REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal 532 of 2003

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 903 of 2003 – L. K. Mutai)

EVAN WAWERU MARIA……..……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant, Evan Waweru Maria, was charged with the offence of attempted defilement contrary to **Section 145(2) of the Penal Code.** The particulars of the offence were that on the 3rd March 2003 at [*particulars witheld*], Nyandarua District, the appellant attempted to have carnal knowledge of M N M, a girl under the age of fourteen years. He was alternatively charged with the offence of indecent assault of a female contrary to **Section 144(1) of the Penal Code.** The appellant denied both counts. After a full trial, the appellant was convicted as charge on the main count of attempted defilement contrary to **Section 145(2) of the Penal Code**. He was sentenced to serve ten years imprisonment. Being aggrieved by his conviction and sentence, the appellant filed appeal to this court.

At the hearing of the appeal, Mr Koech Learned State Counsel conceded to the appeal on the sole ground that in the trial before the magistrate's court, the appellant had been prosecuted by police officers who were not authorized in law to conduct such prosecutions. On whether or not the appellant should be retried, Mr Koech left the issue to the court. In response thereto, the appellant indicated to the court that he wished to withdraw the appeal.

I have perused the proceedings of the trial magistrate. I have noted that the criminal charge facing the appellant was prosecuted by Sergeant Kiama, Corporal Shibeka and Sergeant Maina. All these Police prosecutors were police officers of a rank lower than that of an Assistant Inspector of Police. They were thus not authorized to prosecute criminal cases before a magistrate's court as provided by **Section 85(2) and 88** of the Criminal Procedure Code. In **Elirema –vs- Republic [2003] KLR 537** the Court of Appeal held that where a police officer of a rank lower than that of an Assistant Inspector of Police prosecutes a criminal case before a magistrate's court, the proceeding thereto will be a nullity. I hereby declare the proceedings of the trial magistrate on which this appeal arose to be a nullity and as a consequence of which the appeal is allowed, the conviction quashed and the sentences imposed set aside.

The issue that remains for the determination of this court is whether or not the appellant should be retried. The principles to be considered by this court in determining whether or not an appellant should be retried was set out in the case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal held at page 6 that;

"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 acceptable 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 required it."

In the present case, I have carefully considered the evidence that was adduced by the prosecution in the vitiated case. I have noted that the appellant was not properly identified by the witnesses as the person who allegedly attempted to defile the complainant. The evidence of identification offered by the prosecution fell far short of the required standard. Indeed, the trial court erred in allowing the evidence on identification when the said evidence was essentially dock-identification, which in law is worthless evidence.

In the circumstances of this case, the said evidence raises doubt as to the culpability of the appellant for the offence which he was charged and convicted. The complainant told her mother that she did not know the person who had attempted to defile her immediately after the incident. It would therefore serve no useful purpose if a retrial is ordered based on the weak prosecution evidence that will likely to be adduced against the appellant. The State did not insist that the appellant be retrial, perhaps due to the observations made by this court concerning the evidence that would be adduced by the prosecution were this court to order the appellant to be retried.

The appellant is therefore ordered discharged. He is set at liberty and ordered released forthwith from prison unless otherwise lawfully held.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE