

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 227 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 2 of 2003 of the Resident Magistrate's Court at Makueni: G. J. K. Kiia, Esq. on 7.1.2003)

MUTISO WAMBUA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant Mutiso Wambua was charged with the offence of defilement of a girl under 14 years Contrary to Section 145 (1) of the Penal Code before Resident Magistrate's Court at Makueni. He pleaded guilty to the offence and was sentenced to 14 years imprisonment, hard labour and 6 strokes of the cane. The appellant is dissatisfied with the sentence and preferred this appeal.

In the grounds of appeal, the appellant has no quarrel with the conviction but the sentence which he contends is excessive and harsh and requested its reduction.

The Learned State Counsel conceded the appeal on grounds that the prosecutor in the lower court was one Corporal Kyumbu who was unqualified in terms of Section 85

(2) Penal Code and Section 88 Penal Code. Under the said sections the Attorney General may appoint prosecutors from Advocates of the High Court or police officers of the rank of Ag. Inspector and above. Corporal Kyumbu is none of the above. In light of the Court of Appeal decision in the case of **ROY ELIREMA & ANOTHER V. REPUBLIC CR. APP. 67/2003**, it is now settled law that once a prosecution is conducted by unqualified prosecutor the proceedings are rendered a nullity the result being that the proceedings before the court are a nullity and the conviction quashed and the sentence set aside.

The State Counsel prays that this court do order for a retrial of the case. The appellant objected to such an order but merely requested that the sentence be reduced.

In the case of **MANJI V. REPUBLIC 1966 E.A 343** the Court of Appeal held that the court will generally order a retrial if the original trial was illegal or defective but will not order a retrial where there was insufficient evidence. In the matter before court, the prosecution was conducted by an unqualified prosecutor. It was defective and it is one that can be considered for a retrial.

In the Manji case as well as the case of **SUMARI V. REPUBLIC 1964 EA 481** the Court of Appeal held that a retrial would only be ordered where the interests of justice require it and where it is unlikely to cause injustice to the accused person and that each case has to be considered on its own merit. The appellant was charged with a serious offence of rape. He pleaded guilty to it. He does not query the conviction.

The appellant was sentenced on 7.1.2003, on the same day that plea was taken. He has been in prison for about one year 6 months. Considering the seriousness of the offence, the period which he has been in prison is not unreasonably long and this court would consider a retrial.

In the case of **ROY ELIREMA CASE** the court considered the issue of availability of witnesses in the event that a retrial is ordered. The offence was committed in Makueni within the local limits of that court's jurisdiction. The appellant was a servant in the home where complainant hails from. Witnesses would therefore be available if called upon to testify.

In sum, I am of the view that this case is apt for a retrial and this court orders that the case be remitted back to the lower court for a retrial. The appellant claimed to be a minor at time of trial, that is 17 years. It is noted that the court never bothered to have his age assessed before sentence. It is ordered that this be done before the case is heard, because in the event of a conviction; the age factor would affect the sentence in light of the Children's Act.

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

R. V. WENDOH

JUDGE