**MWANGE NDOYO …….…….....…..……..…..... APPELLANT**

**VERSUS**

**REPUBLIC ……. RESPONDENT**

***(Being an appeal from the conviction and sentence of the Principal Magistrate***

***T.M. Mwangi delivered on 11/62010 in Kitui Criminal Case No. 1030 of 2007)***

**J U D G M E N T**

The appellant was charged in the subordinate court with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. In the alternative, he was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

After a full trial, he was convicted of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act. He was sentenced to serve 24 years imprisonment.

He has now appealed to this court against both conviction and sentence. He also raised a Constitutional issue of being kept in police custody for 14 days before being taken to court to be charged.

The learned State Counsel, Mrs Gakobo, conceded to the appeal on a technicality. Counsel contended that though the trial was conducted by two magistrates, the succeeding magistrate did not comply with section 200 (3) of the Criminal Procedure Code (Cap 75). Counsel asked for a retrial. In counsel's view, the evidence on record was sufficient to sustain a conviction. Secondly, witnesses are readily available. Thirdly, the offence is serious, as the complainant was aged only 6 years.

Lastly, counsel argued that the sentence imposed was 24 years imprisonment, and the appellant had served only slightly more than one (1) year imprisonment.

In his submissions in court, the appellant objected to a retrial proposed by the State Counsel. He contended that he was in custody for 3 years before conviction. He also complained about two charges being filed and dated same day, and also being charged with an attempt. He also complained that the charge sheet did not indicate the OB number. He further complained that the P3 form indicated that it was for Sammy Kalunda, not the complainant Musangi Kalunda.

It is a fact that the trial in the lower court was handled by two magistrates. These were Hon. JO Omburah SRM and Hon. EN Gichangi RM. On 22nd October 2008, when the succeeding magistrate took over the case, it was recorded as follows:-

**"Prosecutor: This matter is part-heard before court 3 which was transferred to Mombasa. However, I have 3 witnesses and ready to proceed.**

**Court: Section 200 of the Criminal Procedure Code is read over and explained to the accused.**

**Accused: The matter can proceed."**

As I have stated earlier in this judgment learned State counsel has stated that section 200 (3) of the Criminal Procedure Code was not complied with. The section provides:-

**"200 (3) 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

The above provisions of the law are mandatory. It is quite clear that the succeeding magistrate must inform the accused person of his right to recall witnesses. The record before the trial court does not show that the learned magistrate actually informed the accused of his right to recall witnesses. In addition, what was stated by the accused does not indicate that he was so informed. It also does not indicate that he elected to proceed without recalling witnesses. The provisions of the law being mandatory, failure to comply with the same means that the whole trial is a nullity. The conviction and sentence have therefore to be quashed.

Do I order a retrial? It is not in all cases in which an appellate court quashes a conviction on technical grounds, that it has to order a retrial – *See* **Ruhi vs Republic (1985) KLR 373**. Each case has to be considered on its own merits and circumstances. The evidence on record has to be considered. The gravity of the offence and the length of sentence has to be considered. The period that the appellant has been in custody has also to be considered.

In my view, this is a serious offence. The sentence imposed is relatively long and the appellant has been in custody barely 2 years, after conviction. The State Counsel has assured the court that the witnesses are readily available.

The appellant has raised a number of grounds regarding the charge sheet. He has also questioned the period he was in custody before being charged in court. He has also raised issues to do with contradictions in evidence. I will not go into the merits of these grounds. In my view, doing so will prejudice the final decision if I order a retrial. Suffice to say that, I am of the view that the evidence on record is reasonably sufficient to sustain a conviction, if same is tendered in a fresh trial.

Taking into account the gravity of the offence, the availability of witnesses, evidence tendered, and period of sentence served, I am of the view that this is a proper case to order a retrial.

For the above reasons, I allow the appeal. I quash the conviction and set aside the sentence. I order that the appellant be retried by court of competent jurisdiction, other than the two magistrates who handled the trial herein.

In the meantime, the appellant will remain in custody. The matter will be mentioned before the Chief Magistrate at Machakos on 14th June 2012 for appropriate orders regarding commencement of the fresh trial.

It is so ordered.

Dated and delivered at Machakos this **11th** day of **June** 2012.

**George Dulu**
**Judge**

**In presence of:-**

Appellant in person
N/A for State
Mueni – Court clerk.