

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
HIGH COURT CRIMINAL APPEAL NO. 198 OF 2002

JAMES KATITHI NZUKI ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

**(From the Original Conviction(s) and Sentence(s) in Criminal Case No. 268 of 2001 of
Resident Magistrate's Court at Makueni J.K. KIIA DM I on 2/7/02)**

J U D G M E N T

The appellant, Katithi Nzuki was on 16/7/02 convicted of the offences of Rape Contrary to Section 140 of the Penal Code and Assault Contrary to Section 251 of the Penal Code by the District Magistrate I at Makueni. He was then sentenced to seven years imprisonment, hard labour and six strokes for the offence of rape and three years imprisonment for the offence of assault. The prison sentences were to run concurrently. He is aggrieved by both the convictions and sentences and he filed the appeal. When the appeal came up for hearing the learned State Counsel, Mr O'Mirera conceded the appeal for reasons that the case in the lower court was prosecuted by an incompetent prosecutor one Corporal Kyumbu. A look at the record of appeal does confirm that Corporal Kyumbu was the prosecutor. His prosecution of the case offends Section 85 and Section 88 (2) of the Criminal Procedure Code which provides that the Attorney General may appoint prosecutors from Advocates of the High Court or police officers of the rank of acting Inspector and above. Corporal Kyumbu was not qualified as he was not above the rank of acting Inspector of police.

In the recent case of ROY ELIREMA versus REPUBLIC Criminal Appeal No. 67/03 the Court of Appeal held that prosecution of a case by an incompetent prosecutor renders the proceedings a nullity. The State Counsel urged me to order the proceedings a nullity which I hereby do. Since the proceedings are a nullity, it follows that the conviction and sentences cannot stand. I hereby quash the conviction and set aside the sentence. Can this court order a retrial as urged by the state counsel? In the case of MANJI versus REPUBLIC 1966 E.A 343 the Court of Appeal held that a retrial will normally be ordered in a case where the proceedings in the lower court are defective or illegal and provided that the accused person will not be prejudiced by a retrial. In the present case the proceedings in the lower court were a nullity and have been quashed and it is, therefore, a good case for a retrial.

The appellant was charged with a very serious offence of rape. I have scanned the testimony of the witnesses in the lower court and in my view; the evidence on record is such that a conviction may result. There is indeed overwhelming evidence and for that reason it is only fair that the accused be brought to justice by his case being heard a fresh. So far the appellant has served just over two years from 16/7/02. He has hardly served half of his term. It is only fair that justice be done for both the appellant and the complainant.

The witnesses were from the local area where the complainant hails from Makueni district. Some were her relatives and the court is convinced that if a retrial is ordered they will be found to come and testify. Although the appellant totally opposed a retrial considering the aggravated nature of the offence a retrial will not prejudice appellant. I, therefore, do order that the appellant be retried before a court of competent jurisdiction at Makueni and that the court do give the matter priority. The appellant to be produced before Makueni court on 22/12/04 for plea.

Dated at Machakos this 7th day of December 2004

R.V. WENDOH

JUDGE