



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
Criminal Appeal 168 of 2003

**(From Original Conviction and Sentence in Criminal Case No. 1047 of 2002 of
the Resident Magistrate's Court at Yatta P. T. Nditika Esq. on 25.4.2003)**

TITUS MUEMA MBUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

Titus Muema was charged with the offence of Rape contrary to section 140 of the Penal Code in Criminal Case 1047/2002 before Resident Magistrate's Court Yatta. After a full hearing, he was convicted and sentenced to 5 years imprisonment with hard labour. He is aggrieved by the judgement of the lower court against which he appeals on both conviction and sentence.

When the appeal came up for hearing on 12.4.2005 the Learned State Counsel Mr. Omirera conceded to the appeal for the reasons that the proceedings before the lower court were conducted by one Sergeant Kanyonda who was unqualified to prosecute. Counsel urges the court to order a retrial because there is overwhelming evidence on record as against the appellant that would result in conviction. Counsel further submitted that the offence of rape being a very serious one, it is in the interests of justice that a proper trial be conducted and if appellant is found guilty, to be convicted accordingly; that so far the appellant has only served 2 years of the 5 years meted on him and he will not be prejudiced if he is tried again and lastly that it will be possible to get hold of the witnesses if the need arises.

The appellant objected to the prosecution's request for a retrial as he denies having committed the offence and that it is not his fault that the proceedings in the lower court were conducted by an unqualified prosecutor.

From the record of appeal it is true that Sergeant Kanyonda appeared for the prosecution in the lower court. He is an unqualified prosecutor in terms of Section 85 and Section 88 (2) of the Criminal Procedure code which provides that the Attorney General shall appoint prosecutors from police officers of the rank of Acting Inspector and above and Advocates of the High Court. The said Sergeant Kanyonde does not fall under any of these categories. In light of the new celebrated case of **ROY ELIREMA V. REPUBLIC CR. APP 67/2002**, where the Court of Appeal considered the above issue, it was held that proceedings conducted by an unqualified prosecutor are null and void. Under the circumstances the proceedings before the lower court are hereby declared null and void. The conviction is quashed and the sentence set aside.

Can this court order a retrial in this case? A retrial will generally be ordered where the proceedings before the lower court are defective or illegal; and where the court is satisfied that the evidence on record if considered may result in a conviction, and that the retrial will not be prejudicial to the accused. See case of **MANJI V. REPUBLIC 1966 EA 343**.

So far the appellant has served 2 years in prison since he was sentenced on 25.4.2003. That is less than ½ of the sentence he was handed of 5 years.

The offence which the appellant faced is a very serious one of rape which carries in maximum sentence of life imprisonment. The appellant was only sentenced to 5 years which in my view was very lenient. The court appreciates that it is not the appellant to blame for the defective proceedings before the lower court. It is the court and the prosecution who should have noted the anomaly and rectified it. However, there is also the complainant who was allegedly raped and the court has to ensure justice is done to all and I find that it would only be fair to have the appellant retried under the circumstances.

This case emanated from Yatta. The complainant and other witnesses reside within the local jurisdiction of that court. If called upon to testify I believe they would be available.

I have had occasion to consider the evidence adduced before the lower court. P.W.1 the complainant was accosted at about 10.00 p.m. as she came from the toilet, was pushed in a house and raped. There was no light in the room. She said that the rapist put on a torch after he raped her and he left as people who were outside feared him. She claimed to have known the person and reported to the Assistant chief. He is not a person she had known before. P.W.1 never told the court how she was able to identify the rapist. She did not know him before. She never told the court that the torch he allegedly lit was ever shown on his face. The rapist was not arrested by those outside.

P.W.2 one of those who responded to the screams saw somebody get out of room where screams were emanating from and the person disappeared. P.W.2 further said the person came out running. He did not tell court whether he had an opportunity to see the rapist and for how long or whether there was ample light or not and if so what type of light.

The Assistant Chief P.W.3 admitted that he arrested somebody else for the offence first before the appellant was arrested. If accused had been identified to P.W.3 as the assailant I do not know under what circumstances the Assistant Chief went to arrest somebody else on being told by the appellant.

From the evidence on record, I do find that there was no proper evidence on identification. The circumstances under which P.W.1 was attacked and raped were such that it was not easy to identify the assailant. P.W.1's evidence was never tested on an identification parade. The court only accepted dock identification which is worthless. Though there was evidence that P.W.1 was raped yet the evidence pointing to appellant was so weak that he should not have even been put on his defence. The conviction is untenable and unsafe.

The upshot is that though there was good reason to order a retrial yet the evidence on record is unlikely to result in a conviction after it is duly considered by the court. It will be futile ordering a retrial. The appellant is therefore set at liberty forthwith unless otherwise lawfully held.

Date at Machakos this 10th May 2005.

R. V. WENDOH

JUDGE