REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 86 of 2007

VERSUS

REPUBLIC ……RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 51 of 2003 of the Principal Magistrate's Court at Malindi – C. Ocharo (RM)

J U D G M E N T

The appellant was charged with the offence of attempted defilement of a girl contrary to Section 145(2) of the Penal Code.

The particulars are that on the 13th day of July 2003 at Msabaha Village in Gede Location within Malindi District of the Coast Province, attempted to have carnal knowledge of M. O. A. (details withheld), a girl under the age of 14.

After undergoing the due process of the law, the appellant was convicted and sentenced to serve seven (7) years imprisonment. He appealed to this court on four (4) grounds. At the hearing Mr. Muranje, learned counsel for the appellant, applied for leave to argue the grounds globally. There being no objection, I granted the said application.

Plea was taken on 15th September 2003. Hearing commenced on 1st February 2003 before **J. Manyasi SPM**, who was in the meantime was promoted to Chief Magistrate. Then came the infamous 2003 purge in the Judiciary. J. Manyasi, Chief Magistrate, was unfortunately one of the affected judicial officers.

The matter was subsequently mentioned before J. Kiarie PM. on 13th September 2004, 12th November 2004 and 17th November 2004 and several subsequent occasions. On 7th July, 2005 the hearing commenced before **D. Ogembo SRM**. However, it is neither recorded in the proceedings nor mentioned in the judgment that he ever complied with the mandatory provisions of Section 200 of the Criminal Procedure [Cap 75] Laws of Kenya.

The learned counsel for the state, Mr. Ogoti, conceded the appeal he *inter-alia* argued that Section 200 of the Criminal Procedure Code is couched in mandatory terms. Failure to comply with the same renders the proceedings defective by reason of being an error in law. He argued that the matter should proceed for a retrial. He assured me that witnesses would be available in that event.

Mr. Muranje, learned counsel for the appellant shared the same view. He was amenable to a retrial.

Section 200 of the Criminal Procedure Code provides:

"***(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-***

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

In **NDEGWA VS. REPUBLIC [1985] K. L. R. 534 at P. 538 (Paragraph 40)** the court has this to say in similar circumstances:

"***Section 200 is a provision of the law which is to be used very sparingly indeed; and only in case where the exigencies of the circumstances, not only are likely but will defeat the ends of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.***

In the circumstances of this case the exigencies of the circumstances would have defeated the ends of justice if the succeeding magistrate did not adopt and continue the criminal trial started by the predecessor as it was at the defence stage.

However, it is incumbent upon the succeeding magistrate to explain to the appellants the provisions of Section 200 of the Criminal Procedure Code [Cap 1966] Laws of Kenya.

It suffices to say, in the light of the foregoing authority that the trial was flawed.

Accordingly, I quash the conviction, set aside the sentence and order that the matter do proceed for a retrial before the Senior Principal Magistrate at Malindi or any other magistrate at the said station with competent jurisdiction.

DATED and delivered at Malindi this 21st day of February 2008.

N. R. O. Ombija

JUDGE