



**Mwaura v Republic (Criminal Appeal 80 of 2020)
[2022] KECA 1317 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1317 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 80 OF 2020
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
DECEMBER 2, 2022**

BETWEEN

DAVID KAGAI MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kiambu
(Nagillah, J.) dated 3rd October, 2017 in HC. CR. A. No. 159 of 2016)*

JUDGMENT

1. This is a second appeal by the appellant, David Kagai Mwaura, who was tried before the Chief Magistrates Court at Thika and convicted for the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006. It was alleged that at the place and time named in the charge sheet he committed an act that caused penetration with a girl (“GW”), aged 11 years. There was an alternative charge of indecent act with a child contrary to section 11(1) of the said *Act* it being alleged that at the said time and place he touched the genital organ of the said girl. After a plea of not guilty was entered the hearing started before Mulekyo, Senior Principal Magistrate on April 24, 2012 who took the evidence of GW (PW1), that of her mother (PW2 – “LW”), that of another relative DNK (PW3), and a police officer who testified as PW4. It appears from the record that the trial magistrate who took that evidence was transferred to another station and the record shows that Ndeda, Resident Magistrate took over the file on November 28, 2012. It shows further that after the provisions of section 200 *Criminal Procedure Code* were explained to the appellant he told the new magistrate:

“ Accused: I wish the matter to start afresh ...”

2. The court ordered that the matter to start *de novo*.



3. Several adjournments followed for one reason or another and the next hearing was on October 10, 2013 before Onchuru, Ag Principal Magistrate. He took the evidence of GW after which the matter was adjourned again several times. It appears that this magistrate got fed up with the way the matter was proceeding – on June 9, 2014 he recorded that the appellant had formed the habit of raising complaints whenever witnesses were absent or when none were bonded to appear in court. He recused himself and sent the file to be allocated to a different magistrate. It was allocated to Mburu, Resident Magistrate. This magistrate took evidence from a clinical officer, the girl’s relative DNK and the police officer. The matter was adjourned again many times. When it came up for hearing again it was now before Ileri, Principal Magistrate. Section 200 Criminal Procedure Code was explained to the appellant who is recorded to have replied that the case proceeds from where it had reached. Evidence of a police officer was taken after which the prosecution case was closed. The appellant, on being put on his defence elected to give an unsworn statement and indicated that he would call 1 witness. He denied the charge and called his wife (she had testified against him as PW2 (LW) before the magistrate who started the hearing had taken evidence from four witnesses). She denied that her husband had defiled their daughter and said that he was being framed by other relatives. The court prosecutor then addressed the court as follows:

“Court prosecutor: I wish to refer the court to the record where she had testified as a prosecution witness I wish also produce her statement in a weeks time.”

4. The appellant closed his (defence) case. The Court Prosecutor then tells the court:

“Court Prosecutor Kimani: The police file was taken to the police station. I urge the court to refer to the evidence adduced before the court the witness was PW2 and I urge the court to convict the accused person.”

5. We have travelled that long route because there is no indication on record at all that the trial magistrate disregarded that obvious misdirection of making reference or relying on evidence taken by a different magistrate where proceedings had been ordered to start afresh. That issue was also not taken up by the High Court on first appeal and we think that it is a serious legal issue meriting our consideration.

6. When the appeal came up for hearing on a virtual platform on October 5, 2022 the appellant appeared in person from Kamiti prison while learned counsel Mr Okatch appeared for the Director of Public Prosecutions. Both sides had filed written submissions which we have considered.

7. We think the appeal can be determined on the single issue we have identified – the effect of proceedings after an order for *de novo* hearing has been ordered.

8. As we have seen that the victim’s wife had testified as a prosecution witness but when the new trial was conducted she was not called as a prosecution witness. She was instead called by the appellant as his (defence) witness and she denied that the appellant had defiled their daughter, testifying that there was a grudge in the family and that he (the appellant) had been framed up.

9. As we have also seen the hearing was ordered to start *de novo* on November 28, 2012 when a new magistrate took over the proceedings after the magistrate who had heard the testimony of witnesses had been transferred to another station.

10. Section 200 Criminal Procedure Code provides in reference to this appeal at sub-sections (1) and (3):

“(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein



and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

- a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
- (2) ...
- (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 and the succeeding magistrate shall inform the accused person of that right.”

11. Lesiit, J (as she then was) stated in the persuasive case of [Julius M'Mario M'Mauta v Republic](#) [2011] eKLR:

“The term *de novo* means that the case was to begin afresh from the beginning. [Black's Law Dictionary](#), Eight Edition defines trial *de novo* thus:-

“A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.””

12. In [Kennedy Babu Kairu v Republic](#) [2020] eKLR we stated that a court should not refer to proceedings conducted before the matter began *de novo*. We said:

“The other issue concerns the trial Magistrate referring to testimony she had recorded before the hearing was ordered to start *de novo*. In the case of [Daniel Karuma alias Njalu v Republic](#) [2015] eKLR, this court expressed itself as follows:

“Finally, we note that although the trial magistrate heard the case *de novo*, in her judgment she made reference to evidence adduced before the previous magistrates in order to satisfy herself of the consistency of the testimony before her. This was wrong, as the essence of a *de novo* hearing is that the matter commences afresh and no reference can be made to the previous proceedings, as they cease to exist in so far as the new trial is concerned.””

13. In the case subject of this appeal the trial magistrate was asked by the court prosecutor to refer to and rely on evidence given before a *de novo* trial was ordered. The trial magistrate did not state whether he agreed with this request. It was a misdirection to rely on evidence given before a *de novo* hearing was ordered and we think that the appeal succeeds on this point alone. We allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. He shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



S. ole KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

