



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 367 OF 2000  
(From Original Conviction and Sentence in Criminal Case No.**

**JULIUS MWADIMA ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The Appellant in this Appeal was charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the charge were that on the 10th day of May 2000 at about 12.00 p.m. at [ particulars withheld] in Mombasa District within the Coast Province had carnal knowledge of Z.B, a girl under the age of 14 years. After a full trial before the Senior Resident Magistrate the Appellant was convicted of the offence and sentenced to 14 years imprisonment with 4 strokes of the cane. The Appellant has appealed against both conviction and sentence.

When the appeal came before me for hearing Mr. Gumo the Provincial State Counsel stated at the onset that the trial was a nullity the prosecution case having been conducted by a Police Constable contrary to section 85(2) of the Criminal Procedure Code. In view of the seriousness of the offence Mr. Gumo however asked for a retrial.

The Appellant in response stated that he has no faith in the subordinate court and wants his case heard and finalized by this court. Even after I advised him that the retrial ordered will be before another magistrate, he still insisted he wants his case heard by this court. Section 85(2) of the Criminal Procedure Code provides:-

“(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police, to be a public prosecutor for the purposes of any case”

A police constable is a police officer below the rank of Assistant Inspector of police. The conduct of the prosecution case, in the trial giving rise to this appeal, by a police constable therefore renders the trial a nullity. I am reinforced in this holding by the court of Appeal decision in **Roy Richard Eliremia & Another -Vs- Republic Criminal Appeal No. 67 of 2002** (unreported). I therefore quash the conviction

of the Appellant and set aside the sentence of 14 years imprisonment with 4 strokes of the case.

The State has asked for a retrial. By the Appellant insisting that his case should be heard and finalized by this court and not to be remitted to the lower court I understood him to mean he is opposed to a retrial. Even if the Appellant did not oppose a retrial I am still duty bound to consider whether or not this is a proper case in which a retrial should be ordered.

The Law on which a retrial should be ordered is clear. In the case of **Fatehali Manji -Vs- Republic [1966] E.A. 343** the Court of Appeal for Eastern Africa stated thus:-

**“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;**

See also **Mwangi -Vs- Republic [1983] KLR 522** in which the Court of Appeal stated:-

**“... that a retrial should not be ordered unless the appellant court is of the opinion that, that on a proper consideration of the admissible evidence, or potentially admissible, evidence a conviction might result: Braganza -Vs- Republic [1957] E.A. 152 (CA) 469 Pyarwa Bussam -Vs- Republic [1960] E.A. 854.**

Several factors have therefore to be considered. These include:-

1. When the original trial was illegal or defective a retrial will be ordered.
2. A retrial will not be ordered if the conviction was set aside because of insufficient of evidence.
3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial
4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.
5. aA retrial should be ordered where the interest of justice so demand
6. Each case should be decided on its own merits
7. Whether there is evidence to support conviction.

I have carefully studied the lower court record. There was ample evidence including medical evidence upon which the conviction was based. The Appellant was caught in the complainant's father's house the very act of defilement. P.W.1 who caught him in the act of defilement called two neighbours. One of those neighbours was Appellant's girl friend. They both saw the Appellant in the complainant's father's house half naked. The conviction has not been set aside for insufficiency of evidence. There are also no gaps in the prosecution case which the prosecution will seek to fill during the retrial.

In the said case of **Roy Richard Eliremia** the court of Appeal refused to order a retrial because the main witnesses were citizens of Somalia who had left the country. There was also the issue of jurisdiction as it was not clear whether the crime had been committed in Kenya or in Tanzania. Considering those circumstances the Court of Appeal held that it would be unfair to the Appellant to order a retrial. None of those factors obtain in this case. The witnesses must be around. There is no injustice being done to the Appellant. He cannot be heard to complain that he has been in prison for a long period. He is imprisoned because of his criminal act. Every one is presumed to intend the consequences of his acts or omissions

when one is sent to prison for one's own criminal act or omission, there is no injustice done to one in such situation. In the circumstances the interests of justice demand that I order a retrial which I accordingly do. The retrial shall be held before another magistrate.

DATED this 15th day of January, 2004.

D.K. Maraga

**Ag. JUDGE**