REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 33 OF 2012

(From the original conviction and sentence in criminal case no. 650 of 2009 of the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – PM)

JONATHAN CHARO KAINGU .....…….…… APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

1. The appellant was charged with Defilement of a girl aged 15 (fifteen) years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars state that on the 2nd day of August, 2009 in Kilifi District within Coast Province committed an act which caused penetration of his genital organ namely penis into that of E N's vagina a girl aged 15 years.

2. Following a full trial, the appellant was convicted and sentenced to 20 years imprisonment. Six grounds five of which attack the adequacy of the prosecution evidence were relied on. The sixth ground that the sentence is manifestly excessive holds no water as the sentence imposed is the minimum provided by the law.

3. The state conceded the appeal and prayed for a retrial on grounds that the trial court which took over the case after five witnesses gave evidence failed to comply with Section 200(3) of the Criminal Procedure Code. The appellant's counsel opposed the plea for a retrial.

4. I have looked at the record of the trial. It is evident that on 10th February, 2011 when the trial proceeded before a different magistrate the court did not comply with the mandatory provisions of Section 200(3) of the Criminal Procedure Code. On this ground alone the conviction cannot be allowed to stand. Although the prosecution evidence on record could have sustained a conviction, I think that it would be prejudicial to order a fresh trial (see **Mwangi v R (1983) KLR 520,** the court, following the dicta in **Braganza v R [1957] EA 152 CCA)** and stated at page 538 that:

"...a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

5. The principle stated in Ahmedi Ali Dharamsi Sumar V. Republic 1964 E.A. 481 and restated in Fatehali Manji V. The Republic 1966 E.A. 343 wherein the Court of Appeal was that:-

"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 an injustice to the accused person".

6. This case started in 2009 and was only completed in February, 2012. An order for retrial would not be just. The appellant will be set at liberty unless otherwise lawfully held.

Delivered and signed at Malindi this **28th** day of **March, 2014** in the presence of the appellant, Mr. Musyoki for the State.

Court clerk – Samwel

C. W. Meoli

JUDGE