REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 102 OF 2014

(Appeal against Conviction and Sentence in Gatundu SRM Criminal Case No 834 of 2010 – Ms Kinyanjui, Ag. SRM)

STEPHEN WAWERU NYAMBURA..…..……..…….……APPELLANT

VERSUS

REPUBLIC…….……...…….RESPONDENT

J U D G M E N T

1. The Appellant, **Stephen Waweru Nyambura**, was convicted after trial of defilement of a child contrary to **section 8(1)** as read with **subsection (3)** of the **Sexual Offences Act, No 3 of 2006**. He was sentenced to 20 years imprisonment. He has appealed against both conviction and sentence.

2. The main thrust of the appeal is that the mandatory provision of **section 200(3)** of the **Criminal Procedure Code** was not complied with; that there were glaring gaps in the evidence adduced by the prosecution; and that important witnesses were not called to testify, and without reasons being given for failure to call them. Learned prosecution counsel for the Respondent conceded the appeal upon the same grounds.

3. I have perused the record of the trial court. The trial of the Appellant was conducted by two magistrates. The first magistrate, (E.G. Karani, SRM), took the evidence of PW1, PW2 and PW3. Then Ms Nyagina, (Ag. PM) took over the case from PW4 to conclusion of trial and judgment. The second magistrate never complied with the requirements of section 200(3) of the Criminal Procedure Code which states –

> **"(3) Where a succeeding magistrate commences the hearing of proceeding and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right".**

4. The court has a mandatory obligation under the law to inform the accused of this right. A time may well come when a strong argument may be made that where an accused person is defended by counsel failure to inform him of his right may not cause a failure of justice and would be curable under section 382 of the Criminal Procedure Code. But that is an argument for another day. For now, I am satisfied that a mandatory requirement of the law was not complied with by the trial court, and that is sufficient to dispose of this appeal.

5. I also note, just like the learned counsels have, that the evidence placed before the trial court fell short of proving the charge against the Appellant beyond reasonable doubt. There were material contradictions in the testimonies of the witnesses, and the medical evidence adduced was itself suspect and could not offer the much needed corroboration of the complainant's testimony.

6. Further, there were at least two material witnesses whom the prosecution failed to call without offering any reasons for that failure. One of them was called by the defence, and her testimony could not have assisted the prosecution case, thus explaining the failure to call her. But it should be noted that the prosecution in a criminal case always has an obligation to call all and any material witnesses, notwithstanding that the testimony of one or the other may not be of great assistance to the prosecution

case. The point here is that the primary aim of the prosecution should be to ensure that justice is done to both the complainant and the accused; the aim is never merely to secure a conviction.

7. In the event, I will allow this appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF NOVEMBER 2016

HPG WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 4TH DAY OF NOVEMBER 2016