REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 18 OF 2005

RAPHAEL OMONDI MASINDE …..…………...……….…. APPELLANT

VERSUS

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

JUDGMENT

The Appellant, ***RAPHAEL OMONDI MASINDE*** (to whom I shall refer to as the Appellant in this Judgment) was charged in the subordinate Court with one count of rape contrary to Section 149 of the Penal Code. In the alternative he also faced a charge of indecent assault on a female contrary to Section 144 (1) of the Penal Code. He pleaded not guilty to the charges and the case came up for hearing first before Mr. Nyakundi, Chief Magistrate and later on, Mrs. Nzioka, Principal Magistrate. At the end of the trial, the Appellant was found guilty of the alternative count convicted and sentenced to 5 years imprisonment. The Appellant was dissatisfied with the same conviction and sentence and hence lodged this Appeal.

When the Appeal came up for haring before me on 28th June, 2006, Mr. Makura, Learned State Counsel conceded to the Appeal on two grounds that one, Section 200 of the Criminal Procedure Code was not complied with during the trial. The case was firstly heard by Mr. Nyakundi, Chief Magistrate before subsequently being taken over by Mrs. Nzioka, Principal Magistrate. The latter Magistrate failed to comply with the mandatory provisions of Section 200 of the Criminal Procedure Code. Two, from 9th November, 2004 upto 16th November, 2004, it is not clear from the proceedings whether there was a Prosecutor. All that is indicated in the proceedings on these occasions is "***Coram as before.***" Indeed when the ruling on no case to answer was delivered and the Appellant put on his defence, it is not indicated who the Prosecutor was. This was contrary to the provisions of Section 85 (2) as read with Section 88 of the Criminal Procedure Code. The proceedings were thus a nullity and Learned State Counsel urged me to so find.

As to whether there should be a retrial in the circumstances, the Learned State Counsel indicated that the State was not seeking a retrial. That the evidence on record was scanty and full of contradictions that are not easily reconcilable. In the circumstances if an order of retrial was to be made, there was no

likelihood that a conviction may be secured.

The Appellant for obvious reasons welcomed the States' gesture. Nonetheless he tendered written submissions in support of his Appeal which I have carefully read and considered.

I have anxiously considered this Appeal. The record shows that the case was first heard by Mr. Nyakundi who took the evidence of PW1 and PW2. Thereafter the case was taken over by Mrs. Nzioka who heard the evidence of PW3, made a ruling on no case to answer, presided over the defence and wrote the Judgement. Section 200 (3) of the Criminal Procedure provides in mandatory terms that:-

"…***..Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding Magistrate shall inform the accused person of that right…."***

From the foregoing it s apparent that a duty is imposed on the succeeding Magistrate to inform the accused person of his rights. In the instant case, there is nothing to indicate that the Learned Magistrate when taking over the case from the proceeding Magistrate had in mind this provision of the law. She never made any reference to it at all. She just took over the case and proceeded to hear the evidence of PW3. This was wrong and rendered the proceedings a nullity. In the case of ***<u>RAPHAEL VS REPUBLIC (1969) EA 544</u>*** it was held:-

"…***..It is a prerequisite to the 2nd Magistrate's exercising jurisdiction that he should appraise the accused of his right to demand that witnesses or any of them be re-summoned and reheard….if the second Magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and that trial is a nullity…"***

Similarly in the case of ***<u>KARIUKI VS REPUBLIC (1985) KLR 504</u>*** it was held:-

"…***.The Appellant having a right to re-summon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding Magistrate to inform the Appellant of such right, we think that the assumption of jurisdiction by the said succeeding Magistrate without informing the Appellant of his right, was clearly wrong and the trial by the succeeding Magistrate was a nullity……"***

This is what happened in the instant case as well. Indeed all these authorities are on all fours in the circumstances obtaining in the instant case. Accordingly I hold and determine that the assumption of jurisdiction by Mrs. Nzioka without alerting the Appellant of his rights under Section 200 (3) of the Criminal Procedure Code was illegal and rendered the proceedings a nullity. The Learned State Counsel was therefore right in conceding to the Appeal on this ground.

On the second ground, I note that the last time that the coram of the Court was properly recorded was on the 27th October, 2004. Thereafter the Court record as regards coram is merely reflected as "***Coram as before."*** Infact on the day that PW3 testified there is no coram at all. In the case of ***<u>BENARD LOLIMO EKIMAT VS REPUBLIC, CA 151 OF 2004</u>*** (unreported), the Court of Appeal had this to say in similar circumstances:-

"………***It is difficult to appreciate what the phrase "Coram as before" meant in the records……. As there was no coram entered in the record, it is not possible to know whether, if there was a Prosecutor on this hearing date, the same Prosecutor was of the rank specified in Section 85 (2) of the Criminal Procedure Code and was thus a qualified Prosecutor. We cannot assume, as urged by Miss Oundo that I. P. Irungu must have been the Prosecutor on 12th February, 2002 when the Prosecution case was presented……"***

The Court of Appeal then proceeded to hold that they were unable to conclude that the case was properly prosecuted as required by law and declared the proceedings a nullity relying heavily on the case

of ***ELIREMA & ANOR VS REPUBLIC (2003) KLR 537.***

In the instant case, although only a portion of the proceedings would appear to be impugned, that part cannot be separated from the rest and therefore it follows that the entire proceedings before the subordinate Court were a nullity.

The result is that the conviction recorded against the Appellant in those circumstances must be and is hereby quashed and sentence set aside. Again I must commend the Learned State Counsel for conceding the Appeal on this ground as well.

The trial in the Subordinate Court having been declared a nullity on the aforesaid two grounds, the proper course would be to order a retrial. However a retrial can only be ordered where the interest of justice requires it, where it will not occasion injustice or prejudice to the Appellant and where the Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. At the end of the day however each case must depend on its own particular facts and circumstances. See generally ***PASCAL CLEMENT BRAGANZA VS REPUBLIC (1957) EA 145, SUMAR VS RPEUBLIC (1964) EA 481 MANJI VS REPUBLIC (1960) EA 343*** and ***MWANGI VS RPEUBLIC (1983) KLR 522.***

Having considered the principles applicable when considering the issue of retrial, I am satisfied that this is not a proper case for an order of retrial. As correctly submitted by the Learned State Counsel, the evidence tendered particularly that of PW1, PW2 and PW3 was full of contradictions and inconsistencies. For instance whereas PW2 talks of light being at the scene of crime, PW1 who was in the company of PW3 says that there was no light. PW3 testified that he examined PW1 on 20th January, 2004 whereas the offence was committed on 26th January, 2004. This means that the Complainant was examined much earlier than the date of alleged crime. The doctor also testified that some pieces of grass were found in the complainant's pubic area. The examination was allegedly done 4 days after the incident. However according to PW1 she was raped and or indecently assaulted in the house and not in a grass area. So then where would the pieces of grass have come from.

In my view, having carefully considered various aspects of this case, the evidence tendered and the period that the Appellant has been incarcerated I do not think that it will be in the interest of justice to order a retrial. I decline to do so with the consequence that the Appellant shall forthwith be set free unless otherwise lawfully held.

Dated at Nairobi this 31st day of July, 2006.

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MAKHANDIA

JUDGE