



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO 1322 OF 1988

BETWEEN

MATHEA & another..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from original conviction and sentence in Criminal Case No 2174 of 1988 of the Resident Magistrate's

Court at Nyahururu)

April 27, 1989, **Porter J** delivered the following Judgment.

The appellants appeared in the court below each charged jointly with alternative charges of attempted rape and indecent assault.

The learned trial magistrate seems only to have put one charge to them, and has not shown on the record to which charge the appellants were in fact pleading. It does not appear that the alternative was pointed out to them.

Nor apparently from the record did the learned trial magistrate record in which language the proceedings were conducted or to which language interpretation was if any.

The matter was particularly important here, as the plea was recorded as "It is true" from both appellants, and (see *Wanjiru v Rep* [1975] EA 5) therefore the facts were required to be given, as they were, and understood by the appellants which is not clear from the record. State Counsel is therefore right to say that this conviction should not be supported. The trial of the appellants in the court below was not satisfactory, and therefore I must consider whether a retrial should be ordered. (*R v Dossani* (1946) EACA 150).

In CA 56/83 the position as to retrial was reviewed. The main point made was that a retrial could take place where a retrial is in the interests of justice and no injustice is likely to be caused to the appellant. Each case must depend on its own facts

In *Koech v Rep* [1968] EA 109 a retrial was not ordered as the appellant had been in custody for 2 months. In *Kimbio v Rep* [1979] KLR 132 relying on *Braganza v R* [1957] EA 152, it was said that retrial should not be ordered unless the appellate court is of the opinion that a conviction might result.

Cases of injustice have usually involved a consideration of whether the appellant has served an appreciable term of imprisonment already, which has not happened here as the appellants were released on bail after 22 days. One has also to bear in mind whether the prosecution have brought a case which is full of holes which an order for retrial will enable them to fill up. That might result in an injustice.

But each case depends upon its own facts.

Here I am invited to say that the record does not show evidence which might result in a conviction, but, without wishing to prejudice in any way the evidence which another court might hear, the brief facts given do indicate that there might be a conviction if the available evidence were to be properly considered, although of course any other court hearing the evidence would be working to an entirely different standard of proof than I have to consider here.

The offences alleged are much more serious than those in *Koech's* case, by which I am not bound on this point, as each case depends upon its own facts.

I have a discretion in the matter, and I exercise it by ordering that the appeals of the appellants succeed, conviction is quashed and sentence set aside, and a retrial is ordered before a different magistrate and the appellants are bonded on the same terms as they have been before this court to appear before the SRM Nyeri on Tuesday 9th May 1989 for mention.

Dated and Delivered at Nairobi this 27th day of April , 1989

C. PORTER

JUDGE