



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 264 OF 2011

EVANS AMENYA KARINDO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No. 3443 of 2009 of the Chief

Magistrate's court at Kibera before Mrs. Nyakundi, Principal Magistrate on 4th October, 2011)

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with the offence of indecent act with a child contrary to Section 11 (1) of the same Act. After a full trial he was convicted and sentenced to 20 years imprisonment. He appealed against the said conviction and sentence.

I have gone through his submissions and also the reply by the learned counsel for the Republic. The record shows that after hearing five witnesses the trial magistrate was transferred after which her successor took over the proceedings.

Upon invoking the provisions of Section 200 of the Criminal Procedure Code it is the advocate for the appellant who addressed the court and said that the case could proceed from where the previous magistrate had stopped, and asked for copies of the proceedings. The succeeding trial magistrate then gave directions to that effect.

It is clear from the provisions of Section 200 (3) of the Criminal Procedure Code that the duty of the court was to the appellant and not to his advocate. This position has been stated by the Court of Appeal in **Criminal Appeal No. 106 of 2009 Bob Ayub "alias" Edward Gabriel Mbwana "alias" Robert Mandiga vs. Republic**. This court also addressed the same issue in **Miscellaneous Criminal Application No. 445 Of 2012 Rebecca Mwikali Nabutola and others vs. Republic**.

It is therefore irregular for any counsel to step into the position of an accused person under the said provision. In the Nabutola case this court said as follows,

“The record of the trial court must of necessity contain the fact that the trial court, in this case the succeeding magistrate, has informed the accused person of the right to recall or hear any witness. The reply by the accused person must also be placed on the record and the order relating thereto should be signed by the succeeding magistrate. It is not enough for

counsel to state that they have taken instructions because as the Court of Appeal has said the duty of the court is to the accused person and not the advocate.”

The learned counsel for the appellant herein having taken the position of the appellant contributed to the irregularity aforesaid. The learned counsel for the Republic concedes and asks for a retrial because she has confirmed the witnesses and the exhibits can be availed. Further, the evidence adduced in the lower court was sufficient to sustain a conviction. Lastly, no prejudice would be occasioned to the appellant.

I agree that this appeal should be allowed and the only consideration is whether or not a retrial should be ordered. A retrial would generally be ordered where the interests of justice demand. Care should always however be taken to ensure that no prejudice is occasioned to the appellant. Other considerations include whether or not the appellant is to blame for the mistake or omission that has necessitated the call for a retrial. Also, a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result.

The appellant was charged with a serious offence of defilement and the record shows that the evidence adduced may have been sufficient to sustain a conviction. The sentence of 20 years was passed on 4th October, 2011 which is less than 3 years to date. He was out on bail throughout his trial and therefore has not suffered any other incarceration. The learned counsel for the Republic has assured the court that the witnesses and exhibits are available. In the interests of justice this is a fitting case for a retrial.

Accordingly, this appeal is allowed conviction quashed and sentence set aside. The appellant shall be released from prison and escorted to Ngong Police Station so that a retrial is initiated.

Orders Accordingly.

SIGNED DATED and DELIVERED in court this **15th** day of May **2014**.

A.MBOGHOLI MSAGHA

JUDGE