



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 7 OF 2015

JOSHUA OTIENO OMOLLO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo (Hon. C. A. Kutwa PM) dated the 28th January 2015 in Bondo PMCCR No. 735 of 2012)

JUDGMENT

The appellant was charged with Defilement contrary to section 8(1)(3) of the Sexual Offences Act and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act both of which he denied.

In the principal charge the particulars were that on diverse dates between 15th July 2012 and 6th October 2012 in Bondo Township in [particular withheld], Bondo District, Siaya County he intentionally caused his penis to penetrate the vagina of E A O a child aged 13 years.

In the alternative charge it was alleged that on the said diverse dates and place he touched the vagina of E A O a child aged 13 years.

The Prosecution called four witnesses whose evidence was partly recorded by Hon. B. M. Kipyegon Resident Magistrate and partly by his successor Hon. C.A. Kutwa, Acting Principal Magistrate, who after considering the evidence adduced by both sides acquitted the appellant on the main charge but convicted him on the alternative charge and sentenced him to ten years imprisonment.

Being aggrieved he filed this appeal. His appeal is premised on the following

grounds:-

- 1. The learned Magistrate erred in law and in failing to comply with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code by taking over the conduct of the case and failing to inform the Appellant of his right to resubmit the witnesses and/or rehear the case thus greatly prejudicing the Appellant, taking into account that the Appellant was unrepresented by Counsel.**
- 2. The learned Magistrate erred in law and in fact in convicting the Appellant on the alternative charge where there was absolutely no evidence to support that charge.**
- 3. Having found no evidence to convict the Appellant on the main count of defilement, the**

learned Magistrate erred in law and in fact in relying on uncorroborated evidence to convict the Appellant on the alternative charge.

4. The learned trial Magistrate erred in law and in fact in convicting the Appellant in the absence of sufficient evidence to sustain the charges preferred against the Appellant.

At the hearing of the appeal Mr. Odongo, learned Counsel for the appellant submitted that the Magistrate that took over the appellant's trial did not comply with Section 200(3) of the Criminal Procedure Code and on that ground alone this appeal ought to be allowed. He relied on 2 authorities:-

1. Edward Ochieng Ouko V. Republic [2006] eKLR

2. Dickson Kamau Mulwa V. Republic [2013] eKLR

He then urged this Court not to order a re-trial. He submitted that the evidence used to convict the appellant was not sufficient in that nowhere did the complainant allege that her vagina was touched as alleged in the particulars. He also submitted that the complainant could not have been defiled because it was her evidence that on 6th October she was in remand and that it was also her evidence that they slept four girls and two boys on 15th April 2012. He submitted that there was no mention of sexual intercourse at all and that looking at the totality of the evidence there is no reason to warrant a re-trial. He urged this Court to acquit the appellant.

Miss Wakio, Learned Prosecution Counsel conceded the appeal on the ground that Section 200(3) of the Criminal Procedure Code was not complied with when the new Magistrate took over the trial. She however urged this Court to order a re-trial.

Honourabe Kutwa, did not comply with Section 200(3) of the Criminal Procedure Code when he took over the trial from Hon. Kipyegon on 7th May 2014. Authorities abound that this omission renders the trial a nullity. In **Edward Ochieng Ouko V. Republic [2006] eKLR** the Court of Appeal stated:-

"The second magistrate totally failed to inform the appellant of his rights under section 200(3) the (sic) Criminal Procedure Code. Under that section the magistrate was mandatory required to inform the appellant of his right to have all the previous witnesses testify afresh or to be further cross-examined. That right was violated by the magistrate and it renders the appellant's second trial a nullity."

So should I order a re-trial? In the Edward Ochieng Ouko case the Court declined to order a re-trial. As was held by Joel Ngugi, J. and B.T. Jaden, J in **Dickson Kamau Mulwa V. Republic [2013]eKLR** in considering whether to order a re-trial the Court will be guided by the following principles:-

(a) First, a re-trial may be ordered only when the original trial was illegal or defective. See **Merali v Republic (1071) EA 221**. This means that a re-trial should not be ordered where the appeal succeeds due to lack of sufficient evidence. A re-trial should never be used by the Prosecution to fill gaps in its case.

(b) Second, a re-trial should be ordered where the interests of justice require it and refused where it is likely to cause injustice or prejudice to the appellant. See **Ahmed Suman v Republic (1964) EA 481**.

(c) Third, a re-trial should be ordered only when it is likely that it will result in a conviction.

Having considered and re-evaluated the evidence adduced in the lower Court I am satisfied that this is a good case for re-trial. There is in my view evidence that may result in a conviction and the appellant will not be prejudiced as he has only served seven months of his ten year term.

Accordingly the appeal is allowed, the conviction quashed and sentence set aside. The appellant shall be taken before the Bondo Principal Magistrate's Court within seven days of this order for re-trial by

a magistrate other than Hon. Kutwa. In the meantime he shall be remanded at the GK Prison.

Signed, dated and delivered at Kisumu this 21st day of July 2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ruto for the state

Mr. Odongo for the appellant

CC: Moses

