

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 47 of 2005

FREDRICK ONAM OKOTH:.....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

The Appellant, Fredrick Onam Okoth was charged with the offence of defilement of a girl contrary to section 145 of the Criminal Procedure Act in Eldoret Criminal Case No.3515 in the Chief magistrate's court. Upon the trial, the Senior Resident Magistrate, Mrs. A.B. Mongare Found him guilty of the offence and sentenced him to a period of 5 even (7) years with hard labour on 2nd November,2005.

Being aggrieved with the conviction and sentence in the said case, the Appellant filed this appeal which came before me for hearing on the 22nd June, 2006. At the hearing, the Respondent, the Attorney – General through Ms. Oundo, State Counsel conceded to the appeal on the ground that the trial court did not comply with section 200 of the Criminal Procedure Code and specifically sub-section (3) thereof.

In this case, the trial commenced before the Acting Principal Magistrate V.W. Wandera on the 2nd February,2005 who was subsequently transferred. The Chief Magistrate A.B. Mong'are in court No.7 who went on with the hearing to the end. The Respondent has conceded that section 200 (3) was not complied with. This provision states that:-

“(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.”

This is a mandatory requirement. The Respondent asked this court to allow the appeal but order for a retrial under the provisions of section 200 (4) which reads as follows:-

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

I reserved this judgement but granted bail to the Appellant in the sum of Kshs.50,000/= with one surety, pending my consideration of the application for an order of retrial.

Having considered the appeal and the concession by the Respondent I do hereby find and hold that the Appellant was materially prejudiced by the non-compliance of Section 200 (3) of the Criminal Procedure Code. This is a right that must be accorded to the Appellant, that is the right to be told that he could call recall any witness who had already testified. This was not done. On this basis and the concession by the respondent, this appeal is allowed. I do hereby quash the conviction and set aside the sentence.

I have considered the application for an order of retrial. The Appellant was arrested on 8th May,2004 and charged in court on 12th May,2004. The hearing took place on 2nd May,2005, 29th August,2005, 15th September,2005 and concluded on 26th October 2005. Judgement was delivered on 2nd November,2005 when the Appellant was convicted and sentenced.

I have considered the Appellant and the length of time the trial took place. I am of the view that in the circumstances, the trial was concluded with a reasonable time. There was no undue delay considering the circumstances in Kenya. I have also taken into account that the Appellant was out on bond during the trial, and that the witnesses and exhibits are also still available.

I, therefore, do hereby an order that there be a near trial in respect of the charges and the Appellant.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER, 2006

M.K. IBRAHIM

JUDGE