

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 87 OF 2002
(From original conviction and sentence of the Chief
Magistrate's Court at Nakuru in Criminal Case No.
2741 of 2000 – H. WASILWA)

B.M.N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, B.M.N, was charged with the offence of rape contrary to **Section 140 of the Penal Code**. The particulars of the offence were that on the 27th of December 2000 at Rhonda Estate, Nakuru, the Appellant had carnal knowledge of L.N without her consent. The Appellant pleaded not guilty to the charge. After a full trial the Appellant was convicted as charged and sentenced to seven years imprisonment with five strokes of the cane. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

At the hearing of the Appeal, Mr Koech, Learned State Counsel conceded to the Appeal on the sole ground that the proceedings before the trial magistrate were conducted by an incompetent Police prosecutor. Mr Koech, however urged this Court to order that the Appellant be retried in view of the overwhelming evidence that was adduced against him. The Learned State Counsel further submitted that only a few witnesses testified in the case and therefore an order for retrial would not occasion any hardship on the Appellant as his case would in most probability be heard within a very short time. The Appellant on his part objected to being retried. He submitted that he had served nearly three years of the term imposed by the trial magistrate. He urged the Court to discharge him.

I have considered the submissions made by the Appellant and by Mr Koech on behalf of the state. I have also read the proceedings before the trial magistrate. It is not denied that criminal proceedings were prosecuted Sergeant Winnie. She is a Police Officer of a rank lower than that of an Assistant Inspector of Police. She was thus not authorised to prosecute criminal cases in accordance with the provisions of **Section 85(2) and Section 88 of the Criminal Procedure Code**. In the case of **Roy Richard Eliremah & Anor. –versus- Republic C.A. Cr. Appeal No. 67 of 2002 (Mombasa)** it was held by the Court of Appeal that where such a Police Officer prosecutes a criminal case before a Magistrate's Court, the proceedings thereto will be a nullity. I do declare the proceedings of the trial magistrate in respect of which this Appeal arose to be a nullity, as a consequence of which the Appeal is allowed, the conviction quashed and the sentence imposed set aside.

The issue that remains for the determination of this Court is whether or not to order the Appellant to be retried. Mr Koech has submitted that overwhelming evidence was adduced in support of the charge against the Appellant in the vitiated trial. He further submitted that only four witnesses testified and therefore the Appellant would not suffer undue prejudice if he is retried. On the other hand, the Appellant has submitted that he has served nearly three years of the term of seven years imprisonment imposed by the trial magistrate. The Appellant submitted that he should therefore be discharged.

I have considered the rival submissions made. The conditions to be considered by this Court before making an order of a retrial are well settled. The conditions are, *inter alia* , whether the Prosecution has to establish that it can avail witnesses during the retrial of the case. The Court has to consider that there was sufficient evidence adduced by the Prosecution in the vitiated trial so as not to afford the Prosecution an opportunity to fill in gaps during the retrial of the case. Another issue to be considered is whether the

Appellant would be prejudiced if an order of retrial is made and finally whether it would serve the interest of justice if a retrial is ordered. In the present case it is not doubted that the Prosecution was able to prove its case against the Appellant in the vitiated trial. After the rape, the Complainant was seen immediately by the doctor who testified that he was able to see spermatozoa and some epithelial cells after the results were analysed by the laboratory. At the time of the commission of the offence, the Complainant was aged sixteen years. In my evaluation of the said evidence which was adduced, this was one case which an order of retrial ought to be made.

I however hesitate in making an order for retrial for two reasons; firstly, the Appellant was sentenced on the 14th of March 2002 to serve a term of seven years imprisonment. To date the Appellant has served two years and nine months of the said imprisonment term imposed. It would prejudice the Appellant if a retrial is ordered as it would expose the Appellant to be potentially sentenced to serve an even harsher custodial sentence were he to be found guilty in the retried case. Secondly and more importantly, the Complainant in this case must have undergone a traumatic experience during the ordeal that she was subjected to by the Appellant. It is now nearly four years since the offence took place. The Complainant most probably has moved on with her life having put behind the traumatic experience that she was subjected to. It would not be in the interest of justice that a Complainant, who has gone on with her life, to be compelled to again relive an experience which in most probability she would like to forget by giving evidence in another trial.

In the circumstances of this case, it is my humble opinion that the ends of justice would not be served by an order of retrial being made. The two years and nine months imprisonment that the Appellant has served is sufficient punishment for him. He has repaid his debt to the society. He is consequently ordered discharged. He is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 30th day of November 2004.

L. KIMARU

AG. JUDGE