



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
CRIMINAL APPEAL 9 OF 2004**

**(From original conviction and sentence of the Principal Magistrate's Court at  
Nyahururu in Criminal Case No. 1108 of 2003 – L. K. Mutai)**

**HARON MURAGURI KOMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Haron Muraguri Komo, was charged with the offence of attempted rape contrary to **Section 141 of the Penal Code**. The particulars of the offence were that on the 2nd of January 2003 at Gathanji village, Nyandarua District, the appellant attempted to have unlawful carnal knowledge of MM. 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 same day and at the same place, the appellant indecently assaulted MM by touching her private parts. The appellant pleaded not guilty to both charges. After a full trial, he was found guilty of the main charge and sentenced to serve seven years imprisonment. Being aggrieved by his conviction and sentence, the appellant duly filed an appeal against the said conviction and sentence to this court.

At the hearing of the appeal, Mr Koech Learned State Counsel conceded to the appeal on the sole ground that the Police officer who prosecuted the case before the magistrate's court was unauthorized to prosecute criminal cases before the said court. He however urged this court to order for the retrial of the appellant. He submitted that there was overwhelming evidence in the vitiated trial which established that the appellant had attempted to rape the complainant. Mr Koech submitted that had the parents of the complainant not intervened, the appellant could have succeeded in his evil mission of raping the complainant. He argued that this was a fit case for a retrial. In response, the appellant submitted that he should be discharged as there was no evidence to connect him with the offence of attempted rape for which he was charged and convicted.

I have read the proceedings of the trial magistrate from which this appeal arose. I have noted that the criminal case facing the appellant was prosecuted by Corporal Shiveka and Sergeant Migwi. They are police officers of a rank lower than that of an Assistant Inspector of Police. They were not authorized to prosecute criminal cases in a magistrate's court in accordance with the provisions of **Section 85(2) and Section 88 of the Criminal Procedure Code**. In **Eliremah & Anor –vs- Republic [2003]KLR 537**, the Court of Appeal held that where such a police officer prosecutes a criminal case in a magistrate's court, the proceedings thereto will be a nullity. I hereby declare the proceeding therein to be a nullity and as a consequence of which the appeal is allowed, the conviction quashed and the sentence imposed set aside.

Mr Koech has argued that the appellant be retried in view of the serious nature of the offence that the appellant faced and the overwhelming evidence that was adduced against the appellant in the vitiated trial. I have considered the argument made for and against retrial in this case. The principles to be applied

by this court when considering whether or not to order a retrial were restated by the Court of Appeal in the case of **Bernard Lolimo Ekimat –vs- Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where (at page 6) it 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, whereas I do agree with Mr Koech that overwhelming evidence was adduced in the vitiated trial which if presented to a court hearing the case on a retrial may result in a conviction, the circumstances of this case however leads me to make a finding in favour of discharging the appellant. The appellant was sentenced to serve an imprisonment term by the magistrate in the vitiated trial on the 7th of January 2004. The appellant has served twenty months in prison. This is nearly one third of the sentence imposed. It would be a miscarriage of justice if the appellant were to be retried after serving nearly a third of the term of imprisonment imposed in the vitiated trial. If the appellant were to be retried, and if convicted, he would most likely be sentenced to a stiffer punishment than the one which was meted out in the vitiated trial. The sword of justice does not only lean in favour of the prosecution. The constitutional rights of an accused person has also to be taken into consideration. I decline to make an order for retrial.

I order that the appellant be discharged. He is set at liberty and released from prison unless otherwise lawfully held.

**DATED at NAKURU this 19th day of October 2005.**

**L. KIMARU**

**JUDGE**