REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 283 of 2003

STEPHEN NJOROGE …..……..…….....……..…..APPELLANT

VERSUS

REPUBLIC…….……..…….....……..….RESPONDENT

JUDGMENT

STEPHEN NJOROGE hereinafter referred to as the Appellant was arraigned before the Chief magistrate's Court Makadara on one count of defilement of an imbecile contrary to Section 146 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. At the conclusion of the trial the Appellant was found guilty on the main count and was sentenced to seven (7) years imprisonment with hard labour. The Appellant was further ordered to receive five (5) strokes of the cane.

The Appellant was aggrieved by the conviction and sentence and consequently lodged this Appeal. When the Appeal came up for hearing, Miss Nyamosi, learned State Counsel informed the Court that the State was conceding to the Appeal on a technicality. That the proceedings of the Lower Court on 7th August, 2002 were not clear. That the coram of that day merely read "***Coram as before."*** In the light of the decision of the Court of Appeal in ***LOLIMO EKIMAT'S CASE,*** the State was constrained to concede to the Appeal as the proceedings had thereby been rendered a nullity. The Appellant through Mr. Wandugi, Learned Counsel welcomed the decision by the State.

I have carefully perused the record of the subordinate Court, both original and typed and have confirmed that indeed on 7th August, 2002 when the hearing of the case commenced the coram of the Court was indicated as follows:-

"7. 8. 2002

Coram as before

Accused on bond – present

MISS KAMUNGU:

I am from Cradle watching brief for the Complainant. We are with Miss Gachu Advocate.

MRS. NYAKUNDI

RM

Mr. Ngare for Accused – present

PROSECUTOR:

Seven witnesses were bonded, including Dr. Kamau. I am ready to proceed. May the case proceed in camera in view of the nature of the charges.

MRS. NYAKUNDI

RM

COURT:

The Application is allowed. Hearing to proceed……"

Prior to this, the last coram entered properly in the Court record was on 2nd August, 2002. I agree that in the circumstances it is difficult to tell whether the person who conducted the case on behalf of the Prosecution on that date (7. 8. 2002) was qualified to do so pursuant to the provisions of the Section 85 (2) as read together with Section 88 of the Criminal Procedure Code, and also having regard to the Court of Appeal decision ***in ELIREMA & ANOR VS REPUBLIC (2003) KLR 537.*** Bearing in mind the Court of Appeal decision in the case of ***EKIMAT VS REPUBLIC CRIMINAL APPEAL. NO. 57 OF 2004 (ELDORET) UNREPORTED)*** I am bound to hold and do declare that the proceedings were a nullity for the aforesaid reasons. Consequently I set aside the conviction and sentence.

Miss Nyamosi urged me to order a retrial. In support thereof, she submitted that the error in the proceedings cannot be blamed on the Prosecution. That the Prosecution case against the appellant was overwhelming. That PW3 gave direct evidence. The Appellant was well known to her. She called him "Daddy" The Appellant was a step father to the Complainant. On the question of ***voire dire*** examination, Counsel submitted that PW1 was aged 15 years. She was therefore not a child of tender years to be subjected to ***voire dire*** examination by the trial magistrate. Counsel further pointed out that failure to point out as to which charge the Appellant had been convicted of was not fatal. Finally Counsel submitted that in the interest of justice a retrial should be ordered as the Complainant was traumatized.

Mr. Wandugi opposed the request for retrial. He submitted that it would not be in the interest of justice to do so. That the Appellant was convicted on 26th March, 2003. The Appellant has thereby served a substantial portion of the sentence. Indeed Counsel pointed out that the Appellant will be due for release in November, 2007. If a retrial is ordered, it will occasion great prejudice to the Appellant. Counsel also pointed that since the conviction of the Appellant, there has been changes in the law. If the retrial was ordered and the Appellant was convicted, he would face stiffer penalty today than when he was first chargedss. Counsel further submitted that the conviction was unsafe as the evidence adduced was basically hearsay. The Complaint being a minor, the Court did not conduct ***voire dire*** examination. That the Appellant was charged with 2 counts and on conviction the Court did not indicate on which count the Appellant had been convicted. Finally, Counsel submitted that considering the medical evidence adduced, the offence of defilement was not disclosed.

The purpose of a retrial is to call to the attention of the trial Court some error which was committed during the trial. Whether or not to order a retrial is discretionary. The discretion of the Court to order a retrial is one that ought to be exercised sparingly and with a great care. This exercise is not done randomly or capriciously but is grounded on well formulated principles as developed by our Courts over the years. The earliest Court of Appeal decision that laid down some of the considerations was ***FATEHALI MANJI VS REPUBLIC (1960) EA 343,*** in which it was held that:-

(i). In general a retrial will be ordered when the original trial was illegal or defective.

(ii). That each case must depend on its own facts and circumstances.

(iii). That an order of retrial should only be made where the interest of justice require it.

(iv). A retrial will not be ordered if by so doing an injustice will be caused or occassioned.

The case of ***ALOYS AWORI VS UGANDA (1972) EA 469*** introduced another consideration which is:-

(v). A retrial will not be granted for purposes of enabling the Prosecution to fill up the gaps in its evidence at the first trial and

Finally in the case of ***RATILAL SHAH VS REPUBLIC (1958) EA 3*** it was further held that:-

(vi). A retrial should not be ordered unless the Court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result.

Applying these principles to the present case, it is clear that the original trial was illegal and or defective for want of a qualified public Prosecutor. However considering the facts and circumstances of this case, it is my view that it is so long after the events giving rise to the charges against the Appellant as to render a retrial impracticable. I am also not oblivious to the fact that the Appellant is just about to finish his jail term. If a retrial was to be ordered, it will occasion him injustice and or prejudice. He could as well suffer double jeopardy. More important however is that since the conviction of the Appellant, the sentence for the offence has since been enhanced from 14 years to life imprisonment. In the event that a retrial is ordered and is successfully conducted and a conviction returned, the Appellant will most probably suffer the stiffer penalty under the new law. This will occasion him injustice as well as prejudice.

Everything considered, I do not think that an order of retrial in the circumstances would be in the interest of justice.

In the premises, I decline to order a retrial and instead order that the Appellant be forthwith set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 5th day of April, 2006.

…….

MAKHANDIA

JUDGE