REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
Criminal Appeal 234 of 2002
(From Original Conviction and Sentence in Criminal Case No. 133 of 2002 of the Resident Magistrate's Court at Makueni: J. K. Kiia Esq. on 22.10.2002)

MUTHAMA METU …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

J U D G E M E N T

This is an appeal preferred against the judgement of the District Magistrate I Makueni Court in Criminal Case 133/2002 where the appellant had been charged with the offence of rape contrary to Section140 Penal Code and in the alternative indecent assault on a female contrary to section 144 (1) of the Penal Code. He was also charged with the offence of assault causing actual bodily harm. He was convicted of the main charge on count 1 and sentenced to 12 years imprisonment whereas he was sentenced to 4 years imprisonment on the second charge.

At the hearing of the appeal, the Learned State Counsel Mr. O'mirera conceded the appeal for reasons that the proceeding in the lower court were conducted by Corporal Kinyumbu who was not a competent prosecutor. Section 85 and 88 (2) Criminal Procedure Code provide for who may be appointed as a prosecutor. The Attorney General may appoint advocates of the High Court or police officers of the rank of Acting Inspector and above as prosecutors. Prosecution of this case by Corporal Kinyumbu offended the said provisions of law and in light of the now celebrated case of ROY ELIREMA V. REPUBLIC CR. APP. 67/2003, where Court of Appeal held proceedings prosecuted by an incompetent prosecutor to be a nullity. I hereby declare the lower court proceedings a nullity. Having done so, the conviction and sentence cannot stand and I hereby quash the conviction and set aside the sentence.

The State Counsel urged the court to order a retrial for reasons that the charge against the appellant being one of rape was a very serious one, that the offence was committed in May 2002 and determined on 23.10.2002 when the appellant was sentenced to serve 12 years imprisonment and 4 years for assault with the sentences running consecutively and that so far he has only served 2 years, less than ¼ of his sentence. He urged that witnesses are readily available and that the admissible evidence on record was likely to result in a conviction if an order of retrial was made.

The appellant did not object to a retrial.

In the case of MAMJI V. REPUBLIC 1966 EA 343, the Court of Appeal held that the courts will generally order a retrial in proceedings which were defective or illegal and in doing so the order of retrial should not be prejudicial to the accused person. In the present case the proceedings have been declared a nullity and so the trial was defective.

The offence was committed on 23.4.2002. The trial was finalized on 22.10.2002 when the appellant was

sentenced. So far the appellant has served 2 years less than ¼ of the sentence meted against him that is 16 years in total.

The offence is also very serious and the court has read the record of appeal and finds that the admissible evidence on record is such that it would result in a conviction if a retrial was done. Considering the seriousness of the offence it is proper that the court does take into account whether justice has been done to both the appellant and the complainant. In my view a retrial would not prejudice the appellant.

The complainant hails from same village with the appellant and so do the other witnesses. It is within Wote under jurisdiction of Makueni court. If a retrial is ordered the witnesses can be traced.

Since the appellant has hardly served the sentence and for the other reasons above, I find that he will not suffer any prejudice if a retrial is ordered. A retrial is hereby ordered and the trial be conducted on a priority basis. The appellant be produced before Makueni court on 22.12.2004 for retrial.

Date at Machakos this 20th day of December 2004.

Read and delivered in the presence of

R. V. WENDOH

JUDGE