



**Atieli v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 3574 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E016 OF 2021
LN MUGAMBI, J
APRIL 25, 2023**

BETWEEN

BEBETO CARLOS ATIELI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal is against the conviction and sentence to 20 years imprisonment for defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* no 3 of 2006. It was alleged that on 2nd September 2016 in Busia township within Busia County intentionally and unlawfully caused his penis to penetrate the vagina of LL, a child aged 13 years.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* no 3 of 2006. It was alleged that on 2nd September 2016 in Eshikulu sub-location within Busia County, intentionally and unlawfully caused his penis to come into contact with the vagina of LL a child aged 13 years.
3. The prosecution called a total of five witnesses while the appellant called two witnesses.
4. On 7/7/2021, the trial court found the appellant guilty. The appellant was sentenced to serve 20 years on 14/7/2021.
5. The petition of appeal dated 23rd July 2021 was on the following grounds;
 - a. That I pleaded not guilty to the appended charges.
 - b. That the Honourable trial magistrate erred in law and fact by ignoring the fact that I was not identified beyond any reasonable doubt.



- c. That the trial magistrate erred in law and facts by failing to note that the investigation done on this case was shoddy and devoid of merit to warrant my conviction.
 - d. That the trial court erred in law by failing to note that the medical evidence produced in court in this matter did not link the appellant to the said scene.
 - e. That the honourable trial court misdirected itself by failing to observe that the prosecution failed to avail all witnesses to establish the necessary truth in this matter.
 - f. That this court may be pleased to issue orders directing that the appellant be supplied with a copy of full court proceedings of this particular matter purposely to enable him to raise more cogent grounds.
 - g. That more grounds may be adduced or amended upon receipt of the court proceedings.
6. The appellant prayed that his appeal be allowed and this court evaluates freshly the evidence, quash his conviction, set aside the sentence imposed upon him and set him at liberty. He prayed that is this Honourable Court deems it fit to serve justice, it may be pleased to award him with at least a retrial.
 7. The appellant filed a supplementary petition of appeal dated 24th September 2022 and set forth additional grounds of appeal as follows;
 - a. The learned trial magistrate erred in law and in fact in proceeding with the matter without complying with the mandatory provisions of Section 200 of the *Criminal Procedure Code* cap 75 Laws of Kenya.
 - b. The learned trial magistrate erred in law and in fact in convicting the Appellant when there was no evidence of positive identification of the appellant by the victim.
 - c. The learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt when the prosecution's case was riddled with contradictions.
 - d. The learned trial magistrate erred in law and in fact in convicting the Appellant in the absence of medical evidence linking the appellant to the offence before court.
 8. The appellant prayed that this appeal be allowed, the conviction and sentence of the Chief Magistrate in Busia CMC S.O.A no 85 of 2016 quashed and the appellant be set free.
 9. The hearing of this appeal was by way of written submissions.

Appellant's submissions

10. The appellant filed his written submissions on 21st March 2023 and submitted on the grounds of appeal. On ground one, he submitted that the proceedings before the trial court did not comply with Section 200 of the *Criminal Procedure Code*. The proceedings before the trial court proceeded before a total of 4 magistrates and from the record, Section 200 of the *CPC* was never read and explained to the accused person as is required by law. He cited the decision of the Court of Appeal in *Abdi Adan Mohamed v Republic* [2017] eKLR (Criminal Appeal no 1 of 2017 Msa).
11. On grounds two and four of the appeal, the appellant submitted that the trial magistrate based her decision on facts that were never pleaded or proved during trial and further ignored the many contradictions in the prosecution's case. He said that a brief look at the judgment at page 31 of the record indicated that the victim was four and half-years old (4 1/2) which is at variance with the charge sheet which places the age of the victim at 13 years. Similarly, at page 32 of the record of appeal, the trial court in its judgment indicated that the victim gave unsworn evidence and clearly pointed and



referred to the accused person as Okongo yet the name does not belong to the accused person. At page 32, of the record, the trial court judgment captures PW2 allegedly as the victim's mother who never testified during trial as no such witness was ever called by the prosecution since PW2 was one Mary Musimbi who was the victim's teacher.

12. On ground three, he submitted that PW1 did not mention at any time ever being taken to the road to identify the accused person, which is only a theme in the evidence of PW2 and PW5. On ground five, the appellant submitted that there was no sufficient medical evidence linking the accused person to the offence that he faced before the trial court. From the record, while the offence is said to have occurred on 2nd September 2016, the P3 Form indicates that the offence was reported on 20th September 2016 and the victim examined on 21st September 2016, 19 days after the incident. He urged this court to consider the holding in *Philip Muiruri Ndaragua v Republic* [2016] eKLR.
13. He urged the court to find and hold that the prosecution did not discharge the evidentiary burden under Section 107(1) of the *Evidence Act* to prove beyond reasonable doubt that indeed the appellant committed the offence of defilement and proceed to set aside the conviction and sentence of the learned trial magistrate.

