



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 114 OF 2011**

**SIMON KIPSANG SUM:..... APPELLANT**

**VERSUS**

**REPUBLIC:.....RESPONDENT**

**JUDGEMENT**

The appeal herein is conceded. The learned trial magistrate failed to conduct a voire dire examination of the complainant before she testified.

As the complainant was a small child, aged less than four (4) years, the failure to conduct the voire dire examination rendered the trial proceedings a nullity.

The error in question was made by the trial court. It is not attributed to the prosecution.

Therefore, Mr. Mutuku, learned Deputy Director of Public Prosecutions, has asked this court to order that there be a retrial. He assured this court that the prosecution witnesses would be readily procured.

He also submitted that the evidence adduced by the prosecution, during the trial which has now been declared a nullity, was sufficient to sustain a conviction.

Mr. Mitey, learned advocate for the appellant, also called for a fresh trial.

His only concern is that the appellant had been assessed to be unfit to stand trial.

Having given due consideration to the matter before me, I find that the position adopted by the parties before me, is the most appropriate in the prevailing circumstances.

I therefore do hereby allow the appeal, quash the conviction and set aside the sentence. I further order that the appellant, SIMON KIPSANG SUM, shall be re-tried by any magistrate of competent jurisdiction, other than Hon. Atieno Alego SRM (as she then was).

In order to facilitate the said trial, I further direct that the case be mentioned before the learned Chief Magistrate, Eldoret Law Courts, on 11th November, 2013; the mention is intended for the taking of a fresh plea, subject to compliance with Section 162 of the Criminal Procedure Code.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET**

**THIS 23<sup>RD</sup> DAY OF OCTOBER, 2013**

---

**FRED A. OCHIENG**

**JUDGE**