



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

**Criminal Appeal 246 of 2005**

*(From original conviction and sentence in Criminal Case No. 1319 of 2003 of the Principal Magistrate's Court at Kikuyu – M.W. Murage, PM)*

**SIMON KINUTHIA NDUNG’U ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant herein, ***SIMON KINUTHIA NDUNG’U***, was charged with defilement contrary to Section 145(1) of the Penal Code. The appellant denied the charge on 15<sup>th</sup> September, 2003 in the Principal Magistrate’s Court at Kikuyu. His trial commenced before the learned Resident Magistrate (Mrs. Wakahora) on 27<sup>th</sup> October 2003 before later being taken over by the learned Principal Magistrate (Mrs. Murage). The trial was concluded on 16<sup>th</sup> December, 2004 and judgment delivered on 15<sup>th</sup> January, 2005. In that judgment the learned trial Magistrate convicted the appellant and proceeded to sentence him to life imprisonment. The appellant was aggrieved by the conviction and sentence, hence he preferred this appeal through Messrs Mwaura Kamau & Co. Advocates.

When the appeal came up for hearing before me on 19<sup>th</sup> July, 2006, Ms Wafula, learned state counsel conceded to the appeal on the ground that when the matter was first handled by the learned Resident Magistrate, Mrs. Wakahora the prosecutor then was not qualified police prosecutor in terms of Section 85(2) as read together with Section 88 of the Criminal Procedure Code. The proceedings were thus rendered a nullity. Accordingly the learned state counsel invited me to annul the proceedings.

In the same vein the learned state counsel urged me to order a retrial on the grounds that the evidence on record was sufficient to return a conviction. That the appellant had only been in custody for a year and in the premises no prejudice would be occasioned to him if a retrial was ordered.

Mr. Ng’ang’a, learned counsel for the appellant welcomed the states’ gesture in conceding to the appeal. Counsel further pointed out that the appellant was not averse to an order for a retrial.

Section 85(2) of the Criminal Procedure Code provides

***“....(2) The Attorney General by writing under his hand, may appoint any Advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.....”***

The effect of the foregoing provision is that to be appointed a public prosecutor, one must be either an advocate of the High Court or a person employed in the public service. In the case of a person employed in the public service, that person if a police officer ought to be a police officer not below the rank of an Assistant Inspector or Police.

As already stated at the commencement of this Judgment the trial of the appellant first commenced before the learned Resident Magistrate at Kikuyu on 27<sup>th</sup> October, 2003 when the complainant's mother applied to have the case against the appellant withdrawn on the basis that the matter had been discussed at the village level and an agreement struck. The application was successfully resisted by the prosecutor. The prosecutor was none other than P.C. Tom. Subsequent thereto, the case was taken over by the Principal Magistrate with I.P. Kilonzo as the prosecutor.

From the foregoing it is clear that the trial of the appellant was conducted by Police Constable Tom and Inspector Kilonzo. While Inspector Kilonzo was qualified to conduct the trial, Police Constable Tom was not. Since Police Constable Tom was not qualified to act as a prosecutor, the trial of the appellant in which he purported to act as a public prosecutor must be declared a nullity. Since the trial was one, the part which was prosecuted by a qualified prosecutor cannot be separated from that conducted by an unqualified prosecutor. It therefore follows that the entire trial must be declared a nullity. The issue of who is a person qualified to conduct a trial was extensively considered by the court of appeal in **ELIREMA & ANOTHER VS REPUBLIC (2003) 1 KLR 537**. I would apply the principles set out in the said case in the instant case and declare the appellant's trial, a nullity, with the result that the conviction and sentence recorded must be and are hereby quashed.

Miss Wafula, learned state counsel having conceded that the trial was a nullity nonetheless urged me to order a retrial of the appellant. Mr. Ng'ang'a. learned counsel for the appellant did not object. I have on my part considered the evidence tendered. I am satisfied that if the self-same evidence was tendered a conviction is not likely to result. See **MWANGI VS REPUBLIC (1983) KLR 522**. The prosecution only called two witnesses, the minor complainant and the clinical officer who examined the complainant. There were other witnesses who could have been called to buttress the complainant's case. Indeed on 21<sup>st</sup> June, 2004, the prosecutor sought an adjournment to enable him call three other witnesses i.e. 2 police officers and the father of the complainant. This never came to pass as on 2<sup>nd</sup> August, 2004 the prosecution closed the prosecution. If the retrial was to be ordered in the circumstances, it will afford the prosecution opportunity to fill the gaps in their evidence by perhaps calling the said witnesses. To do so will no doubt be the prejudice to the appellant. See **FATENALI MAJI VS REPUBLIC (1966) E.A. 343**. Further the alleged offence took place in September 2003. That is a period well over three years. I have not been told whether the witnesses would be available. It is not sufficient to merely state that the evidence on record is sufficient to return a conviction if a retrial is ordered as the learned state counsel submitted without an assurance of the availability of the witnesses.

Taking all these matters into consideration I do not think it would be just to subject the appellant to a fresh trial. Not on such tenuous evidence. Accordingly I refuse to order a retrial with the consequence that the appellant is to be released from prison forthwith unless otherwise lawfully held.

Dated at Nairobi this 2<sup>nd</sup> day of October, 2006

.....

**MAKHANDIA**

**JUDGE**