

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCR APP NO 239 OF 2003

SAMUEL KIRAGU KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Judgment and Conviction in the Senior Principal Magistrate's Court at Murang'a in Criminal Case Number 1002 of 2002 by G. K. Mwaura – S.R.M.)

J U D G M E N T

Samuel Kiragu Kamau, the Appellant herein was convicted by the Senior Resident Magistrate Murang'a of attempted Rape Contrary to Section 141 (1) of the Penal Code, and assault contrary to Section 251 of the Penal Code. He was sentenced to serve 7 years imprisonment on the first count and 2 years imprisonment on the second count. Being aggrieved by his conviction the Appellant has lodged this appeal.

Learned Principal State Counsel Mr. Orinda has conceded this appeal recognizing the fact that the prosecution of the case in the Lower Court was conducted by a police constable. I concur that P.C. Machuki the officer who prosecuted the case in the Lower Court was not a competent officer as provided under Section 85 (2) of the Criminal Procedure Code. The conviction of the Appellant cannot therefore stand as his trial was a nullity.

I further agree with learned Principal State Counsel that it would not be in the interest of justice to order a retrial as the Appellant has already served more than half the sentence in respect of count 1, and the full sentence in respect of count 2. I therefore allow this appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be forthwith set free unless otherwise lawfully held.

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

H. M. OKWENGU

JUDGE