



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Criminal Appeal 73 of 2003

(From original conviction and sentence of the Principal  
Magistrate's Court at Kericho in Criminal Case No. 183 of 2003  
–R. Ngetich SRM)

MOI OCHIENG OMOLO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant, Moi Ochieng Omolo, was charged with rape contrary to **Section 140** of the **Penal Code**. The particulars of the offence were that on the 19th January, 2003 at Sondu Township in Kericho District, the appellant unlawfully had carnal knowledge of J A O without her consent. He was alternatively charged with indecently assaulting the said J A O by touching her private parts contrary to **Section 144(1)** of the **Penal Code**. The appellant pleaded not guilty to both counts. After full trial, the appellant was found guilty of the main charge of rape. He was sentenced to serve ten years imprisonment with hard labour and two strokes of cane. The appellant was aggrieved by his conviction and sentence. He filed an appeal to this court against both the said conviction and sentence.

At the hearing of the appeal, Mr. Koech Learned State Counsel, conceded to the appeal on the sole ground that the appellant had been convicted in a criminal trial which had been prosecuted by a police officer who was not authorized in law to conduct such cases. He however urged this court to order that the appellant be retried in view of the serious nature of the offence that he faced. He submitted that there was strong admissible evidence which would enable a magistrate's court, hearing the case on retrial, to convict the appellant for the offence of rape which he was charged. In response, the appellant submitted that he admitted committing the offence. He however pleaded for the leniency of the court. He submitted that he was arrested on the 20th of January, 2003.

I have perused the proceedings of the trial magistrate's court. I have noted that the criminal case facing the appellant in the said court was prosecuted by Corporal Kipsang. He is a police officer of a rank lower than that of an Assistant Inspector of police. He was thus not authorized to prosecute criminal cases before a magistrate's court as provided by **Sections 85(2)** and **88** of the **Criminal Procedure Code**. The Court of Appeal in **Eliremah & another versus Republic (2003)KLR 537** held that where such a police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto would be a nullity. I therefore declare the said proceedings to be a nullity as a consequence of which the appeal herein is allowed, the conviction of the appellant quashed and the sentence imposed set aside.

The State has submitted that the appellant should be retried in view of the serious nature of the offence that the appellant faced. It was submitted that there was overwhelming evidence which, if adduced in a retrial, would result in the appellant being convicted for the said offence. The appellant in response admitted committing the offence, however, he pleaded for the leniency of this court. Upon considering the said submissions, I do hold that this is a fit case for a retrial. I have carefully perused the proceedings of the trial magistrate in the vitiated trial and I am satisfied that there is potentially strong admissible evidence which would enable a magistrate's court, hearing the case on a retrial, to convict the appellant. If the appellant wishes to admit to the offence as he has indicated to this court, he may do so before the said magistrate's court that he will appear before when he is taken for the retrial of the criminal case facing him.

In the circumstances therefore, I order that the appellant to appear before the Principal Magistrate's Court Kericho on the 5th of October, 2005 when he shall take plea in the retried case. If the appellant is convicted, I hereby order the trial magistrate's court to take into account the two years and four months imprisonment that the appellant had served pursuant to the sentence imposed by the trial court in the vitiated trial.

It is so ordered.

**DATED at KERICHO this 30th day of September 2005.**

**L. KIMARU**

**JUDGE**