REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 225 of 2003
(From Original conviction (s) and Sentence (s) in Criminal Case No. 251 of 2002 of the Resident Magistrate's Court at Makueni (J.K. KIIA DM I) on 13/11/02

BONIFACE WAMBUA MEI …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

J U D G M E N T

The appellant **BONIFACE WAMBUA MEI,** was charged with the offence of Rape Contrary to Section 141 of the Penal Code. He was also charged in the alternative, with the offence of Indecent Assault, Contrary to Section 144 (1) of the Penal Code. He was in count II charged with attempted rape Contrary to Section 141 of the Penal Code and alternatively with indecent assault on a female Contrary to section 144 (1) of the Penal Code. He was eventually acquitted of the main charges of rape and attempted rape and convicted of two counts of indecent assault. He was then sentenced to seven years imprisonment on count one, with hard labour and 4 strokes of the cane and a similar sentence for count two, the two sentences to run concurrently. He appealed against the conviction and the sentence.

The state counsel who argued the appeal conceded the appeal because the prosecution was conducted by an unqualified Corporal Kyumbu, who was a police officer. He however, sought for a retrial because the offences were serious and were committed against young school girls. He however, also notified the court that the appellant had already served 3 years of the 7 years of imprisonment. He concluded that if a retrial is ordered, overwhelming evidence is available which will convict the appellant. The appellant on the other hand, complained that he had served 3 years and is probably about to be released if remission for his good conduct in prison is taken into account. He opposed a retrial.

I have carefully considered the issues raised. There is no doubt that since the trial was conducted by an unqualified officer, Contrary to Section 85 of the Criminal Procedure Code, the trial was made a nullity. It will therefore be nullified.

As to a retrial, it is not denied that the offences committed were serious and that they were committed to young under aged girls. That is why trial court took a serious view of the case and sentenced the appellant to 7 years imprisonment with hard labour and strokes of the cane. The appellant consequently has served 3 years, and as he argued, may be due to remission soon. Ordering a retrial will open up the case for another possible sentence if found guilty. That will clearly mean that the appellant will start a fresh sentence despite the fact that he has served 3 years in prison already. It is my view and decision that will not be in the interest of justice, despite the fact that there may be available evidence to convict the appellant in a retrial.

For the above reasons the conviction is quashed and the sentence of 7 years hard labour and 4 strokes of the cane, is set aside. The appellant shall be set at liberty from prison unless otherwise lawfully withheld. A retrial is refused. It is so ordered.

Dated and delivered at Machakos this 2nd day of December, 2005.

D.A. ONYANCHA

JUDGE