**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 16 OF 2018**

**JARED NYAIGOTI PETERO.....APPELLANT**

**VRSUS**

**THE STATE.....RESPONDENT**

**[Being an Appeal from the Conviction and Sentence of Hon. P. W. Wasike (RM) Keroka Law Courts dated 31st May 2018 in Keroka Principal Magistrate's Court Sexual Offence Case No. 25 of 2017]**

**JUDGEMENT**

The appellant was tried, convicted and sentenced to life imprisonment on a charge of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The particulars of the charge were that on 14th July 2017 in Masaba South Sub-county within Kisii County he intentionally and unlawfully caused his penis to penetrate the vagina of SM a child aged 7 years.

The prosecution called the child and three other witnesses aster which the appellant testified on oath and denied the charges.

The appellant being aggrieved by the conviction and sentence preferred this appeal. In his petition of appeal, he raised the following grounds: -

> "1. **That my Lord I did not plead guilty to the charges and I firmly maintain the same.**
>
> **2. That my Lord the trial learned magistrate faulted both in law and fact when maliciously conducted the proceedings in the instance case without caution that the appellant was not in ability to understand the proceedings in court in violation of article 49(1)(c) 50 (2) (g) (h) 25(a)(c) 27(1) (2) 28,29(a)(d)(f) of the constitution given to the fact that the appellant was ignorant in the matter of the law.**
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> **3. That my lord the trial magistrate faulted both in law and fact when miserably based the conviction on fictions and misapprehension both from the court and the flattery by the prosecution witness yet the whole allegation was extremely doubtful and below the standard of prove in the matter like this.**
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> **4. That my lord the trial learned magistrate faulted both in law and fact when seemingly based the conviction on the shared intension both from the court and the prosecution. The conviction was hereby based on emotional not facts and rational as required by the law. The rule of justice was trampled upon without just course given to the fact that the possibility of the complainant to be influenced and couch the probable.**
>
> **5. That my lord the trial magistrate further faulted both in law and fact when miserably appreciated the flattery evidence merely demonstrated in court by the prosecution witness without circumspect that the same were precarious and extremely unsafe to base the conviction on the same given that the constitutional rights of the appellant were grossly violated. Section 198(1)(3) of the cpc was awfully undermined by the trial court by failing to interpret the language used in court on the documents which were produced in court.**
>
> **6. That the overall effect is that may this appeal be allowed the conviction quashed and the sentence of life imprisonment set aside and set the appellant to liberty forth with."**

He has urged this court to quash the conviction, set aside the sentence and set him at liberty forthwith.

At the hearing of the appeal the appellant relied on written submissions while Counsel acting for the respondent submitted orally. This court

considered the submissions by both sides but as its duty it also reconsidered and evaluated the evidence before the trial court so as to arrive at its own conclusion. It was in the course of perusing the record that I noticed that the trial was conducted by two Magistrates. The one who started it could not however conclude it due to a transfer and another Magistrate took over. The succeeding Magistrate did not comply with the provisions of **Section 200 (3) of the Criminal Procedure Code** which requires the succeeding Magistrate to inform the accused person his right to demand that any witness be resummoned and reheard. In **Edward Ochieng Ouko Vs. Republic [2006] eKLR** the Court of Appeal stated: -

***"That it was fatal for a trial court not to comply with the section and that the omission to do so rendered the trial a nullity."***

Although the appellant did not raise this ground in the appeal the conviction cannot stand. I am however satisfied that this is a proper case for retrial as there would have been sufficient evidence to convict were it not for this fatal error on the part of the trial Magistrate and the appellant having been sentenced on 31st August 2018 has only served a small proportion of the life sentence – **see Otieno Vs. Republic [2006] 1 KLR 241.** Accordingly, the case is remitted back to the Senior Resident Magistrate's Court Keroka for hearing by a Magistrate other than P. W. Wasike. The appellant shall be escorted to that court on the 4th day of April 2019 for directions. Until then he shall be remanded at the Kisii Main Prison.

**Signed, dated and delivered in Nyamira this 28th day of March 2019.**

**E. N. MAINA**

**JUDGE**