **Eliremah & others vs Republic [2003] KLR 537**, the Court of Appeal held that where such a police officer prosecutes criminal cases before a magistrate's court, the proceedings thereto will be a nullity. I have no option but to declare the proceedings before the trial magistrate's court that led to this appeal to be a nullity. The conviction of the appellant is quashed. The sentence imposed is set aside.

The issue that remains for determination by this court is whether the appellant should be retried. Mr. Njogu submitted that there was overwhelming evidence that was adduced by the prosecution in the vitiated trial that would lead to the conviction of the appellant if this court were to order the appellant to be retried. He further submitted that the witnesses would be easily traced if a retrial was ordered. On his part, the appellant vehemently objected to being retried. Mr. Kipkenei for the appellant submitted that the

evidence adduced by the prosecution in the vitiated trial was not sufficient to sustain the conviction of the appellant. He maintained that it would not serve the interest of justice if the appellant were to be retried. He urged the court to discharge the appellant.

The principles to be considered by this court in deciding whether or not to order a retrial are well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic C.A. Criminal Appeal No. 151 of 2004** (Eldoret) (*unreported)* that:

"***In the case of*** *Ahmed Sumar v Republic* ***[1964] EA 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 our view follow that a retrial should be ordered***".

The court continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] EA 152****. In this judgment the Court accepted the principle that 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".*

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 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 interests of justice require it."

In the present appeal, the appellant was charged with the offence of rape. According to the complainant, she was raped by the appellant and another as she was walking home from a party which had been held at a house of a neighbour. The incident was alleged to have taken place on the 23rd February 2002. The appellant was convicted and sentenced to a custodial sentence on the 23rd March 2003. I have perused the charge that the trial magistrate considered when she convicted the appellant. The said charge was defective. It failed to include the word "*unlawful*" before the words "*carnal knowledge*." It was imperative that before a conviction could ensue, the charge should have been properly drawn. Secondly, since the conviction of the appellant in the vitiated trial, a new legal regime is now operational after the enactment of the **Sexual Offences Act** in 2006. It is therefore evident that the appellant would be subjected, first to a retrial where the prosecution would have an opportunity to amend the charge which was defective. They would further have a chance to have the appellant charged under a new legal regime.

I think it will not serve the end of justice if the appellant is subjected to a process of retrial where the prosecution would be given an opportunity to fill up the gaps in its case. Further, the appellant has been in prison, serving the sentence which was imposed by the trial magistrate in the vitiated trial for a period of three years and eight months. It would be unfair for the appellant to be retried taking into consideration the period that he has been in prison. The court which would hear the case, if retrial were to be ordered, may or may not consider the period that the appellant was in prison in the vitiated trial. In the present case, the ends of justice would be served by the proceedings against the appellant being terminated.

The appellant is consequently discharged. He is ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 14th day of December 2007

L. KIMARU

JUDGE