REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.88 OF 2016

JOSEPH MUTUA MUKUNDI ALIAS KAZUNGU...APPELLANT

VERSUS

REPUBLIC …….…. RESPONDENT

(From the original conviction and sentence in criminal case No. 2950 of 2011 of the Chief Magistrate's Court at Maua by Hon. Oscar Wanyaga – Resident Magistrate)

JUDGMENT

The appellant, **JOSEPH MUTUA MUKUNDI alias KAZUNGU**, was convicted for the offence of defilement contrary to section 8 (1) (3) (sic) of the Sexual Offences Act.

The particulars of the offence were that during the month of December 2010 at unknown dates at [particulars withheld] D.C's office, Igembe North District of Meru County, he intentionally caused his penis to penetrate the vagina of **E K** a child aged 14 years.

The appellant was found guilty of the offence and sentenced to serve 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mwanzia, learned counsel. He raised four grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by failing to comply with section 200 of the Criminal Procedure Code.

2. That the learned trial magistrate erred in law and in fact by allowing a third party to actively participate in the proceedings.

3. That the appellant was not accorded a fair hearing.

4.That the conviction was against the weight of the evidence tendered.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant passed by the gate of the D.C's office Laare, the appellant whom she described as her best friend called her and requested that they engage in sex. She agreed. When she went home she refused to divulge where she was even after a beating by her father. She only informed her parents who

was responsible for her pregnancy when it was discovered.

In his defence the appellant contended that he only came to learn that the complainant was under the age of 18 years when he was arrested.

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.**

The charge was wrongly drafted. It ought to have read contrary:

> **"... to section 8 (1) as read with section 8 (3) ..."**

I however find that the appellant was not prejudiced for he understood the charge against him and he fully participated in the trial. The defect is curable under section 382 of the Criminal Procedure Code.

It has been argued for the appellant that failure to start the case de novo was prejudicial to him. Section 200(3) of the Criminal Procedure Code Provides as Follows:

Section 200(3) of the Criminal Procedure Code provides as follows:

> ***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.***

This is the procedure that the appellant is claiming was breached.

The appellant's case was heard by two magistrates and before the takeover by the second magistrate, the appellant was informed of his right under the provision of section 200 (3) of the CPC. He elected to have his case start de novo.

*The Concise English Dictionary defines the word "**any**" as:*

> **used to refer to one or some of a thing or a number of things, no matter how much or how many.**

In my understanding of this English word, it does not mean all. In the context of section 200(3) of the CPC it does not therefore mean all witnesses must be recalled. The issue of de novo is a creature of misunderstanding but not of the law. Under the section therefore, an accused person may elect to have some of the witnesses he may deem crucial recalled and indicate whether he wants them recalled for examination in chief or for cross examination. Where one is not represented, the court has a duty to explain and elicit from him the intended purpose for recalling.

Under the section, it is mandatory for the succeeding court to inform the accused of his right, what is not mandatory is what follows subsequently. My position is bolstered by the Court of Appeal decision in the case of **JOSEPH KAMAU GICHUKI vs. REPUBLIC [2013] eKLR it said the following:**

> **This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by**

either the prosecution or the accused.

In the instant case I find that no prejudice was occasioned to the appellant by the failure to start the matter de novo.

Mr. Muthomi counsel holding brief was allowed to address the court twice. This was undesirable for it can create the impression that the appellant was not accorded a fair hearing. I however did not find his address prejudicial to the appellant in any way.

Although there was a claim that the appellant was not accorded a fair hearing, my perusal of the record does not support the same. There were so many adjournments attributed to the defence, some of which were un-merited. He cannot be heard to complain.

The appellant contended that the complainant was his lover. He said she had indicated to him that she had finished form four. I agree with the learned trial magistrate that not all who have gone through form four are 18 years or over. In her evidence, the complainant testified that the appellant was her best friend. She consented to have sexual intercourse with him of course she had no capacity to give consent. When she went home she declined to tell her father where she was in spite of him slapping her. Her conduct after the sexual liaison with the appellant and her testimony in court ought to made the learned trial magistrate alert.

Section 8(5) of the Sexual Offences Act provides as follows:

(5) It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

I expected a finding on record as to whether any reasonable person would have believed that the complainant was of the age of eighteen years or above. Without such a finding by the learned trial magistrate, then the defence of the appellant ought not to have been dismissed. This failure to make a finding left the defence to go unchallenged. On this ground therefore, the appeal succeeds.

The conviction is quashed and the sentence set aside. The appellant is to be set at liberty unless if otherwise lawfully held.

DATED at **MERU** this **27th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE