



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION NO. 369 OF 2004

(From Original Conviction And Sentence In Criminal Case No. 2034 Of 2002 Of The
Chief Magistrate's Court At Nairobi)

EDWARD LISAMULA MULIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **EDWARD LISAMULA MILIMU** was charged with two (2) counts of unnatural offences contrary to section 169(a) of the Penal Code; and six (6) counts of Indecent practices between males contrary to section 165 of the Penal Code.

Following his trial, the appellant was acquitted in relation to the two counts of unnatural offences. He was also acquitted in relation to one count of indecent practice. However, the learned trial Magistrate convicted the appellant on five counts of indecent practice. The appellant was finally sentenced to two years imprisonment on each count, but the said sentences were ordered to run concurrently.

Being aggrieved with the conviction and sentence, the appellant lodged this appeal. In his Petition of Appeal, the appellant set down 17 grounds. However when the appeal came up for hearing, the appellant's advocate, Mr. Lubullela submitted that the whole trial was a nullity. His reason for so saying was that the prosecution was conducted by an unqualified prosecutor.

A perusal of the record of the proceedings before the trial court confirms that the prosecution was conducted by PC Munguti.

By virtue of the provisions of section 85(2) of the Criminal Procedure Code, PC Munguti would be deemed to have been unqualified for appointment as a public prosecutor. He was unqualified because his rank was below that of an Assistant Inspector of Police, whilst the statutory provision stipulates that the Attorney General could only appoint public prosecutors either from amongst advocates or, alternatively, from amongst police officers not below the rank of Assistant Inspectors.

In Roy Richard Elirema & Another versus Republic, Criminal Appeal No. 67 of 2002, (at Mombasa)

the Court of Appeal held as follows, at page 11;

“In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial court, for if it does so there would be a serious risk of the court losing its impartiality and that would violate the provisions of section 77(1) of the Constitution. For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a person or police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the conviction recorded against the two appellants must be and are hereby quashed and the sentences set aside.”

In the light of the foregoing submissions by the appellant, the learned State counsel, Ms Okumu conceded the appeal. She was definitely right to do so, as the authority cited above is binding on this court. Consequently, I do hereby quash the conviction against the appellant, and set aside the sentences, as well.

However, the learned State Counsel notified the court that she would be seeking a retrial of the appellant. I therefore directed that the hearing of this appeal would be limited to the issue as to whether or not this court should order for the appellant’s retrial.

The appellant strongly objected to a retrial. He pointed out that six (6) of the witnesses who testified at his trial were refugees. There was therefore no indication that the said six witnesses were still in Kenya. In effect, the appellant felt that if he was ordered to face a retrial, there was every possibility that the prosecution witnesses would not be available, and thus the appellant would be prejudiced. In response to that point, the learned State Counsel informed the court that she had had a word with the investigating officer, and had been assured that although many of the witnesses were refugees, there were all present in Kenya. It was therefore submitted that the retrial, if ordered, would not run into the difficulty of not having prosecution witnesses. To that extent, the case was distinguished from that of **Roy Richard Elirema** (above-cited), in which the Court of Appeal said that the main witnesses, who were citizens of Somalia, were not known to still be in Kenya.

I am persuaded by the submission of the state on this point. If the witnesses are available in Kenya, there would be no reason to anticipate unreasonable delays in a retrial, if the court were to order for it.

The next ground raised by the appellant for opposing a retrial was the fact that the incidents giving rise to the charges which had been preferred against him, occurred a long time back. He said that the incidents date back, some 3 years. He also said that in some instances, the complainants did not even indicate the precise dates when the alleged incidents occurred.

In support of this contention, the appellant cited **Roy Richard Elirema & Another Versus Republic, and Wilfred Shilingi Versus Republic, Criminal Appeal No. 210 of 2002**. In the **Elirema case**, the offence was committed more than 4 years before the date of the judgment by the court of Appeal; while in the **Wilfred Shilingi case**, the offence was committed some 4 years before the date of appeal.

In both cases, the Court of Appeal took into consideration the duration between the Commission of the offence and the appeal date. In answer to this issue, the learned State Counsel sought to distinguish the two authorities from the circumstances in this case. She submitted that the appellant herein had only been in custody for about two months, as compared to the appellant in the **Elirema case**, who is said to have been in custody for over 4 years.

Having perused the judgment in the **Elirema case** I noted that the appellants had originally been charged with Robbery with violence. Although, it is not expressly stated in the judgment, that the appellants were in custody, it is safe to presume that they must have been in custody, because they had been charged with a capital offence. I therefore believe that the respondent has a point, to the effect that the appellant's circumstances are distinguishable from those prevailing in the **Elirema Case**.

It was then submitted by the appellant that he has special circumstances due to his physical condition. He is wheelchair-bound and therefore has to rely on other inmates or prison officers for both his mobility and the sustenance's of his bodily and hygiene needs.

