



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 89 OF 2018**

**BETWEEN**

**EVANS OCHENGO OINO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon.D. K.*

*Matutu, SRM dated 30<sup>th</sup> August 2018 at the Magistrates Court in Kilgoris in Criminal Case No. 360 of 2016)*

**JUDGMENT**

1. The appellant, **EVANS OCHEGO OINO**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the *Sexual Offences Act* (“the *Act*”). It was alleged that 16<sup>th</sup> March 2016 at [particulars withheld] in Transmara West District within Narok County, he intentionally caused his penis to penetrate the vagina of EWG, a child aged 10 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the *Act* based on the same facts. After hearing, the appellant was convicted of the offence of attempted defilement contrary to **section 9** of the *Act* and sentenced to 14 years’ imprisonment.

2. The thrust of this appeal centres on the provisions of **section 200(3)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* (“the *Code*”) which provides as follows:

*200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused of that right.*

3. The trial before the subordinate court commenced before Hon. M. N. Munyendo, Rm on 12<sup>th</sup> May 2016. The trial magistrate left the duty station and when the matter was placed before Hon. A. K. Mkoross on 5<sup>th</sup> October 2016, he complied with the provision of **section 200(3)** of the *Code*. The matter was mentioned on 25<sup>th</sup> January 2017 whereupon Hon. Mkoross indicated that he was going on transfer and could not conclude the case. The matter was then mentioned on 19<sup>th</sup> June 2017 before Hon. Oanda, PM and then fixed for hearing before Hon. Matutu, SRM on 11<sup>th</sup> October 2017. The matter then proceeded for hearing before Hon. Matutu who completed the matter and convicted the appellant.

4. Both counsel for the appellant and for the respondent agree that the appeal must be allowed for want of compliance with **section 200** of the *Code*. From the proceedings I have summarized, the question for consideration is whether Hon. Mkoross or Hon. Matutu was the “succeeding magistrate” within the meaning of **section 200** of the *Code*. The duty to inform an accused of his right is thrust upon the succeeding magistrate and the succeeding magistrate is the one who “commences hearing of the proceedings.” In this case Hon. Mkoross, did not commence hearing of the proceedings. It is Hon. Matutu who commenced the hearing of the proceedings and who failed to comply with **section 200(3)** of the *Code*. Consequently, I allow the appeal.

5. I now turn to consider whether a retrial is appropriate. In *Muiruri v Republic [2003] KLR 552*, the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Amongst the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

6. On this score, I find that the evidence against the appellant was overwhelming and the offence for which the appellant was charged is

serious. The failure to comply with **section 200(3)** of the *Code* was purely that of the court.

7. I therefore allow appeal, quash the conviction and sentence and direct that the appellant shall be retried on the same charges before a Magistrate of competent jurisdiction other than Hon. D Matutu, PM. The appellant shall remain in custody and shall be taken to the Magistrates Court at Kilgoris on **5<sup>th</sup> April 2019** for re-trial.

**DATED and DELIVERED at KISII on this 2<sup>nd</sup> day of April 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochoki, Advocated for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.