

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 113 OF 2002

**(From Original Conviction and Sentence in Criminal Case No. 162 of 2002
of the Senior Resident Magistrate's Court at Kwale L.N. Mbatia, SRM)**

MWACHUPA MKALLA 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. On his own plea of guilty he was convicted and sentenced to 8 years imprisonment with 3 strokes of the cane. He has appealed against that sentence.

When the appeal came up for hearing before me on the 15th March 2004 Mr. Monda, learned State counsel, conceded that the appeal should be allowed as the prosecution case was conducted by a police constable. He however asked for retrial given the seriousness of the offence.

The prosecution case giving rise to this appeal was conducted by a police constable contrary to section 85(2) of the Criminal Procedure Code which requires that prosecutors should be of or above the rank of Assistant Inspector of police. A police constable is below that rank. In the circumstances the trial was a nullity. The conviction is hereby quashed and the sentence of 8 years imprisonment and 3 strokes of the cane set aside..

The Republic has asked for a retrial given the seriousness of this offence. Appellant on the other hand objects to a retrial. He says he has been in prison since 31/1/2002.

Before a retrial is ordered the appellate court has to consider several factors. These include the nature and seriousness of the offence, the period of the appellant's incarceration, the prejudice if any that will be caused to the appellant and the complainant's interest to be considered along with public interest.

In this case the offence with which the appellant was charged was defilement of a girl contrary to Section 145(1) of the Penal Code. The girl defiled was only 8 years old in standard one. The appellant was about 40 years old married with 5 children. He had gone to visit the complainant's parents and I suppose after being fed was accommodated for the night in one of the rooms in the complainant's parents' house. He abused the hospitality given to him and defiled the young girl who was sleeping in another room.

It will be a great injustice if the Appellant were to be left free. There is no injustice or prejudice that will be done to the appellant if a retrial is ordered as he will be facing a trial for his criminal act. I believe the trial court will consider his period of incarceration if after a retrial he is again convicted.

In the circumstances I order a retrial before another magistrate.

DATED this 22nd day of March 2004.

D.K. Maraga

Ag. JUDGE