In the light of the said physical challenges, the appellant submitted that a retrial would occasion him untold suffering. But the state expressed the view that the appellant's medical condition could not be a ground for refusing to order a retrial. In principle, I do hold that the medical condition of a person would not, by itself, be sufficient ground for concluding that he should not be retried. The fact that a person is physically challenged cannot and does not mean that he cannot commit an offence. And if he is charged with an offence, such a person would undergo a trial, just like every other accused person. So also, if an appellate court came to the conclusion that the said person should be retried, his physical limitations should not be a bar to an order for retrial.

In the opinion of the State, the evidence which is on record is overwhelming. It is thus contended that an order for retrial would not prejudice the appellant in any manner. As far as the state is concerned, the appellant was positively identified by the complainants. It is also contended that although the evidence of the complainants was not corroborated by any independent witnesses, the evidence was sufficient to sustain conviction.

However, on his part the appellant submits that the evidence on record was so inadequate as to be incapable of sustaining a conviction. The first reason cited by the appellant, to illustrate that the evidence was inadequate, is the fact that none of the complainants ever lodged a complaint with the police. Indeed, as far as the appellant was concerned, the persons who could properly be termed as the complainants in this case were the UNHCR and the Lutheran World Federation. He says so, because PW9 did testify that it was the UNHCR that filed a complaint, in Nairobi.

I have perused the record of the proceedings, and verified that PW9, Inspector Pascal Mweu, was one of the two investigating officers. He testified as follows;

“I am one of the investigating officers herein. The other one is Lilian Kambia who is away in Botswana. The complaint was made by UNHCR to Mr. Langat. I do not know the particular officer from UNHCR who reported the matter. Prior to that report we had no report from any of the complainants”.

By his evidence, PW9 was appointed as an investigating officer, for this case, on 29th July 2002. By that date Miscellaneous Law Amendment Act No. 5 of 2003 had not been enacted. The said Act introduced, inter alia, the meaning of the word **“complainant”**, as an addition to section 2 of the Criminal Procedure Code. It stated that the word

“Complainant “means, “a person who lodges a complaint with the police or any other lawful authority”.

It is on the basis of that definition that the appellant submitted that UNHCR was the complainant. However, as I have already stated above, the amendment which introduced the meaning of the word **“complainant”** had not come into being, as at the time when the appellant was arrested and charged. The said meaning will therefore not be applicable to this case. I say so not just because the amendment came into force at a later date, but also because of the reasons advanced by the Court of Appeal **in Roy Richard Elirema & Another versus Republic Criminal Appeal No. 67 of 2002**, at (Mombasa).

In that case, the Court of Appeal said, inter alia:

“PART VI of the Code is headed ‘PROCEDURE IN TRIALS BEFORE SUBORDINATE COURTS’ and the sub-heading is ‘PROVISIONS RELATING TO THE HEARING AND DETERMINATION OF CASES.’ There is no direct mention of a prosecutor, whether public or private. The parties named in section 202, for example, are the complainant and the accused person. If the “complainant” is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “complainant” in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of the Republic.”

I have set out the foregoing at length, as it illustrates that the word “**complainant**” was capable of having more than one meaning. Indeed, I do believe that whereas the complaint may have been lodged by UNHCR, in this case, that alone did not make the said UNHCR the “**complainant**.” I believe that the word “**complainant**” as used in the case, has the meaning alluded to by the Court of Appeal when they made reference in the **Elirema Case** (above) to the “victim of the crime who is merely the chief witness on behalf of the Republic”. It is in that context that I understand the word “**complainant**” to have been used.

Indeed, I would go further to say that I am not entirely sure that the meaning now ascribed to the word, following the amendment to section 2 of the Criminal Procedure code is all-inclusive. I say so because to my mind, there are many instances where the person who lodges a complaint with the police is different from the victim of the offence. For instance, the victim may be under-age or hospitalized; and the offence committed against him or her is reported by a parent, friend or a person who witnessed the incident. In such circumstances, I consider that it might create confusion if the case comes up for trial and the “**complainant**” is still the person who made the report, while traditionally the term has usually been used in reference to the victim of the offence. Perhaps, it may become necessary to have a further debate on the appropriateness of the meaning now ascribed, by statute, to the word “**complainant**”.

Be that as it may, there is no doubt that the victims in this case did not make any reports to the police. Indeed, PW9 testified to that effect, and added the following:

“I did record one of the complainants statements. I did arrest the accused on 31st July 2002 while we were in the process of investigations. Albert gave me a statement that he was sexually molested. He gave me no evidence. None of the complainants gave me any evidence. We have a police station at Kakuma. No report had been made at the station by any of the complainants.”

