



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL APPEAL 200 OF 2006

EDWARD OCHIENG OUKO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisumu (Warsame, J) dated 13th July, 2006

In

H.C.Cr.A No. 41 of 2005)

JUDGMENT OF THE COURT

The offence of which the appellant was convicted was committed on 7th September, 2002. That is more than four years ago. We are told that the appellant at first pleaded guilty, was convicted and sentenced to a term of imprisonment. He appealed to the High Court and it appears his appeal was allowed and a retrial ordered. The new trial opened before Mr. Korir, a Senior Resident Magistrate, on 8th June, 2004 and that Magistrate heard evidence of three witnesses and would appear to have gone on a transfer. Another magistrate called L.N. Mbugua took over the trial on 22nd July, 2004 and all he did on taking over was to record that:-

“Case to proceed from where the previous magistrate had stopped as per section 200 of C.P.C.”

The second magistrate totally failed to inform the appellant of his rights under **section 200 (3)** the Criminal Procedure Code. Under that section the magistrate was mandatorily required to inform the appellant of his right, to have all the previous witnesses testify afresh or to be further cross-examined. That right was violated by the magistrate and it renders the appellant’s second trial a nullity. We cannot order a further retrial. We must also express our concern that neither the magistrate nor the learned Judge of the superior court noticed that the appellant, for the purposes of the Children Act, was himself a child, and even if he was guilty of the offence charged, he could not be sent to prison. Yet the magistrate sentenced him to life imprisonment with hard labour and the learned Judge of the High Court confirmed that sentence as lawful. It certainly was not lawful. We allow the appeal, quash the conviction, set aside the sentence and order that the appellant be released from prison forthwith, unless he be held for some other lawful cause.

Dated and delivered at Kisumu this 24th day of November, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.