



IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 34 OF 2015

BETWEEN

CLINTON TOBIAS ODERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 914 of 2012 at Senior Resident Magistrate's Court at Winam, Hon. J. Sala, RM dated 19th December 2014)

JUDGMENT

1. The appellant, **TOBIAS CLINTON ODERA**, was charged with the offence of defilement contrary to **section 8(2)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on 23rd June 2012 at [particulars withheld] Village, Kisumu East District, he intentionally caused his penis to penetrate the vagina of ZAO, a girl aged 7 years. He was tried, convicted and sentenced to life imprisonment.
2. The only issue necessary for determination of this appeal is whether the learned magistrate was right to proceed with a matter after the accused had elected to start the matter afresh under **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***
3. The trial in the subordinate court commenced before Hon. Wakumile, PM who was subsequently transferred. On 12th June 2013, Hon. Sindani, RM explained to the appellant the provisions of **section 200** of the ***Criminal Procedure Code*** and he elected to proceed with the matter from where it had reached. The matter was placed before Hon. Waigera, RM who once again complied with **section 200** of the ***Criminal Procedure Act***. She took the testimony of 2 witnesses but she too was transferred. When the matter was placed before Hon. Njalale, RM on 10th December 2013, the accused elected to have the matter heard afresh.
4. On 12th February 2014, the matter came up for hearing before Hon. Sala, RM who recorded the following proceedings;

Prosecutor

I am ready with 2 witnesses.

Accused

I am also ready.

Court

I note that on 10/12/2013, the accused elected to have the case start afresh.

Prosecutor

On 3 different occasions, the accused had elected that the case considers (sic) afresh.

Kindly consider that although the accused had a right to have the case start afresh under s. 200 of the CPC. The minor has a right under the Constitution, the Children Act and the Sexual Offences Act to have the case conducted expeditiously.

Court

I have considered sentiments by both the accused and prosecutor. I note that this being a new trial court, the accused has a right to have it start afresh. I also note that the complainant has a right to a fair and speedy trial. While considering the above, I am of the view that the accused seems to have the case commence each time purely to delay the case. I hereby direct that the case proceeds from where it had reached.

5. The applicable provision in this case is **section 200(3)** of the **Criminal Procedure Code** which states 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 re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. [Emphasis mine]

6. The provision cited is mandatory in nature in so far as the accused is granted the right to make an election as to whether the trial should start afresh. In this case the learned magistrate fell into error to the extent that on 10th December 2013, the learned magistrate had explained to the accused his right and the accused had elected to start the matter afresh. The record is also clear that the accused was not given an opportunity to be heard before the order was varied despite that fact that his statutory right was being violated. Moreover, it was wrong for the learned magistrate to ascribe to the appellant any motive to delay the case when he had exercised his statutory right due to a state of affairs brought about by matters entirely beyond his control. In the circumstances, I find and hold that the trial that proceeded was a nullity and as a result I quash the conviction and sentence.
7. Given the nature and gravity of the offence and in particular the overwhelming evidence against the appellant, I order a retrial. The appellant shall remain in custody and be taken to retrial before the Senior Resident Magistrates Court at Winam on **22nd July 2016**. The trial shall proceed expeditiously.

DATED and DELIVERED at KISUMU this 20th day of July 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Chelangat, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.