



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CRIMINAL APPEAL NO. 100 OF 2018**

**EZRAH KENANI JASON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the conviction and sentence of Hon. Wamucii Resident Magistrate dated the 26<sup>th</sup> October 2018 in Kisii CMCC No. 113 of 2014)**

**JUDGMENT**

1. **EZRAH KENANI JASON** (the Appellant) has appealed against the conviction and sentence dated the 26<sup>th</sup> October 2018. He was charged with the offence of **Defilement** contrary to Section 8 (1) as read with section 8 (4) of the Sexual Offences Act. No. 3 of 2006. The particulars of the offence are that; “On the 11<sup>th</sup> day of January 2014, in Kisii Central within Kisii County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JA a child aged 7 years old”. The alternative charge was, “**Indecent Act of a Child** contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016. The particulars of the offence are that; “ On the 11<sup>th</sup> day of January 2014, in Kisii Central within Kisii County the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of JA a child aged 7 years old’.

2. The Appellant was convicted of the offence of defilement and sentenced to life imprisonment. His grounds of appeal in short is that the prosecution did not prove their case beyond reasonable doubt and that the sentence meted on him was harsh and excessive.

3. At the hearing of the appeal the prosecution conceded to the appeal. Mr. Otieno submitted that having looked at the proceedings the trial was conducted by Hon. K.Sumba PM, then Hon. J.M. Njoroge and thereafter Hon. S. N. Lutta who took the matter and complied with Section 200 of the Criminal Procedure Code (the CPC). That when Hon. Wamucii took over the proceedings on the 19/3/2018 she did not comply with the provisions of Section 200 of the CPC. That this was fatal to the proceedings. He requested the court to order a retrial.

4. Mr. Ochoki for the Appellant submitted that they had no objection to having a retrial in the matter as the judgment was delivered in October 2018.

5. I have perused the proceedings and I confirm that when Hon. Wamucii took over the matter on the 13/3/2018 she did not comply with the provisions of Section 200 (3) which provides as follows;

(3) 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.

6. The appellant was not informed of his right as provided under section 200 (3) of the CPC. This is a legal requirement which the trial court should have complied with. The said provision is couched in mandatory terms. On whether I should order a retrial, this depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person. The prosecution informed the court that the complainant was 12 years was present when the Appellant was sentenced, she addressed the trial court. Considering the circumstances of this case, and also that the Appellant’s counsel did not object to a retrial, I set aside the conviction and sentence and order a retrial. The Appellant shall be presented before the Chief Magistrate for plea on the 5<sup>th</sup> of March 2019. The Appellant shall remain in custody until then.

**Dated signed and delivered at Kisii this 27<sup>th</sup> day of February 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Appellant In person**

**Mr. Nyakundi h/b Mr. Ochoki For the Appellant**

**Mr. Otieno Senior Prosecution Counsel**

