



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 919 of 2003

*(From Original Conviction and Sentence in Criminal Case No.20425 of 2001 of the Chief Magistrate's Court at Makadara – Mrs. E. A. Nyaloti- RM).*

ANTONY MALILI NDAMBUKI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein, ANTONY MALILI NDAMBUKI, was convicted on one count of indecent assault on a female contrary to Section 144 (1) of the Penal Code. Upon conviction the Appellant was sentenced to serve five years imprisonment. Being aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal.

This is yet another case in which the Appellant's Prosecution in the trial Court was partly conducted by a person who was not qualified to conduct such Prosecution, to wit a Police Constable. Mrs. Kagiri, Learned State Counsel was thus constrained to concede to this Appeal on that basis. However, Counsel sought for an order of retrial. Mr. Kalwa welcomed the concession but was opposed to an order for retrial.

The record of the trial Magistrate's court shows that towards the end of the Prosecution case, one P.C Wanjohi, took up the Prosecution of the case and indeed led the evidence of PW4. Although this was only a portion of the trial; which was conducted by P. C. Wanjohi, the trial being only one, if any part of it was materially defective then the whole trial must be invalidated.

On the issue of who is qualified to prosecute in Criminal trials, the Court of appeal in **ROY RICHARD ELIREMA & ANOR (2003) KLR 537** stated as follows:-

*“..... For one to be appointed as a Public Prosecutor by the Attorney general one must either be an Advocate of the High Court of Kenya or a person employed in the Public service not being a Police Officer below the rank of an Assistant Inspector of Police, we suspect the rank of Assistant Inspector must have been replaced by that of acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as Prosecutors and the trial of the Appellant in which they purported to act as Public Prosecutors must be declared a nullity.....”*

In the ***ELIREMA CASE*** the two unqualified persons were Corporal Kamotho and Corporal Gitau. In the present Appeal, the unqualified person was of the lowest rank in the Police force to wit a Police Constable. That was clearly contrary to the provisions of Section 85 (2) as read together with Section 88 of the Criminal Procedure Code as correctly submitted by the Learned State Counsel.

In view of the foregoing P. C. Wanjohi was not qualified to act a Prosecutor and hence the trial of the Appellant in which he purported to act as a Public Prosecutor must be declared a nullity. I now do so with the consequence that the conviction recorded against the Appellant must be and is hereby quashed and the sentence set aside.

What next? Mrs. Kagiri asked me to order a retrial. What were her reasons? Counsel submitted that the offence was serious. That the Appellant was charged with defilement. The Complainant was a child of six years. She positively identified the Appellant as the offender. To counsel therefore the evidence against the appellant was overwhelming. Counsel maintained that it would be in the interest of justice for a retrial to be ordered. In concluding her submissions, the Learned State Counsel proclaimed that the witnesses were readily available to testify again if a retrial was to be ordered.

Mr. Kalwa opposed the order for retrial. He submitted that pursuant to Section 124 of the Evidence Act, the evidence of a minor requires corroboration which was not forthcoming in the instant case. Counsel further pointed out that there was no nexus between the spermatozoa found on the pants of the minor and the Appellant as well as the venereal disease diagnosed on the Complainant. Counsel maintained that in the circumstances the possibility that the complainant could have been defiled by another person other than the Appellant. Finally Counsel submitted that the Appellant was convicted three years ago and if a retrial was to be ordered in the circumstances it will occasion an injustice and or prejudice to the Appellant.

I have considered the submissions by both the state and the Appellant with regard to the order for retrial. The principles applicable to such case are clearly well settled. An order for retrial cannot be made unless the Appellate Court is of the opinion that on consideration of the admissible or potentially admissible evidence a conviction may result. An order for retrial should not be made if it will occasion injustice or prejudice to the Appellant. Such an order should only be made in the interest of justice and should not be made if it will accord the prosecution opportunity to fill in the gaps in the evidence previously tendered. See generally ***PASCAL BRAGANZA VS REPUBLIC (1964) EA 152, AHMED ALI DHARAMSHI SUMAR VS REPUBLIC (1964) EA 481, FATEHALI MANJI VS REPUBLIC (1966) EA 43*** and ***MWANGI VS REPUBLIC (1983) KLR 522***.

Counsel argued the matter as though the Appellant had been convicted on the main Count of defilement. The record reveals that the trial Magistrate found the evidence on the main Count to be insufficient to sustain a conviction and consequently acquitted the Appellant on that count. Instead she convicted the Appellant on the alternative Count of indecent assault on a female. That being the case the issue of corroboration, nexus between the spermatozoa and the venereal disease does not come into consideration.

I have no doubt in my mind that the evidence against the Appellant on the charge of indecent assault on a female was overwhelming and if the self same evidence was to be tendered a conviction is likely to result., the Appellant was convicted on 28<sup>th</sup> March, 2003 but was released on bail pending Appeal on 6<sup>th</sup> November, 2003. He had thus only served eight months out of the five years imprisonment term imposed. The Appellant thus cannot be heard to say that a retrial will occasion him prejudice or injustice. If anything such an order will be in the interest of justice. The offence committed is serious as it involved a minor of six years who may be traumatized by the experience for the remainder of her life. The state has stated that the witnesses are readily available to testify again in the event that a retrial is ordered.

I think that taking into account all these factors and in the interest of justice a retrial would be appropriate in the circumstances of this case. Accordingly I order that there be a retrial in this case. Towards this end the Appellant shall appear before the Senior Principal magistrate's Court at Makadara

on 10<sup>th</sup> July, 2006 for the retrial to commence before any other Magistrate of competent jurisdiction other than Mrs. E. A. Nyaloti, RM who presided over the initial case.

Dated at Nairobi this 28<sup>th</sup> day of June, 2006.

.....

**MAKHANDIA**

**JUDGE**