



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 170 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 87 of 2003 of the Resident Magistrate's Court at Yatta P.T. Nditika on 15/4/03)

REPUBLIC PROSECUTOR

VERSUS

JOHN MUTISO MUTUA ACCUSED

J U D G M E N T

John Mutiso Mutua, has appealed against the Judgment of the Resident Magistrate, Yatta Court in Criminal Case 87/03 in which he was charged with the offence of Rape Contrary to Section 140 of the Penal Code.

The allegation against the appellant was that on 22/12/02, at about 7.30 p.m. at Makutano village in Machakos district, he had carnal knowledge of A.N.M, without her consent. In the alternative, he faced a charge of indecent assault Contrary to Section 144 (1) of the Penal Code. After a full trial the appellant was convicted of the offence of Rape and sentenced to 5 years imprisonment. He appealed against both conviction and sentence. The appellant did not wish to be present at the hearing and it therefore proceeded in his absence.

At the hearing of the appeal, the learned state counsel conceded to the appeal on grounds that the lower court proceedings were prosecuted by Sergeant Kanyonda, who was an unqualified prosecutor and that the proceedings were therefore a nullity. He urged the court to order a retrial for the following reasons:

The charge which the appellant faced is a very serious one and requires that the perpetrator be held answerable; that the appellant was sentenced to serve 5 years imprisonment on 15/4/03, and has not yet served a substantial part of the sentence; that the appellant will not be prejudiced by an order of a retrial; that the admissible evidence of record will no doubt lead to a conviction; and lastly, that the witnesses will be readily availed if the need arises.

A cursory look at the record of appeal discloses that Sergeant Kanyonda, was the prosecutor in the lower court proceedings. Under Section 85 (2) and 88 Criminal Procedure Code, prosecutors can only be appointed by the Attorney General from police officers of the rank of acting Inspectors and above or advocates of the High Court. Sergeant Kanyonda, was none of the above and was therefore unqualified to prosecute the case in the lower court. Prosecution by an unqualified prosecutor renders the proceedings a nullity and I hereby declare the proceedings before the Yatta Court null and void. The conviction is thereby quashed and sentence set aside.

Can this court order a retrial? A court will normally make an order for retrial if the proceedings before the lower court are illegal or defective. The proceedings before the lower court were illegal and having been

quashed, the court can order a retrial.

The appellant was sentenced to 5 years imprisonment on 15/4/03. So far he has served about 2 ½ years. It is about half the sentence. In my view, this forms a substantial part of his sentence bearing in mind that he has a right to remission of the sentence. However considering the seriousness of the offence which is rape, and considering the fact that the sentence meted was on the lower side, the court would consider ordering a retrial. This is because the court has to balance between the rights of the appellant as well as the victim of this heinous offence which is rampant.

The complainant testified that the appellant is a person she knew well. I am satisfied that in the event that witnesses are required for purposes of a retrial they would be easily traced.

I have read the evidence that was adduced before the lower court. PW1 was the only witness to the crime. The complainant was alone. It was at about 7.30 p.m. It was not clear where the complainant was accosted by the rapist because it is not indicated save that it was in a house. The plaintiff merely says there was light. The court was not told what type of light, where the light was in relation to the appellant and how far PW1 was from the light. The court was not also told what the intensity of the light was. I find that the identification of the rapist was not watertight. The complainant did not specifically

state how she was able to identify him or what she noted on the appellant to be able to recognize him, how long she had known the appellant since she claims to have known him before. The evidence of identification being so weak, it is my view that the court should not have found appellant guilty of the offence and in the circumstances, I do find that the admissible evidence on record is unlikely to lead to a conviction even if a retrial were ordered and for this reason, I decline to order a retrial. The appellant is therefore set at liberty forthwith unless otherwise lawfully held.

R.V. WENDOH

JUDGE

Dated at Machakos this 11th day of October 2005