**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CRIMINAL APPEAL NO. 273 OF 1999**
(From original conviction and sentence in Criminal Case No. 2112 of 1999 of the Senior Resident Magistrate's Court at Molo – J. KIARIE

**MUSA MOHAMMED MENDOH……..……..APPELLANT**
**VERSUS**
**REPUBLIC……RESPONDENT**

**JUDGMENT**

The appellant, Musa Mohammed Mendoh, was charged with several counts under the Penal Code. The appellant was charged with two counts of defilement of a girl under the age of fourteen years contrary to **Section 145(1) of the Penal Code.** The particulars of the charge were that on the 28th of August 1999 at [*particulars witheld*] Township, the appellant had carnal knowledge of M.N.N. and R.A.N. who were girls under the age of fourteen years. The appellant was further charged with two counts of spreading an infectious disease contrary to **Section 186 of the Penal Code**. The particulars of the charge were that on the 28th of August 1999 at [*particulars witheld*] Township, the appellant defiled M.N.N. and R.A.N and consequently spread an infectious disease namely a venereal disease to the two. The appellant was further charged with the offence of failing to consult a medical practitioner contrary to **Section 44(1) of the Public Health Act**. The particulars of the offence were that on the 6th of September 1999 at Molo District Hospital, Nakuru the appellant was found to have contracted a venereal disease and had failed to consult a medical practitioner for treatment. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was found guilty as charged on all the counts. He was sentenced to serve twelve years imprisonment in respect of the two counts of defilement. He was also sentenced to receive twelve strokes of the cane. He was sentenced to serve one year imprisonment on each of the other three counts that he was charged with. The sentences were ordered to run concurrently. The appellant was aggrieved by the conviction and sentence and has appealed to this court.

At the hearing of the appeal, the appellant sought the leniency of the court as regard the sentence that was imposed upon him. Mr Gumo, the Learned Assistant Deputy Public Prosecutor did not oppose the plea for leniency. He however observed that the appellant appeared to be seriously ill. I have perused the proceedings of the trial court. I have however noted that both the appellant and the Learned Assistant Deputy Public Prosecutor overlooked the fact that the appellant had been tried by an incompetent prosecutor before the trial magistrate court. From the record of the court, the criminal case facing the appellant at the magistrate's court was prosecuted by Police Constable Njagi. Police Constable Njagi is a Police Officer of a rank less than that of an assistant inspector of police. He was thus not authorised to prosecute a criminal case

before a magistrate's court. **In Eliremah & Anor –versus- Republic [2003]K.L.R. 537** the court of appeal held that where such a police officer prosecutes a case before a magistrate's court, the proceedings thereto will be a nullity. I therefore declare the proceedings before the trial magistrate from which this appeal arose to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentences imposed set aside.

As stated at the earlier part of this ruling the appellant pleaded with the court to exercise its leniency on him. Mr Gumo, the Assistant Deputy Public Prosecutor did not oppose the plea of leniency by the appellant. Mr Gumo was most probably influenced by the state of health of the appellant. I have considered the said submission made. The issue now before me for determination is whether or not to order a retrial in view of
the fact that the trial which the appellant was convicted has been declared a nullity. The
principles which this court ought to consider in deciding whether or not to order for a retrial are well settled. **In Bernard Lolimo Ekimat –versus- Republic C.A. Criminal Appeal No. 151 of 2004 (Eldoret)** ***(unreported)***, the Court of Appeal held at page 6 as hereunder:

> ***"In the case of Ahmed Sumar v Republic [1964]EA 481, at page 483, the predecessor to this Court stated as follows:***
> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."***
> ***The court continued at the same page paragraph H and stated:***
> ***"We are also referred to the judgment in Pascal Clement Braganza v R [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***
> ***There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been accepted to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

I do not need to mention all of the said principles, suffice for me to state that the overriding principle is that the ends of justice must be met when a decision is made whether or not an appellant should be retried. In the instant appeal the appellant has been in lawful custody since the 7th of September 1999. He was sentenced to serve the said term in prison on the 24th of November 1999. The appellant has thus served five years and four months of the said term of imprisonment imposed in the vitiated trial. I also observed the health status of the appellant when he appeared before me during the hearing of the appeal. I saw that the appellant was serious ill. Putting into consideration the fact that the State was not opposed to this court reviewing the sentence imposed upon the appellant, it is my considered view that the ends of justice will not be served by the appellant being retried. Even if the appellant were to be found guilty in the retrial, the five years and six months period already served in prison will

be sufficient punishment for the appellant in this appeal, considering all the circumstances of this case.

In the premises therefore the appellant is hereby ordered discharged. He is set at liberty unless otherwise lawfully held.

**DATED at NAKURU this 9th day of May 2005.**

**L. KIMARU**
**JUDGE**