

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 1 OF 2015

IBRAHIM ABDI BORU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.272 of 2014 of the Senior Resident Magistrate's Court at Moyale by Hon. Gathogo Sogomo – Senior Resident Magistrate)

JUDGMENT

The appellant, **IBRAHIM ABDI BORU**, was Charged with an Offence of attempted defilement contrary to section 9(1) (2) (sic) of the Sexual Offences Act of 2006.He was alternatively charged with an offence of committing an indecent act with a child contrary to section 11(1) of the sexual Offences Act,2006.

The particulars of the offence were that on 27th September 2014 at Walda location of Sololo sub county within Marsabit County, the appellant willfully and unlawfully attempted to cause his penis to penetrate into the vagina of **B.Y.G**, a child aged six years. Alternatively, he did an indecent act by willfully and unlawfully causing his penis to come into contact with the vagina of **B.Y.G**, a girl aged six years.

The appellant was found guilty of the offence in the substantive charge and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was unrepresented. From his listed ten grounds of appeal, am able to distill the following grounds:

1. That the learned magistrate erred in law and in fact in convicting the appellant without adequate evidence on record.
2. That the learned magistrate erred in law and in fact by failing to appreciate that **PW1** and **PW2** were relatives and would therefore frame the appellant falsely.

The state opposed the appeal through **Mr. Mwangangi**, the learned counsel.

Briefly the facts of this case are as follows:

When **B.Y.G, PW1** was looking for a younger sibling, she met with the appellant whom she knew by the name **T**. She described him as a man who plays a guitar and they follow after him. On this day he did not have a guitar. He held her and took her under a bridge where he defiled her.

In his defence the appellant contended that he was implicated because of jealousy.

I have noted that when **Hon. Gathogo Sogomo** took over the trial from **Hon. Vincent Adet** who had been transferred he did not comply with the requirements of section 200 of the Criminal procedure code.

Section 200 (3) of the **Criminal Procedure Code** provide as follows:

(3) 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 the and succeeding magistrate shall inform the accused person of that right.(emphasis mine).

The succeeding magistrate is duty bound to explain to an accused person and record his response. Failure to do so renders the trial a nullity. There are several authorities on this issue. In **CRIMINAL APPEAL NO. 21 OF 2013 (AT NYERI) HENRY KAILUTHA NKARICHIA and another vs. REPUBLIC**, the court of appeal observed as follows:

The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in DAVID KIMANI NJUGUNA –VS REPUBLIC, NAKURU CRIMINAL APPEAL NO. 294 OF 2010 after a review of several decisions of this Court on the subject;

“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.

The trial of the appellant was therefore rendered a nullity by the failure by the succeeding trial magistrate to comply with the said provision. I will not bother to delve into the merits or otherwise of the grounds he had raised.

*The conviction is quashed and the sentence set aside. The appellant's case will be tried afresh at Moyale Court before any other Magistrate other than **Hon. Adet and Hon Sogomo**. Mention at Moyale Magistrate's Court on 23.3.2016 with a view to fix a hearing date.*

Orders accordingly.

DATED at Marsabit this 9th day of March 2016

KIARIE WAWERU KIARIE

JUDGE