

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 39 OF 2019

MOSES ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original judgment in S.O.A case No. 120 of 2015 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

1. Moses Onyango, the appellant herein, was convicted for the offence of sexual assault contrary to section 5 (1) as read with section 5 (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on 3rd August 2015 at Nambale Township within Busia County, intentionally and unlawfully caused his penis to penetrate the anus of FO., a juvenile male aged 14 years.
3. The appellant was sentenced to serve 10 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised the five grounds of appeal which I do not wish to reproduce herein.
5. The trial was conducted by two magistrates. Hon. R.M Washika (SRM) heard the evidence of four witnesses and Hon. M.A Nanzushi took the evidence of PW5 and the defence. Section 200 (3) of the Criminal Procedure Code provides as follows:

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 provision and which has been a subject of many judicial pronouncements. In the case of **David Kimani Njuguna vs. Republic, (Nakuru) Criminal Appeal No. 294 of 2010** after a review of several decisions of the Court of appeal on the subject stated:

All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity.

6. The failure by Hon. Nanzushi to comply with the section resulted in a mistrial. I accordingly quash the conviction and set aside the sentence. The appellant to be presented before the chief Magistrate's Court at Busia on 2nd Monday, after normalcy has returned, for trial by a magistrate of competent jurisdiction other than Hon Nanzushi.
7. Since this matter has taken time and the appellant has served part of the sentence, the trial ought to be on a day to day basis unless where it is not practicable. Should he be convicted after trial, he ought to be given credit of the period served.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE