

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 119 OF 2018

BETWEEN

GEORGE NYAKUNDI NYAGETUMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.K Mutai – RM dated 16th November 2018

at the Senior Resident Magistrate’s Court at Ogembo in Sexual Offences Case No. 68 of 2018)

JUDGMENT

1. The appellant, GEORGE NYAKUNDI NYAGETUMBA, was charged, convicted and sentenced to serve 15 years imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act.

2. I am constrained to allow the appeal as the appellant did not receive a fair trial. On 29th September 2018, the appellant requested for an adjournment on account of the fact that he was feeling unwell. The prosecution opposed it and the trial magistrate ruled as follows;

The accused is now taking the proceedings lightly. He is not in the observation of the court unwell. Matter shall proceed.

3. The sentiments of the trial magistrate were unfortunate and could not be supported by previous proceedings where the matter had proceeded without an application for adjournment by the appellant. There was also no basis for the trial magistrate to diagnose the appellant’s illness by observation particularly given that prior to the hearing the appellant was sick and the court had ordered his treatment. I therefore conclude that the appellant’s right to a fair trial was violated.

4. The case is still fresh and there is overwhelming evidence against the appellant hence I shall order a retrial on condition that the appellant shall remain in custody until the complainant testifies.

5. I quash the conviction and sentence and order a retrial. The appellant shall be taken to Ogembo Magistrate’s Court on **15th March 2019**.

Dated and delivered at Kisii this 7th day of March 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Kimaiyo, Advocate for the appellant.