



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL 230 OF 2003**

*(From Original conviction (s) and Sentence (s) in Criminal Case No. 87 of 2002 of the Resident Magistrate's Court at Tawa P.N. Morigori on 23/7/02)*

**STEPHEN NZINZA KITEMA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant was charged with Rape Contrary to Section 140 of the Penal Code. He was convicted on his own plea of guilty and sentenced to 7 years imprisonment. He appealed against the conviction and sentence.

The state has rightly conceded the appeal on the basis that the trial was conducted by a police constable who had no power to prosecute the case as provided under Section 85 (2) of the Criminal Procedure Code and has properly requested that the trial be declared a nullity. But the state has also sought for a retrial on the ground that this was a very serious offence and that the state has ample evidence to prove the charge if a retrial is ordered. Mr O'Mirera, for the Republic also pointed out that the appellant had pleaded guilty at the lower court and that he will not therefore be prejudiced.

I have carefully considered the case. There is no impediment to declaring the lower court trial a nullity since the prosecutor, a police constable had no power to prosecute the case. I accordingly declare the lower court trial a nullity, quash the conviction and set aside the sentence of 7 years.

As touched the request for a retrial, however, this court notes that the appellant pleaded guilty to the offence of rape. If this court orders a retrial, the accused will carry the stigma of his earlier plea of guilty. It is likely that he will not receive a fair trial even if he goes there and enters a plea of not guilty. Further more, this court notes that the appellant has served half of his sentence of seven years. It will in the court's view, be prejudicial to him to be exposed to a possibility of a fresh prison sentence, especially when such may not be limited to the original sentence of 7 years. Under these circumstances, it will not be in the interest of justice to order a retrial.

For the above reasons, the appellant shall forthwith be released from prison unless otherwise lawfully detained therein. It is so ordered.

Dated and delivered at Machakos this 31st day of October, 2005

**D.A. ONYANCHA**

**JUDGE**