REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 1028 of 2003
(From Original Conviction and Sentence in Criminal Case No. 186 of 2001 of the Resident Magistrate's Court at Mandera).

MOHAMMED MOHAMUD DIRIYE ……....……...…….APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

The Appellant **MOHAMED MOHAMUD DIRIYE,** was charged with the offence of Rape Contrary Section 140 of the Penal Code. He was after a full trial in which the prosecution called a total of seven witnesses, found guilty of the offence and sentenced to ten (10) years imprisonment plus hard labour. Consequent upon the conviction and sentence as a foresaid and being dissatisfied with the same, the appellant lodged this appeal.

The Learned State Counsel, Ms Okumu, conceded to the appeal when it came up for hearing. The sole ground advanced by the Learned State Counsel for conceding to the appeal was that the prosecution of the case in the court below was conducted by an unqualified police prosecutor by the name of Corporal Galma. I have perused the record of the trial court and have confirmed that indeed corporal Galma led the entire prosecution case. The participation of Corporal Galma in the trial as aforesaid rendered the entire proceedings defective and a nullity ab initio. I therefore do declare the proceedings a nullity in tandem with the court of appeal decision in **ELIREMA & ANOTHER VS. REPUBLIC CRIMINAL APPEAL NO.67 OF 2002,** with the consequence that I quash the conviction and set aside the sentence.

Ms Okumu sought a retrial. The Learned State Counsel submitted in support of the request thereof that the evidence was overwhelming. That the Appellant was charged with the offence of rape which is serious. The offence attracts life imprisonment. That though the Appellant had served almost five (5) of the sentence imposed, nonetheless due to the seriousness of the offence, a retrial should be ordered, Learned State Counsel concluded his submissions.

The Appellant opposed the order for retrial and urged the court to order his release instead. He submitted that he was ailing. That he had been in prison for over five (5) years and consequently he would suffer prejudice if a retrial was ordered.

I have carefully analysed and re-evaluated the evidence on record. The evidence on record in strong, enough to sustain a conviction if a retrial is ordered. An order for retrial, it has been held, should be made where the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See **MWANGI VS. REPUBLIC {1983] E.A. 522.** I am satisfied that a conviction may result if the self same evidence is tendered during the retrial.

I am aware also that an order for retrial should only be made where the interests of justice require it and where the accused person will suffer no prejudice. See ***MANJI VS. REPUBLIC [1966] EA 343***. In the instant case, the Appellant was sentenced to a term of imprisonment of ten (10) years plus hard labour. He has already served half of the term. I think in those circumstances if a retrial is ordered, the appellant may suffer prejudice. I think that the appellant has been sufficiently punished for the offence and therefore a retrial will not be in the interest of justice. I therefore in the exercise of my discretion,

decline to order a retrial with the consequence that the appellant is set free forthwith unless he is otherwise lawfully held.

Dated at 21st of September, 2005.

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M. S. A. MAKHANDIA

JUDGE