REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 22 OF 2016

BETWEEN

ELIZAPHAN OCHUTO ELKANA..................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.N Mwaniki – PM dated 15th June 2016 at the Senior Resident Magistrate's Court at Keroka in Criminal Case No. 979 of 2010)

JUDGMENT

1. The appellant, **ELIZAPHAN OCHUTO ELKANA,** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act*** and sentenced to life imprisonment. The particulars of the charge were that on 19th July 2010 in Borabu District within the then Nyanza Province intentionally and unlawfully caused his penis to penetrate the vagina of SN, a child aged 5 years old.

2. Although several grounds of appeal have been raised for determination, the single decisive issue that will resolve this appeal is whether the trial magistrate complied with **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The appellant case is that the trial magistrate had ordered that the matter do start afresh and the magistrate taking over the conduct of the matter erred in setting aside the order and proceeding with the matter. Learned counsel for the respondent conceded that appeal on that basis.

3. This matter had a chequered history before the trial court and it is as follows. After the appellant was arraigned in court, the trial commenced before Hon. N. Wairimu, SRM. She did not complete the hearing as she was transferred. When Hon. R. Mitey took over the conduct of the matter on 4th September 2012, she duly informed the appellant that he was entitled to recall witnesses under **section 200(3)** of the ***Criminal Procedure Code***. On 19th September 2012, the appellant indicated that he wished to recall the clinical officer, PW 3. The matter then proceeded for hearing with the prosecution calling PW 3 and other witnesses. After the close of the prosecution case, the appellant was put on his defence and he duly testified and proposed to call an additional witness.

4. Before Hon. Mitey finalized the case, she was transferred and Hon. Sindani, PM took over the conduct of the matter. On 19th June 2014, Hon. Sindani directed that the matter starts afresh after complying with **section 200(3)** of the ***Criminal Procedure Code***. Unfortunately, the matter did not proceed before him and was heard before Hon. Mwaniki, PM who directed that appellant to complete the defence case after varying the orders made by Hon. Sindani on 19th June 2014. The defence was completed whereupon the judgment was delivered.

5. It is clear that the Hon. Mwaniki did not have jurisdiction to vary the order of Hon. Sindani who had complied with **section 200** of the ***Criminal Procedure Code***. He could only have proceeded with the trial by requiring that all the witnesses be recalled. Consequently, I allow the appeal on that basis.

6. The issue that remains to be considered is whether I should order a retrial. The applicable principles were enunciated in ***Fatehali Manji v Republic*** **[1966] EA 343** where the East Africa Court of Appeal stated, *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person." (See also* ***Mwangi v Republic*** **[1983] KLR 522**).

7. Although there was overwhelming evidence implicating the appellant in the offence, I have taken into account that the appellant was

charged in 2010 and the reason why the trial magistrate ordered the matter to proceed is that witnesses could not be found. In these circumstances, a re-trial may not be feasible. I have also considered that appellant was a child within the meaning of the ***Children Act*** when the alleged offence was committed. I have also taken into account the fact that the appellant has been in prison for 2 years and remand custody for 6 years.

8. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

9. As a similar appeal had been filed by the appellant namely; ***Nyamira HCCRA No. 26 of 2016***, it is hereby struck out.

DATED and DELIVERED at KISII this 27th day of NOVEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Nyatundo, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.