



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 19 OF 2018

JACKSON KIPSANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of (Hon. D. Alego, SPM) in Kapsabet

Senior Principal Magistrate's Court CMCRC No. 254 of 2016)

JUDGMENT

The appellant was sentenced to life imprisonment for the offence of defilement, contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 24th January, 2016 at [particulars withheld] Village in Sorora Location within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of AJ a child aged 3 years.

His appeal to this court is against conviction and sentence. Prosecution counsel Busienie on the one hand submitted that the offence was proved beyond reasonable doubt but on the other hand conceded the appeal on the ground that while the trial was conducted by two magistrates the succeeding magistrate did not comply with Section 200(3) of the Criminal Procedure Code which resulted in a mistrial. She however urged this court to order a retrial. The appellant did not oppose the prayer for retrial.

I have perused the record of the lower court and indeed the trial was conducted by the two magistrates. Hon.G. Adhiambo SRM heard nine witnesses including the victim. The record shows that on 7th March 2017 Hon. D. Alego (SPM) heard one witness before rendering a ruling in which she put the appellant on his defence.

Failure, to comply with Section 200(3) of the Criminal Procedure Code is a violation of the accused person's right to a fair trial and results in a mistrial. In Mark Limo Chesire Vs. Republic [2019] e KLR the Court of Appeal held: -

“From the foregoing cited authorities, it is clear that Section 200(3) of the CPC must be complied with fully and the court record must demonstrate such compliance. It was not sufficient for counsel for the appellant to merely say that the case should proceed from where Mwilu, J left. It was paramount and the court record should show that the trial court took the trouble to inform the appellant of his rights enshrined in that provision of the law...

We are satisfied that there was non-compliance with the mandatory provisions of section 200(3) of the CPC. The consequences of such failure leads to a mistrial. The appellants right to a fair trial were therefore infringed and violated under Article 50(1) of the Constitution...”

Similarly I find that the succeeding magistrate's failure to comply with Section 200(3) of the CPC renders the trial against the appellant in this case a nullity. **Should I then order a retrial?** In considering whether to order a retrial I have considered that the appellant was sentenced on 21st March 2018 and has served only 1 ½ years of the sentence of life imprisonment. I have also considered that apart from that mistake on the part of the trial magistrate which the prosecution has nothing to do with, there is evidence that could lead to a conviction. Accordingly the conviction is quashed, the sentence of life imprisonment is set aside and it is ordered that the case is returned to the lower court for retrial by a magistrate other than D. Alego. Pursuant to that order this file shall be placed before the Deputy Registrar forthwith for directions as to the date for mention before a magistrate. The appellant shall remain in custody in the meantime.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF SEPTEMBER, 2019.

E. N. MAINA

JUDGE

In the presence of: -

- 1. Ms. Busienei/ Kagali for the State**
- 2. The Appellant in person**
- 3. Mwelem - Court Assistant**