REPUBLIC OF KENYA

<u>IN THE HIGH COURT OF KENYA AT NYERI</u>

<u>Criminal Appeal 320 of 2003</u>

<u>GIBSON MUCHEKE</u>

GIBSON MUCHEKE MWANGI……………...……………APPELLANT

VERSUS

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

(Appeal from both conviction and sentence of the Senior Magistrate's Court at Murang'a in Criminal Case Number 209 of 2002 by G. K. Mwaura – S.R.M.)

<u>J U D G M E N T</u>

Gibson Mucheke Mwangi hereinafter referred to as the Appellant was tried and convicted by the Senior Resident Magistrate Murang'a for the offence of Rape Contrary to Section 140 of the Penal Code. He was sentenced to serve 12 years imprisonment and to receive 4 strokes of the cane.

Being aggrieved the Appellant has brought this appeal against his conviction and sentence. Learned Principal State Counsel Mr. Orinda has conceded the appeal on the grounds that the prosecution was conducted by an incompetent person. He is however urging this court to order a retrial contending that there was sufficient evidence to sustain the Appellant's conviction. Mr. Gacheru who appeared for the Appellant urged this court not to order a retrial as the Appellant has already gone through a full trial.

It is evident from the record of proceedings of the Lower Court that the case against the Appellant was conducted by police constable Machuki. This was a contravention of Section 85 (2) of the Criminal Procedure Code. The trial against the Appellant was therefore a nullity and his conviction cannot stand. There remains the issue of whether to order a retrial.

The case of ***Fatehali Manji v Republic [1966] E A 343*** provides guidance as follows: -

"***In general a retrial will be ordered only when the original trial was illegal or defective, it will not be***

ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a trial is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

In this case the Appellant's trial was defective as it was vitiated by the participation of the incompetent prosecutor. A perusal of the record of the lower court however reveals that there was sufficient evidence which if properly admitted could sustain the charge against the Appellant. Although the Appellant has served 3 years out of the 12 years imprisonment term imposed upon him, the charge was of a serious nature and it is in the interest of justice that the case be properly heard. Moreover although the offence was committed 5 years ago, it should not be difficult to get the witnesses who were the Complainant, her brother, a police officer and a Clinical Officer.

I therefore allow this appeal to the extent of quashing the conviction and setting aside the sentence. I order that the Appellant shall be remanded at Murang'a police station to be produced before another Magistrate (other than the one who tried him) for a retrial.

Those shall be the orders of this court.

Dated, signed and delivered this 29th day of May 2006.

H. M. OKWENGU

JUDGE