



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**APPELLATE SIDE**

**Criminal Appeal 263 of 2003**

**MUTUKU KIOKO MOSES ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant was charged in Kangundo Senior Resident magistrate Criminal Case 577/03 with two offences namely rape contrary to section 140 of the Penal Code and indecent assault of a female contrary to section 144 of the Penal Code. After the hearing the appellant was convicted of the 1st charge of rape contrary to section 140 of the Penal Code. No finding was made on the 2nd charge. He was sentenced to life imprisonment, with hard labour. The appellant was dissatisfied with both conviction and sentence and filed this appeal. The appellant initially filed the appeal in person but by an application dated 7.7.2004 and filed in court on 9.7.2004, Mr. Kakonzi applied to amend the petition of appeal which was allowed since notice was duly served on respondents.

Briefly stated, the prosecution case as I understand it was that the complainant was seated in her fathers house at about 2.20 p.m. on 21.7.2003 when the appellant entered their house. He threatened to harm the complainant if she did not do as he said. He removed her pants, undressed and started to have intercourse with her. Meanwhile complainants father P.W. 2 had seen the appellant enter his house and went to see what he wanted. He found the appellant lying on the complainant. The appellant got off and dressed and P.W.2 closed the door to the house and called 2 men who were near his house to witness. P.W.3 was one of the two people called and he was threatened by appellant who managed to escape. P.W.4 Dr. Muthoka who examined the complainant on 22.7.2003 found that there had been an attempt at vaginal penetration. In his sworn defence the appellant claimed to have gone to sell goods at Kathaana on 21.7.2003. He denied having had any knife or raping the complainant. The State Conceded the appeal on grounds that the prosecution of the case in the lower court was conducted by Police Constable Mbonge who was an unqualified prosecutor. Under Section 85 (2) Penal Code and Section 88 Penal Code the Attorney General may appoint prosecutors from Advocates of the High Court or police officers of the rank of Ag. (Assistant) Inspector of police and above. Police Constable Mbonge was none of the above and his purported prosecution of the case before the lower court was improper. In the light of the now well known case of ROY ELIREMA V. REPUBLIC CR. APP. 67/03 and which the appellants counsel cited the Court of Appeal held that prosecution of a case by an unqualified prosecutor renders the whole proceedings a nullity and hence void. I therefore find that the whole proceedings before the lower court were a nullity and that being the case, the conviction is hereby quashed and sentence set aside.

The State prays that this court do order a retrial. The appellants counsel objected to a retrial on grounds that the evidence adduced by prosecution is not sufficient to sustain a conviction. The appellants relied on the authority of AHMED SUMAR V. REPUBLIC 1964 E.A 481. In that case the Court of Appeal held that an order of retrial depends on the particular facts and circumstances of each case and such order should be made where the interests of justice require it and where no injustice is likely to be caused to the appellant. In the later case of FATEHALL MANJI V. REPUBLIC 1966 EA the Court of Appeal in addition to the holding in the SUMAR case held that generally a retrial will be ordered only when the original trial was illegal or defective but it will not be ordered if conviction is set aside for insufficiency of evidence. The offence which the appellant faced was allegedly committed on 21.7.2003. He appeared before the lower court for plea on 29.7.2003 and was convicted and sentenced on 20.8.2003. The trial was conducted speedily and he has been in prison for only one year. There has been no delay in hearing of his

case and even this appeal.

The appellant was charged with a very serious offence of rape. The complainant was a young child of 15 years who was also disabled. It is the argument of the appellant that no offence was committed since there was no penetration as the Doctor only found there to have been an attempt. There is evidence that a vaginal swab had been taken and the complainant to have pus cells. It will be upto the court to decide whether attempted penetration amounts to rape or not. Besides the appellant faced a 2nd charge of indecent assault which ideally should have been an alternative charge. No finding was made on that 2nd charge. The lower court can still proceed and make a finding on the said charge. It is my considered view that the evidence on the lower court record may result in a conviction and a retrial would be proper in this case in order that ends of justice be met.

The trial in the lower court having been conducted by an unqualified prosecutor renders the trial defective and this would call for a retrial. In the case of **ROY ELIREMA** the court also considered the question whether witnesses would be available in the event that the court ordered a retrial. The offence was committed in Kangundo area. The witnesses are local residents of that area and witnesses would be available to testify if called upon to do so.

In the case of **ALFRED KIOKO V. REPUBLIC CR.APP. 154/02** which was cited by appellant the Court of Appeal noted that there had not been sufficient evidence before the lower court to sustain a conviction and it would be futile ordering a conviction and further that the appellant had been in remand and prison for a total of 4 years and it would have been unfair ordering a retrial. The circumstances of that case are different from the present one.

After considering all the requirements for consideration before a retrial can be ordered, it is my view that the said conditions are met and the circumstances and justice of this case require that there be a retrial and this court so orders that there be a retrial. The appellant be produced before Kangundo court on 12.10.2004 for mention.

Dated, read and delivered at Machakos this 7th day of October 2004.

Read and delivered in the Presence of

R. V. WENDOH

JUDGE