REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 110 of 2004
(From original conviction and sentence in criminal case No. 777 of the 2003 of the Principal Magistrate's Court at Nyahururu – L. K. Mutai)

DANIEL KAMAU NJAGI………………..……………...………APPELLANT

VERSUS

REPUBLIC……………………………………..……………RESPONDENT

JUDGMENT

The appellant, Daniel Kamau Njagi, was charged with the offence of defilement of a girl contrary to Sec**tion 145(1) of the Penal Code**. The particulars of the offence were that on the night of the 14th and the 15th of October 2002 at [*particulars witheld*] in Nyandarua District, the appellant had carnal knowledge EM. The appellant was alternatively charged with the offence of indecent assault of a female contrary to **Section 144(1) of the Penal Code**. The particulars of the offence were that on the night of the 14th and 15th October 2002 at the same place, the appellant unlawfully and indecently assaulted EM, a girl of fourteen (14) years by touching her private parts. The appellant pleaded not guilty to the charges. After a full trial, he was found guilty as charged and sentenced to serve seven years imprisonment. Being aggrieved by his conviction and sentence, the appellant appealed to this court against the said conviction and sentence.

At the hearing of this appeal, Mr Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal on the sole ground that the police officer who prosecuted the case before the trial magistrate's court was not authorized in law to prosecute such cases before such a court. Mr Gumo however submitted that in view of the serious nature of the offence and the fact that the victim *(a minor*) would be traumatized for the rest of her life, and in the interest of justice, the court should order that the appellant be retried. The appellant on his part urged the court not to order that he be retried. He submitted that he had been in lawful custody for a period of three years. This period includes the one year that he had been in remand custody before the case was heard and determined. The appellant submitted that he had served two years of the sentence imposed by the trial magistrate.

I have perused the proceedings of the trial magistrate from which this appeal arose. I have noted that the criminal case facing the appellant was prosecuted by Sergeant Maina and Corporal Shiveka. They are 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 magistrates court as provided by **Sections 85(2) and 88 of the Criminal Procedure Code. In the case of Eliremah & Anor –versus- Republic [2003]KLR 537,** the Court of Appeal held that where such police officers prosecute a case in a magistrate's court, the proceedings thereto will be a nullity. I do therefore declare the proceedings of the trial magistrate court to be a nullity as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

The issue that is left for determination by this court is whether the appellant should be retried as submitted by Mr Gumo on behalf of the State or whether he should be discharged. The principles to be considered by this court in determining whether the accused person should be retried were set out by the Court of Appeal in the case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret)** (unreported). At page 6 of the said judgment it was held 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, the State argued that the appellant should be retried because he faced a charge on a serious offence. It was submitted that the victim of the crime (who was then a minor) would be traumatized for the rest of her life because of the ordeal that she underwent at the hands of the appellant. It was further submitted that for the dictates of justice to be met, the appellant ought to be retried. On the other hand, the appellant has submitted that he should be discharged in view of the fact that he has been in lawful custody for a period of three years.

I have carefully considered the submission made. While it is true that the appellant faced a charge of a serious offence, it is equally true that the appellant has served nearly a third of the sentence imposed by the trial magistrate in the vitiated trial. Balancing the scales of justice between the rights of the appellant as an accused person and the duty of the State to ensure that there is public harmony in the Society, in my considered view, in this case, the scales of justice will tilt in favour of the appellant. The appellant was sentenced to serve seven years imprisonment in the vitiated trial. Prior to the said conviction he was in remand custody for a period of nearly one year. In total the appellant has been in lawful custody for a period of three years. I do not think the ends of justice would not be served if a citizen of this country is ordered to be retried after being in lawful custody for a period of three years and also having served nearly a third of the term imposed by the trial court in the vitiated trial.

In the circumstances of this case, I will discharge the appellant. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 26th day of October 2005.

L. KIMARU

JUDGE