



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION  
Criminal Appeal 641 of 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 1655 of 2002 of the Senior Resident Magistrate's Court at Kikuyu (J. M. Wakahora – R.M.)

JOSEPH GATHARA KIMANI .....APPELLANT  
VERSUS  
REPUBLIC.....RESPONDENT

J U D G M E N T

JOSEPH GATHARA KIMANI was found guilty and convicted of the offences of **CONSPIRACY TO DEFILE** contrary to **Section 152** of the **Penal Code** in count I and in count II of **DEFILEMENT OF A GIRL** contrary to **Section 145(1)** of the **Penal Code**. He was sentenced to serve 3 years imprisonment and 7 years imprisonment respectively on 30th June 2003. He filed his appeal thereafter challenging both the conviction and sentence.

When the appeal came up for hearing, **MISS GATERU** learned counsel for the State conceded to the Appeal. She contended that since the entire case was conducted by an unqualified prosecutor within the meaning of **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code**, the entire proceedings were null and void.

I have confirmed from the record of the proceedings that the prosecution case was conducted by one **Police Constable ACHIYA** and one **Police Constable TOM**. That rendered the proceedings defective. Accordingly, I declare them invalidated, quash the conviction and set aside the sentence.

**MISS GATERU** has urged the court to order a retrial. It was her contention that no prejudice will be suffered by the Appellant. That the witnesses were also available. She also submitted that the Appellant had not served a substantial part of the sentence. The Appellant on his part supported the idea of holding a re-trial in the case.

I have considered that the offence for which the Appellant was charged was very serious. As learned counsel for the State has noted, the Appellant has not served a substantial part of the sentence. He will not suffer any prejudice if a retrial is ordered. Besides, the Appellant does not oppose such an order being made. Further, I am of the opinion that a conviction may result from the evidence in the case if an order for retrial were ordered.

I order that a retrial be held. The Appellant should remain in custody until 31st May 2005 when he should be produced before the Kikuyu Senior Resident Magistrate's Court for plea in this case.

Dated at Nairobi this 9th day of May 2005.

**LESIT, J.**

JUDGE

