



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: GICHERU, SHAH & OWUOR, J.J.A.)

CRIMINAL APPEAL NO. 74 OF 1999

BETWEEN

MICHAEL WAMBUA GATUKU APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from an Order of the High Court of Kenya at Nyeri
(Justice Juma) dated 19th April, 1999**

in

H.C.C.R.A. NO. 413 OF 1998)

JUDGMENT OF THE COURT

In this second appeal, the appellant, Michael Wambua Gatuku, appeals against the order of Juma, J. dated 19th April, 1999 at Nyeri.

The appellant was originally charged in the Senior Resident Magistrate's Court at Murang'a with the offence of attempted rape contrary to **section 141** of the Penal Code. In the alternative, he was charged with indecent assault to a female contrary to **section 144(1)** of the Penal Code.

He was tried and convicted on the main charge of attempted rape and sentenced to seven years imprisonment with four strokes of the cane. The particulars of the charge he faced being that on the 4th of September 1996 at [particulars withheld] in Murang'a District of the Central Province he attempted to have carnal knowledge of R.N.G without her consent. Pursuant to that conviction he lodged an appeal against both Conviction and Sentence. In the petition of appeal prepared by himself he raised altogether seven grounds of appeal.

On 19th April, 1999 the appeal record was placed before the learned judge who invoked **section 352(2)** of the Criminal Procedure Code and made the following order.

"I certify that I have perused the record

and I am satisfied that the appeal has been

lodged without any sufficient ground for complaint.

Appeal summarily rejected. Section 352(2) "

It is this order of summary rejection that the appellant now appeals against. His complaints are set out in seven grounds of appeal. Mr. Oluoch, State Counsel, very candidly conceded and in our view rightly so, that this was not an appeal which should have been summarily rejected as the learned judge did, for the reason that the appeal to the superior court did raise questions of both law and fact. Hence, the learned judge misdirected himself and erred in invoking **section 352(2)** of the Criminal Procedure Code. This section is clear as to the grounds upon which an appeal from a subordinate court may be summarily rejected - See **Mulacha Raj Mohan vs. Republic** [1954] 21 E.A.C.A. Page 383.

We are satisfied that the learned judge erred by summarily rejecting the appeal.

On perusal of the trial Court's record, it would appear that the appellant's case was dealt with by at least four Magistrates. P.M. Morigori, Resident Magistrate, commenced the trial and heard the evidence of the complainant (**PW1**), **W.P (PW2)** and **J.M (PW3)** being the only witnesses the prosecution called to prove the case against the appellant. The appellant then jumped bail and his matter was continuously mentioned by two other Magistrates who amongst other orders issued a warrant of arrest. Eventually upon arrest the appellant was produced before Mwangulu, **District Magistrate I**, for the hearing of his case to continue. The learned Magistrate purporting to comply with **section 211** of the Criminal Procedure Code placed the appellant on his defence. The appellant gave an unsworn testimony. The Magistrate then wrote his judgment and convicted the appellant on evidence that had been wholly taken by another Magistrate. This was without compliance with section **200(3)** of the Criminal Procedure Code. The non-compliance with this section amounted to a mistrial. For this reason the appellant's trial was a nullity. In the result, we allow the appellant's appeal, quash his conviction and set aside his sentence of **7 years imprisonment** and **four strokes** of the cane but order that he be retried by a different Magistrate of competent jurisdiction.

Dated and delivered at Nyeri this 19th day of May, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR