

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Criminal Appeal 63 of 2004

ERICK KIPROTICH RONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Erick Kiprotich Rono was charged with two counts under the **Penal Code**. He was charged with the offence of abduction contrary to **Section 142**. The particulars of the offence were that between the 21st and the 23rd of September 2003 at Kaplelwa Village in Kericho District, the appellant abducted Sharon Chebet Langat from her mother Grace Langat without her consent. He was further charged with rape contrary to **Section 140**. The particulars of the offence were that between the 21st and the 23rd of September 2003 at Kaplelwa village Kericho District the appellant had carnal knowledge of Sharon Chebet Langat without her consent. The appellant was alternatively charged with having indecently assaulted the said Sharon Chebet Langat which offence was contrary to **Section 144(1) of the Penal Code**. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was found guilty on the main charges of abduction and rape. He sentenced to serve seven years and life imprisonment respectively in respect of the two counts. Being aggrieved by his conviction and sentence, the appellant duly filed an appeal to this court.

At the hearing of the appeal, Mr Gumo, the Learned Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the appellant had been prosecuted by a person, who, in law, was not qualified to prosecute criminal cases before a magistrate's court. He however urged the court to order the appellant to be retried in view of the serious nature of the offence that he had faced in the vitiated trial. On his part, Mr Moturi, Learned Counsel for the appellant, which welcoming the conceding of the appeal, submitted that the appellant ought not to be retried in view of the fact that he had initially been convicted in the vitiated trial on a defective and incompetent charge. Mr Moturi urged the court to discharge the appellant.

I have perused the proceedings of the trial magistrate from which this appeal arose. I have noted that the proceedings thereto were prosecuted by Corporal Kipsang. He is a police officer of a rank lower than that of an Assistant Inspector of police. He was thus not authorised to prosecute criminal cases before a magistrate's court. In **Eliremah & Anor –vs- Republic [2003]KLR 537**, the Court of Appeal held that when such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto shall be a nullity. I do hereby declare the proceedings herein to be a nullity as a result of which the conviction of the appellant is quashed and the sentence imposed thereto set aside.

The issue that remains for the determination of this court is whether or not to order that the appellant be retried. The principles to be considered by this court in deciding whether or not to order a retrial are well settled. In **Bernard Lolimo Ekimat –versus- Republic C.A. Cr. Appeal No. 151 of 2004 (Eldoret)** the Court of Appeal held that a retrial, *inter alia*, should not be ordered to enable the prosecution fill gaps in the evidence or aid the prosecution to rectify the mistakes in the charge. Further a retrial would not be ordered if the prosecution were to be blamed for the mistake that occasioned the vitiated trial to be declared a nullity; A trial would not be ordered if the potentially admissible evidence to be adduced during the retrial would not sustain a conviction; Finally a retrial can only be ordered if the interest of justice requires it.

Applying these principles to this case, it is my considered view that the appellant ought to be retried. Having perused the proceedings of the trial magistrate in the vitiated trial, it is clearly evident that there is potentially strong admissible evidence that may result in the conviction of the appellant. Further the complaint by the appellant that he was convicted on a defective charge only relates to one count. In my view, the fact that one of the three counts is, according to the appellant, defective, does not render the other two counts defective or incompetent. I have considered the serious nature of the offences that the appellant faced. The interest of justice demands that he should face a retrial.

In the circumstances therefore, I order that the appellant be taken before the Principal Magistrate, Kericho on the 8th of February 2006 where he shall take plea in the case to be retried. In the meantime the appellant shall remain in custody. He shall be at liberty to seek bail when he appears before the said Principal Magistrate, Kericho.

It is so ordered.

DATED at NAKURU this 1st day of February 2006.

L. KIMARU

JUDGE