



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO. 16 OF 2020**

**CHRISPINUS ODUORI NYAMWE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence in S.O.A case No.121 of 2016 of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi-Chief Magistrate)

**JUDGMENT**

1. Chrispinus Oduori Nyamwe, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (2) [sic] of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the 6<sup>th</sup> day of May 2015 at [Particulars withheld] village, Bukhayo West location within Busia County intentionally and unlawfully caused his penis to penetrate the vagina of DO, a child aged 7 years.
3. The appellant was sentenced to serve fifteen years imprisonment. He has appealed against both conviction and sentence.
4. He raised three grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and in fact by failing to analyse the entire evidence on record thereby arriving at an erroneous finding.
  - b. That the learned trial magistrate erred in law and in fact by failing to give proper evaluation and weight to the defence offered by the appellant.
  - c. That the learned trial magistrate erred in law and in fact in meting out un-statutory sentence.
5. In the written submissions, the advocate for the appellant raised the issue of non-compliance with section 200 (3) of the Criminal Procedure Code.
6. The appeal was opposed by the state.
7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
8. Section 8 (1) (2) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

**...contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act ...**

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced. The error is curable under section 382 of the Criminal Procedure Code.

9. Section 200 (3) of the Criminal Procedure Code provides:

**Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right. [Emphasis added]**

10. This provision is mandatory. Every succeeding magistrate has an obligation to inform an accused person of the right created under the subsection. Failure to do so, results in a mistrial. The Court of Appeal while emphasizing the import of non-compliance with the section in the case of **Henry Kailutha Nkarichia & another vs. Republic [2015] eKLR** stated as follows:

**As to the contested consequence of the learned Judge's failure to inform the appellants of their right to call any or all of the witnesses who had testified before his predecessor, we cannot agree that the need to comply with ) is lessened by the fact that all the witnesses had already testified by the time the case was taken over by Emukule J. If anything, we would opine that the more the witnesses who had testified, the greater the possibility of prejudice and therefore the more the need for the accused person to be informed and availed of the right of recall. At any rate, the provision applies to all cases of takeover of a partly or fully heard case by a succeeding judicial officer; because whether such officer acts on the evidence of his predecessor or recommences the trial *de novo*, it is always subject to the accused person's right of recall.**

11. Hon. W.K. Chepseba took the evidence of three prosecution witnesses. Hon. Mrs. Ambasi, the learned chief magistrate, took the conduct of this case 18<sup>th</sup> November 2019. She did not comply with section 200(3) of the Criminal Procedure Code. This provision is mandatory.

12. The appellant's trial, therefore, amounted to a mistrial. There will be no need for me to evaluate the other grounds.

13. I therefore quash the conviction and set aside the sentence. I make an order for a retrial. The appellant to be availed on 29<sup>th</sup> October 2020 at Busia Chief Magistrate's Court for retrial by any other officer of competent jurisdiction other than Hon. Ambasi.

14. In the interest of justice the matter ought to be heard on a priority basis and where practicable, on a day-to-day basis.

**DELIVERED and SIGNED at BUSIA this 22<sup>nd</sup> Day of October, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**