REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 218 OF 2004

TOM OMUKUTI ABISAI……...……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal

Case No. 330 of 2002 –R. Kirui & T. Wekulo[S.R.M.]

JUDGMENT

The appellant, Tom Omukuti Abisai was charged with **Rape contrary to Section 140** of the **Penal Code**. The particulars of the offence were that on the 14th October 2001, at Nakuru Township, the appellant jointly with another not before court, had unlawful carnal knowledge of GW 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, the appellant unlawfully and indecently assaulted G W by touching her private parts. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main charge of rape. He was sentenced to serve five years imprisonment. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting. He particularly raised two grounds of appeal which challenged the manner in which the criminal proceedings against him were conducted before the trial magistrate's court. He was aggrieved that he had been prosecuted by an incompetent police prosecutor who was of a rank lower than that of an Inspector of police. He faulted the trial magistrate who took over the conduct of the proceedings after the previous magistrate had ceased having jurisdiction for failing to comply with the provisions of **Section 200** of the **Criminal Procedure Code**.

At the hearing of the appeal, Miss Opati for the State conceded to the appeal on the grounds that the trial before the subordinate court was vitiated by the non-compliance with the provisions of **Section 200** of the **Criminal Procedure Code**. She however asked the court to order that the appellant to be retried. Mrs Ndeda for the appellant was not keen on the appellant to be retried. She submitted that it would be unfair to subject the appellant to a retrial in view of the period that the case had remained pending in court. She pleaded with the court to terminate the proceedings.

I have perused the proceedings of the trial magistrate's court from which this appeal arose. I noted that part of the proceedings before the subordinate court was prosecuted by Sgt. Winnie. Sgt Winnie led PW4 and PW5 in their evidence on behalf of the prosecution. Sgt. Winnie was a police officer of a rank lower than that of an Assistant Inspector of police and was not therefore authorised to prosecute criminal

cases before a magistrate's court in accordance with the provisions of **Section 85 (2)** of the **Criminal Procedure Code**. The Court of Appeal in **Eliremah & others vs Republic [2003]KLR 537** held that where such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto would be a nullity.

This court further notes that when the convicting magistrate took over the conduct of the proceedings on the 11th June 2003, she asked the appellant if he wished to have the three witnesses who had earlier testified recalled so that they could be re-examined. The appellant's counsel expressed the appellant's wish to have the said witnesses recalled. However, inexplicably, when the trial resumed on the 2nd July 2003, the said witnesses were not recalled. The trial magistrate proceeded with the trial without recalling the said three witnesses. It was evident that the trial magistrate was in breach of **Section 200 (3)** of the **Criminal Procedure Code** that makes the requirement for the recall of the witnesses mandatory once an accused person expresses the wish that such a witness be recalled. The error by the trial magistrate made the proceedings and the subsequent judgment of the said court to be vitiated. (*See **Mudoola & Anor. vs Republic [1990] KLR 616** at page 618*). In the present case, I have no option but to declare the proceedings before the trial magistrate's court a nullity and as a result thereof quash the conviction and set aside the sentence imposed by the trial magistrate.

The issue that remains for determination by this court is whether an order should be made for the appellant to be retried. 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 case, the appellant was charged before the subordinate court on the 18th February 2002. He has been attending court for over five years. This does not include the period in which he was in prison before he was released on bail pending the hearing of this appeal. Miss Opati submitted that the appellant ought to be retried in view of the serious nature of the offence that he was charged with. Miss Opati did not however tell the court if the witnesses who testified in the vitiated trial would be able to be procured for the purposes of testifying in the retried case.

In view of the period that this case has taken, this court is of the opinion that it would be unlikely that the prosecution would secure all the necessary witnesses to testify in the retried case. This court has also taken into account the nature of the evidence that was adduced against the appellant in the vitiated trial. It was evident that if the same evidence were to be adduced before another court in a retrial, there is a

possibility that the appellant would be acquitted. This is due to the fact that other persons were alleged to have been involved in the commission of the offence against the complainant. It was clear that the evidence which was adduced in the vitiated trial may not be strong enough to sustain a conviction.

Taking into account the totality of the facts of this case, this court is of the view that it will not serve the ends of justice if the appellant is retried. The criminal proceedings against the appellant are hereby terminated. The appellant is ordered discharged. He shall be set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 6th day of December 2007

L. KIMARU

JUDGE