



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL APPEAL NO. 40 OF 2016

JOSEPH KIPKOECH CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No 457 of 2016

at Kilgoris Law Courts before Hon. A.K. Mokeross SRM on 22.11.2016)

JUDGMENT

1. The appellant's was charged with 2 offences, defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act no. 3 of 2006. The appellant pleaded not guilty and the trial commenced before Hon. Munyendo Sitati RM. Hon. Munyendo heard 3 key witnesses the complainant, her mother and the arresting officer. Hon. Munyendo was transferred and Hon. Mokeross took over the matter on the 25/10/2016. Hon Mokeross did not comply with the provisions of section 200 of the Criminal Procedure Code(CPC)Cap. 75 of the Laws of Kenya. Section 200 (3) specifically provides that, *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.*

2. Since the succeeding trial magistrate did not comply with the provisions section 200 of the CPC I am constrained to allow the appeal and quash the conviction and sentence.

3. The next question is whether in the circumstances of the case, there should be an acquittal or a retrial be ordered. The guiding principle is that each case must depend on particular facts and circumstances of that case but an order for retrial should be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the appellant. ( **See Makupe vs. Republic [1984 KLR 523]**).The case is a 2016 case and is therefore not an old case. I have considered the matter and in the interest of justice I order a retrial. The appellant shall remain in custody and shall be taken to Kilgoris Principal Magistrate's Court to take plea on the **13<sup>th</sup> of December 2018.**

Dated signed and delivered at Kisii on the 7<sup>th</sup> December 2018.

R.E.OUGO

JUDGE

In the presence of;

Mr. Otieno, Senior Prosecution Counsel for the State

Appellant In person

Rael Court clerk