

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 48 OF 2003

**(From Original Conviction and Sentence in Criminal Case No. 1305 of 2002
of the Senior Resident Magistrate's Court at Kwale L.N. Mbatia, SRM)**

KATEMBO MUTHOGA MUTURA APPELLANT

Versus

REPUBLIC RESPONDENT

RULING

The Appellant was tried and convicted on the offence of unnatural offence contrary to section 162(a) of the Penal Code and sentenced to seven years imprisonment with 4 strokes of the cane. He now appeals to this court against the conviction and sentence.

Mr. Monda, learned State Counsel conceded the appeal on the grounds that part of the prosecution case was conducted by police constable Yegon contrary to section 85(2) of the Criminal Procedure Code. That being the case I declare the Appellant's trial before the subordinate court a mistrial. Consequently I set aside the conviction and the sentence imposed on the Appellant.

Mr. Monda argued that the offence with which the Appellant was charged was serious. He asked for a retrial. He said that there is ample evidence upon which the Appellant was convicted.

A retrial is normally ordered where the original trial was illegal or defective and where there is evidence which if adduced at the retrial may result to a conviction. Even with all those a retrial will not be ordered if it will cause an injustice to the Appellant.

I have perused the lower court record. The Appellant sodomised his neighbour's mentally handicapped son. The son although handicapped gave very clear evidence. The doctor who examined him corroborated that evidence. He found spermatozoa in complainant's anus. The Appellant took advantage of the mental handicap of the neighbour's son, sodomised him and even took him to the river and ordered him to bathe which he did. This was obviously to destroy evidence. It will be an injustice to the complainant if the appellant is let free on a technicality. The Appellant has been in prison for slightly over a year. But he must know that the offence he committed carries an imprisonment term of 14 years.

For these reasons I order that the Appellant be retried for the offence before another magistrate of competent jurisdiction.

DATED this 8th day of June 2004.

D.K. Maraga

Ag. JUDGE

