REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Milimani Law Courts)

Criminal Appeal 666 of 2003

SIMON GICHIA NG'ANG'A …….…….....…….…….……..APPELLANT

VERSUS

REPUBLIC……..…….....……..….RESPONDENT

JUDGMENT

The genesis of this Appeal is a charge sheet dated 28. 2. 2003 in which the Appellant, ***SIMON GICHIA NG'ANG'A*** was charged with one count of attempted rape contrary to Section 141 of the Penal Code and another count of assault causing grievous harm contrary to Section 234 of the Penal Code. The particulars of each count were stated in the charge sheet and I need not repeat them here.

Following a full trial, the Appellant was acquitted of the charge of attempted rape but convicted on the other count of grievous harm. Upon conviction, the Appellant was sentenced to 4 years imprisonment. He now appeals to this Court against both the conviction and sentence. He advanced seven grounds in his petition of Appeal. When the Appeal came up for hearing before me on 14th November, 2005, Miss Gateru appeared for the State, whereas the Appellant appeared in person.

Miss Gateru conceded to the Appeal and rightly so in my view. The concession was on the basis that one CPL Ongeri who led the entire prosecution case was not qualified to do so and that Section 85 (2) and 88 of the Criminal Procedure Code were thus breached. Miss Gateru the Learned State Counsel therefore invited me to declare the proceedings a nullity and quash the same.

I have perused the record of the proceedings and have confirmed that indeed CPL Ongeri prosecuted the entire case. That rendered the proceedings a nullity as it contravened mandatory and express provisions of the law. In the light of the Court of Appeal decision in ***ELIREMA & ANOR VS REPUBLIC (2003) KLR 537*** which held that such prosecution renders the entire proceedings a nullity, I have no choice in the circumstances but to set aside rather than quash the proceedings. This is on the basis of the holding in the case of ***PIUS OLIMA & ANOTHER VS REPUBLIC C.A. NO. 110 OF 1991*** in which the Court of Appeal stated:-

"…..***But since the Appeal has not been heard on its merits and the issue now before us is not for the quashing of the conviction of the Appellants, the proper order that should be made is to set aside the conviction of the Appellants by the superior Court rather than to quash it which could lead to a successful plea of autre fois acquit and to discharge the Appellants and set them free….***"

Miss Gateru urged me to order a retrial on the basis that the evidence on record was sufficient to sustain a conviction, that the witnesses who testified were readily available to testify again in the event that a retrial is ordered and finally that no prejudice would be occassioned to the Appellant as he had not served a substantial portion of his sentence. The Appellant as expected opposed an order for retrial stating that he had no control over the prosecution of the case. That he was sick and finally that he had served a substantial portion of the sentence imposed and indeed had only 4 months left on the sentence.

A retrial should not be ordered unless three conditions are met. One, that the original trial was a nullity or defective; two that the interest of justice require it and; three no injustice will be occasioned to the

Appellant if an order for retrial is made. See ***JACKSON MUTHARIA MWAURA & ANOR VS REPUBLIC CA NO. 58 OF 1988*** and ***PIUS OLIMA & ANOR (Supra).***

Indeed in the later case the Court stated:-

"…… ***The three conditions that must be satisfied are conjunctive and not disjunctive and one of them which must be present but which is absent in the Application before us; is that the trial in the superior Court cannot be said to have been defective……"***

While I do not doubt that the first condition has been met, I do not find so with regard to the last two conditions. The Appellant was sentenced to 4 years imprisonment on 4th July, 2003. According to the Appellant he has served a substantial portion of the sentence and is only left with 4 months to go. In the circumstances I am convinced that such an order would cause the Appellant injustice and prejudice contrary to the submissions by Learned State Counsel. Indeed if the order for retrial was to be made in the circumstances of this case it will cause the Appellant to suffer double jeopardy. I do not think that the interest of justice would require a retrial in this case being held. Accordingly I decline to order a retrial and in instead order that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 11th day of January, 2006.

…….

MAKHANDIA

JUDGE