



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 159 OF 2010

**(From original conviction and sentence in Criminal Case No. 2170 of 2007 of the
Chief Magistrate’s Court at Naivasha – T.W.C. WAMAE, SRM)**

DAVID NJOROGE

NJIHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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JUDGMENT

David Njoroge Njihia has appealed against the decision of T.W.C. Wamae, SRM in Naivasha Criminal Case No. 2170/2207. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act (SOA) No. 3 of 2006**. The particulars of the offence were that:-

“On 4/11/2007 at N[.....] Nyandarua District of Central Province had carnal knowledge of L.W.N a child aged 11 years.”

In the alternative, the accused was charged with the offence of indecent assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act**. It was alleged that:-

“On 4/11/2007 at [...] Nyandarua District of Central Province indecently assaulted L.W.N a child aged 11 years by touching her private parts namely buttocks and vagina.”

After the trial, the court convicted the appellant and sentenced him to 20 years imprisonment. The appellant is aggrieved by both conviction and sentence and filed this appeal, based on the grounds found in the petition of appeal and further grounds that were handed over to the court at the hearing of the appeal. The grounds will be condensed as hereunder:-

- 1. That Section 200 of the Criminal Procedure Code was not complied with;**
- 2. That the appellant’s fundamental rights were breached because he was not brought to court after 16 days;**
- 3. That there was no medical evidence to support conviction;**

4. **That the ingredients of the offence were not proved;**
5. **The charge was not proved to required standard;**
6. **That the sentence was excessive.**

In total, the prosecution called 9 witnesses and the appellant made a sworn statement in his defence. Three magistrates heard the case, F.K. Gitonga, Senior Resident Magistrate heard six witnesses, the 6th witness having been heard on 18/9/08. The matter was adjourned severally and on 9/6/2009, N. Njuki (SRM) took over the matter. The record does not disclose why Gitonga, SRM did not proceed with the case to its conclusion. Njuki, SRM took the evidence of PW7, 8 and 9. When the appellant was put on his defence, the matter was adjourned severally. The appellant failed to attend court and a warrant of arrest was issued. The appellant was later produced in court on a warrant of arrest when his defence was then taken by T.W.C. Wamae (SRM).

One of the grounds that the appellant has raised relates to Section 200 of the Criminal Procedure Code which requires that where a magistrate ceases to exercise jurisdiction over a case after taking part of the evidence, the succeeding magistrate should ask the accused person whether he wants the case to proceed from where the preceding magistrate stopped, or whether he wants some witnesses recalled or whether the matter should start afresh. I have perused the court record and I note that when Njuki, SRM took over the proceedings, he did not comply with **Section 200** of the **Criminal Procedure Code**. He took three witnesses without taking directions and without the appellant electing on how to proceed. I however, noted that when TCW Wamae took over on 18/3/2010, she did comply with the provisions of **Section 200** of the **Criminal Procedure Code**. Had the magistrate perused the file, may be the irregularity committed by Njuki, SRM, the evidence of PW7 to PW9 could have been set aside and the three witnesses recalled. Njuki, SRM, having failed to comply with **Section 200** of the **Criminal Procedure Code** makes the proceedings before the trial court irregular and it amounts to a mistrial. The proceedings must be quashed.

Can this court order a retrial? The appellant was charged with a serious offence of defilement of a child which carries a maximum life sentence. He was handed a sentence of 20 years imprisonment on 14/4/2010. The offence was allegedly committed on 4/11/07. The court record shows that the appellant contributed to the delay in the conclusion of the case when he did not attend court after he was called upon to enter his defence. He was brought under warrant of arrest. So far, the appellant has served just below 2 years out of the 20 years. The witnesses hailed from N[...] in Nyandarua and this court believes they can be found. In my view, the appellant will not suffer any prejudice if the court orders a retrial. The court therefore directs that trial starts afresh at Naivasha Chief Magistrate's Court, before a different magistrate other than F. K. Gitonga, SRM, M. Njuki, SRM or TWC Wamae, SRM. Since it is a retrial the court directs that the trial be speeded up.

The appellant be produced before Naivasha Chief Magistrate's Court on 6/3/2012 for directions as to the hearing.

It is so ordered.

DATED and DELIVERED this 2nd day of March, 2012.

R.P.V. WENDOH
JUDGE
PRESENT:

Ms Idagwa for the State.

Appellant in person - present

Kennedy – Court Clerk.