From the foregoing it is evident that the investigating officer did not get any evidence from the complainants regarding the offences allegedly committed on their persons. He explained that he did not conduct further investigations on the complainants’ bodies, “*as the issue was brought up much later.*” Furthermore, during his re-examination, PW9 testified as follows;

“I did not get any medical evidence due to lapse of time. In cases of indecent assault there is no evidence.”

That summarizes the prosecution case against the appellant. Thus it leaves only the oral testimony of the complainants. The appellant was thus correct to state that the evidence of the complainants was not corroborated by any independent witnesses. But that still begs the question, is corroboration necessary in cases such as these, which involve two adult males?

Mr. Lubulellah advocate cited the Court of Appeal’s decision **in John Mwashigadi Mukungu Versus Republic, Criminal Appeal No. 227 of 2002**, (at Mombasa), as authority for the proposition that corroboration was necessary. In his view, the Court of Appeal had, by that case only outlawed the requirement of the discriminatory application of the need for corroboration in relation to women.

That judgment emanated from a case in which the complainant was a victim of rape. The appellant had been charged, tried and convicted for the offence. He appealed to the High Court, but his conviction was upheld. He then appealed to the Court of Appeal, on the grounds that there had been no corroboration of the complainant's evidence. The Court of Appeal expressed itself as follows:

“The framers of the Constitution and Parliament have not seen the need to make provisions to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the constitution.”

In my understanding, the foregoing is the **ratio decidendi** of that judgment. In other words, corroboration is not obligatory before conviction can be properly found, in sexual offences.

Therefore, even though there may not have been corroboration of the complainants evidence, that alone would not weaken the finding of the learned trial Magistrate, to the effect that the offence had been committed. But then again, what did the trial court base the conviction on?

Basically, the learned trial Magistrate believed the evidence of the prosecution witnesses. She also gave a careful and detailed analysis of the defence case, and came to the conclusion that the appellant's defence was without merit. In the words of the learned trial magistrate, he found the prosecution witnesses credible.

I must say that the analysis of the learned trial magistrate was very thorough indeed. In my assessment, her attention to detail was meticulous. However, there is only one technical difficulty, which is brought about by the provisions of section 200(3) of the Criminal Procedure Code. The said section provides as follows:

“Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

In this case, all the nine (9) prosecution witnesses testified before Senior Resident Magistrate, Mr. G. K. Ombongi. After the close of the prosecution case, the appellant's advocate submitted that his client did not have a case to answer. However, before he could give a Ruling on the issue, Mr. Ombongi passed away. It was at that stage that the Senior Resident Magistrate, Mrs W. A Juma took over the conduct of the trial. However, the record does not show that she complied with the provisions of section 200(3). She did not inform the accused that he had a right to have any of the witnesses re-summoned and reheard.

In the case of **Ndegwa Versus Republic {1985} KLR 534, at 537** the Court of Appeal expressed itself in the following words;

“No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of a subject. He is the most sacrosanct individual in the system of our legal administration. It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second Magistrate did not himself see and hear all the prosecution witnesses even though he said he carefully “observed” the evidence given by the prosecution witnesses. He was therefore not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possibly make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation.”

I cannot do any better than to adopt, wholly, the foregoing words. Having done so, I now turn to section 200(4) of the Criminal Procedure Code, which stipulates as follows:

“Where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the High Court may, if it is of the opinion that the accused persons was materially prejudiced thereby, set aside the conviction and may order a new trial.”

In this case I had already quashed conviction and set aside the sentence, on the basis of the prosecution by an unqualified prosecutor. The failure by the convicting magistrate to comply with section 200(3) of the Criminal Procedure Code is thus just another basis for declaring the trial a nullity. The only question now remaining is whether or not I should order a retrial.

Although, I had already given consideration to each of the grounds canvassed before me, hereinabove, I must now look at the composite picture. The offences herein were committed in 2001. That is not a very long time ago. I also consider that the appellant was not in custody during the trial. Therefore, he has only been in custody for about two months, following his conviction and sentencing. The state has informed me that the witnesses are available. As the offences with which the appellant was charged were serious, I do not think that the appellant will be so adversely prejudiced if he was retried. It is my considered view that the ends of justice demand that the appellant be retried. But then again, the said retrial would have to be limited only to the offences of indecent practices. The appellant will therefore not be retried for the unnatural offences, in respect of which he had already been acquitted.

The retrial shall be conducted by a competent magistrate, other than Mrs W. A Juma. I further direct that the said retrial shall be accorded priority. To that end, the criminal case is to be mentioned, before the Magistrate’s Court, on 18th October 2004, for purposes of fixing hearing dates.

In the meantime, the appellant is to be released, whilst awaiting his trial, provided that he executes a personal Bond of Kshs 100,000/=, with one surety of like sum.

For the avoidance of doubt, I direct that the surety is subject to approval by the Deputy Registrar of this court, in the normal manner.

Dated at Nairobi this 13th day of October, 2004.

FRED A. OCHIENG
AG. JUDGE

Mr. Odero court clerk