REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 16 OF 2017

ALI MOHAMED JIRAN …….. APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged in the magistrates court at Wajir with defilement contrary to section 8(1)(3) of the Sexual Offences Act no. 3 of 2006. The particulars of the offence were that on 19th May 2016 in Mandera county intentionally caused his penis to penetrate of the vagina of L O a child aged 15 years. In the alternative he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006. The particulars of the offence were that between the same dates and place touched the vagina of L O a child aged 15 years with his penis.

He denied both charges.

Evidence was tendered before Cherono SPM now a judge. When Justice Cherono was appointed a judge the case went before Mugendi Nyaga RM, and was adjourned a number of times in December 2016.

In February 2017, the case was mention before Hon Amos Makoros SRM. On 23rd of March 2017 Mr. Wanyoike came a record for the accused and noted that the accused (now appellant) had stated that he preferred that the case proceeds from where it had reached, but that after consultation the accused had now decided that the case starts afresh. This request was opposed by Mr. Ndete for the prosecution and the magistrate delivered a ruling and declined to reverse the previous order and refused the case to start the case afresh. This ruling is the subject of the present appeal which was filed by Stephen Gakonyo Wanyoike advocate for the appellant.

Counsel for the appellant filed written submission to the appeal which he relied upon. Several authorities were relied upon by counsel for the appellant.

Mr. Okemwa learned Principal Prosecuting Counsel conceded to the appeal.

The issue for my determination is whether the learned magistrate was right in declining to start the trial afresh. The relevant section of the law in this regard is section 200(3) of the Criminal Procedure Code (cap.75) which provides as follows:-

> **"Where a succeeding magistrate commences the hearing or proceedings and part of the evidence has been recorded by his predecessor the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall informed the accused person of that right."**

Several court cases have dealt with the application of this section of the law. It has been held by courts that it is mandatory for the accused person to be informed of the right to recall witnesses. In my view, the law is protecting the rights of the accused to get a fair trial.

In the case of PETER NDEGWA -VS- REPUBLIC (1985) KLR 534 Madan, Kneller and Nyarangi J J A stated with regard to section as follows:- At page 536

“ Section 200 is a provision of the law which is to be used very sparsely indeed and only in cases where the exigencies of the circumstances not only are likely but will defeat the course of justice if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to a latter becoming un available to complete the trial. Section 200 is not to be invoked where a seemingly in the instant case such a half heard trial is a short one, it could be conveniently started denovo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.”

In my view, the ideal situation is that the trial court should hear all the witnesses and determine their demeanor. Therefore, where it does not cause injustice or prejudice to the prosecution or defence, the trial court should ideally hear all witnesses.

The Principal Prosecuting Counsel does not oppose the appeal. I find no reason to dis allow the appeal.

I thus allow the appeal and set aside the ruling of the trial magistrate at Wajir declining to start the hearing of the case afresh. I order that the case of the appellant in the trial court at Wajir be started and heard afresh. I will proceed to give a mention date at Wajir court for the case to be started afresh.

Dated and delivered at Garissa on 27th July 2017.

George Dulu

Judge