Case Number:	Criminal Appeal 1 of 2008
Date Delivered:	09 Dec 2010
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Jessie Wanjiku Lesiit
Citation:	DAVID ABDALLA OSMAN v REPUBLIC [2010] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

S214 of CPC failure to give and accused right to elect to elect whether to re- call witness after prosecution has amended its charge

Whether trial is defective

Whether a retrial should be ordered

Principles applicable

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 1 OF 2008

LESIIT, J

AVID ABDALLA OSMAN……APPELLAN

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VERSUS

EPUBLIC ……RESPONDEN

(From Original Conviction and Sentence of Chief Magistrate's

Criminal Case No. 2933 of 2006 Meru: M.G.G. Khadhambi: SRM)

JUDGMENT

The appellant was charged with Attempted Defilement Contrary to Section 9 (1) of the Sexual Offences Act. He was tried, convicted and sentenced to 15 years imprisonment. Being aggrieved by the

conviction the appellant fled this appeal.

The appellant raises only one ground in his supplementary petition of appeal thus:

“1. That the trial court did not afford the Appellant the right to re- call, or re- examine the prosecution witnesses as the charge sheet was amended at the close of the [prosecution case occasioning the appellant prejudice and therefore miscarriage of Justice”

The appellant was represented by Mr. Mwanzia advocate. In his submissions Mr. Mwanzia urged that the only complaint by the appellant was that after the prosecution witnesses had all testified, the prosecutor successfully applied to amend the charge. The new charge was read over the appellant who pleaded not guilty. The prosecutor proceeded to close the case which the court allowed without giving the appellant an opportunity to recall any of the witnesses as required under S214 of the CPC. Counsel relied on the case of **YONGO V REPUBLIC [1983] KLR 319.**

Mr. Mwanzia urged the court to quash the conviction, set aside the sentence and release the appellant as he had served 3 years of 15 years jail term he was sentenced to serve.

Mr. Musau learned State Counsel admitted that the learned trial magistrates was in error for failing to call upon the appellant to say if he wished to recall any witnesses for further cross- examination.

Mr. Musau urged the court to order a retrial on the grounds that even though the appellant was in prison for 3 years, the minimum sentence for the offence is 10 years. Counsel submitted that witnesses were available and that the error was by the court not prosecution, and therefore the case should be retried.

S. 214 of the CPC provides as follows:

" (1) Where, at any stage of a trial before the close of the case the prosecution, it appears to the court that the charge is defective, either in substance of in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross – examined by the accused or his advocate, and, in the last- mentioned event, the prosecution shall have the right to re- examine the witnesses on matters arising out of further cross – examination."

The proviso to Section 214 makes it mandatory for the court to require an accused person to make an election whether or not to recall witnesses who may have testified in the case once the charge is amended and or substituted. This is a mandatory requirement and therefore a right of the accused. The court of appeal in the case cited by Mr. Mwanzia for the appellant, **YONGO V REPUBLIC, Supra,** put it this way:

"It is mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the provision to section 214 of the Criminal Procedure Code (Cap 75).

The appellant should have been given the opportunity to further questioning might have caused the trial magistrate to form a different view of the witness' evidence"

I have considered this appeal. I have also perused the record of the proceedings. It is not in dispute that an error occurred at the trial of the case in that the learned trial magistrate allowed the substitution of the charge at the end of the prosecution case. The learned trial magistrate compiled with the provision of S. 214 CPC only in part. She read over the new charge to the appellant who denied it. She however failed to comply with the rest of the proviso. Trial learned magistrate omitted to accord the appellant his right to recall witnesses for further cross- examination if he so wished.

In the case cited by Mr. Mwanzia the court of appeal allowed the appeal, set aside the High Court's summary dismissal of the appeal, quashed the conviction and set aside the sentence.

The cited case concerned a misdemeanor (SP), a charge of creating a disturbance in a manner likely to cause a breach of the peace Contrary to Section 95 (1) of the Penal Code. The appellant had been sentenced to six months imprisonment. The amendment effected in the cited case was in the particulars of the charge in order to align the words allegedly spoken by the appellant as per the particulars of the charge with the evidence adduced by the key witness in the case.

In the instant case, the charge was substituted from a complete offence of Defilement to one of Attempted Defilement under the Sexual Offence Act. The other distinction is not only the seriousness of the charge but the severity of the sentence facing the appellant. While the cited case the appellant may have served a substantial part of the sentence by the time his case was heard in the court appeal, in the instant case the appellant cannot be said to have served a substantial part of the sentence meted against him by the lower court.

It is my view that failure to comply fully with the proviso under S214 of the CPC renders a trial defective. The court has no discretion to exercise in such circumstances but to quash the conviction and set aside sentence. Having done so the court has to decide whether it should order a retrial of the case against the accused persons. The principles which apply to a case of this nature are now well settled in the Court of Appeal case of **PIUS OLIMA & ANOTHER V REPUBLIC C.A NO. 110 of 1991** held;

"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are: Ahmed Sumar – v- Republic 1968 EA 481; Manji –v- Republic 1966 EA 343; Muyimba & Others –v- Uganda 1969 EA 433 and

Merali & Others –v- Republic 1971 EA 221.The principles that merge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justices require and is no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

The original trial in the instant appeal has been found to be defective. I have considered that the offence charged is very serious. The appellant has not served a substantive part of the sentence and stands to suffer no prejudice if the court orders a retrial of this case. I have also considered that since there has not been a big lapse of time since the offence was committed the prosecution should be able to obtain the witnesses for retrial.

I considered the evidence that was adduced at the trial. I am satisfied that if the self- same evidence is adduced in the retrial, a conviction is likely to result.

I am satisfied that the interests of justice requires that a retrial should ordered in this case which I hereby order.

The appellant shall be held in custody until 14th December 2010 when he should be taken before the Chief Magistrate's court, Meru for taking of plea in this case. Those are my orders.

Dated at Meru this 9th day of December 2010.

LESIIT, J.

JUDGE