

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 76 of 2003

JOSHUA MUTINDA MUSAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in Resident Magistrate's Court at Baricho in Criminal Case No. 977 of 2002 dated 10th March 2002 by Mr. J. M. Githaiga – R.M. – Baricho)

J U D G M E N T

Joshua Mutinda Musau hereinafter referred to as the appellant was charged before the Resident Magistrate Baricho for the offence of Defilement of a girl contrary to section 145 (1) of the Penal Code. He was convicted of the lesser charge of indecent assault contrary to section 144 (1) of the Penal Code and sentenced on the 10th March 2003 to serve hard labour and 2 strokes of the cane. Being dissatisfied the appellant has lodged this appeal against his conviction and sentence. Learned State Counsel Ms Ngalyuka has conceded this appeal and in my view rightly so. The trial in the lower court was a nullity the case having been prosecuted by one P.C. Ragwa who was not a competent person under section 85 (2) of the Criminal Procedure Code.

Ms Ngalyuka however urges this court to order a retrial. Mr. Kahiga who appeared for the appellant strenuously opposed the application contending that the evidence adduced against the appellant was not sufficient to prove the case against the appellant as the evidence of the complainant was not corroborated.

Having considered the evidence that was adduced before the trial magistrate, I am satisfied that the evidence was sufficient to support the conviction had the trial been properly conducted. Nevertheless it is evident that out of the sentence of 3 years which was imposed upon him, the appellant served 1 year before he was released on bail pending appeal. An order for retrial would therefore not be fair nor just.

I do therefore allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant.

The appellant shall therefore be forthwith set free unless otherwise lawfully held.

Dated signed and delivered this 28th November 2005

H. M. OKWENGU

JUDGE