Respondent's submissions

14. The Respondent filed its submissions on 15th February 2023 and submitted on the grounds of appeal. On ground one, it conceded that the trial court did not comply with the mandatory provisions of Section 200 of the *Criminal Procedure Code*. Since the criminal case had been partly heard and the evidence of all the five prosecution witnesses recorded by the preceding magistrate, then the succeeding magistrate was under a mandatory duty to fully comply with that legal provision. It submitted that the succeeding magistrate was under a duty to inform the appellant of his right to request that some witnesses who had testified be summoned. They cited the decision in *Office Of Director Of Public Prosecutions v Peter Onyango Odongo & 2 Others* High Court At Siaya Constitutional And Judicial Review Division Petition no 2 of 2015 [2015] eKLR.
15. On ground two, the respondent submitted that the ground is misplaced because the judgment of the trial magistrate is consistent and flows from the evidence tendered by the 5 prosecution witnesses. On ground three, the respondent submitted that there was no coercion in identifying the appellant as the perpetrator of the offence and the complainant identified him as a neighbour. They submitted that the complainant's evidence was reliable, consistent and credible and she did not waver even during cross examination. The element of identification of the appellant by the victim was proved beyond reasonable doubt.
16. On ground four, with respect to age, the respondent stated that the victim testified that she is 14 years old and she referred to the age assessment report which was later produced by PW5 as P. exhibit1. Although there is contradiction on the age of the victim during her testimony, it submitted that the victim was still a child that the contradiction was not fatal to the prosecution's case. On proof that the penetration was by the accused person, they submitted that the complainant described the appellant as a person known to her and she pointed the appellant as the one who held her mouth and defiled her. On proof that there was penetration of the complainant, it stated that it is clear that there was penetration. This evidence was corroborated by the evidence of PW4, the clinical officer came to the finding that there were tears and bruises on her vagina and her hymen was not intact. On contradictions in prosecution's case, they invited this court to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence.



17. On ground five, the respondent stated that DNA analysis is not an ingredient or component for the offence of defilement to be proved. It cited the decision in *Samuel Mburu Wanyoike v Republic* [2018] eKLR where the Court of Appeal reviewed the decision in *AML v Republic* [2012] eKLR where it was stated:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

18. In conclusion, it submitted that this is a case suitable for retrial since all the evidence availed by the prosecution was sufficient to convict the appellant herein and that the error for non-compliance with Section 200 of the *CPC* was on the part of the trial court and not that of the prosecution.

Analysis and Determination

19. Having read and considered the submissions together with the petition of appeal and record of appeal and the law applicable, it is my view that these are the issues that arise for determination of this appeal:

- a. Whether the learned trial magistrate complied with the requirement of section 200(3) of the *Criminal Procedure Code* cap 75 Laws of Kenya upon taking over the matter from the previous magistrate?
- b. If the above is in affirmative, what is the effect of failure to comply with the said provisions?
- c. Whether the prosecution proved its case beyond reasonable doubt;

20. This being the first appeal this court must abide by the obligations set out in *Okeno v Republic* [1972] E.A. 32 as re-stated in *Kiilu and another v R* [2005] 1 KLR 174 that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (see *Peters v Sunday Post*, [1958] E.A. 424.)”

21. On the first issue, this case was handled by 4 magistrates. The hearing commenced before Hon. J.N. Maragia (RM) who heard two prosecution witnesses on 17/8/2017. Hon. W. Chepseba (CM) took over from where it was left and he noted that he had complied with Section 200(3) of the *Criminal Procedure Code*. However, it is hard to denote from the record that the said provision was explained to the appellant herein as the response from the accused/appellant was never captured. He heard three prosecution witnesses. The hearing of the defence case was before Hon. L. Ambasi (CM) whereby the defence witnesses gave their evidence on 22/7/2019. The Hon. Mrs. L. Ambasi (CM) did not comply with the provisions of Section 200(3) of the *Criminal Procedure Code*.

22. Section 200 of the *Criminal Procedure Code* deals with instances where a criminal trial is handled by more than one magistrate. The said provision stipulates:



- (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 re-summon the witnesses and recommence the trial.
 - (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
 - (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 re-summoned and reheard and the succeeding magistrate shall inform the appellant person of that right. [emphasis added]
 - (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
23. The importance of compliance with Section 200 of the [CPC](#) in protecting the rights of an accused person was set out by Hon. Makau, J in [Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others](#) [2015] eKLR where the learned judge held that:
- “21. In my view Section 200 (3) of the [Criminal Procedure Code](#) protects the rights of the accused to a fair trial as guaranteed by [the constitution](#) under Article 50 (2) of [the constitution](#) which states every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of [CPC](#) as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.”
24. The court of Appeal in [Ndegwa v Republic](#) [1985] KLR 534 stressed the importance of complying with Section 200 (3) of the [Criminal Procedure Code](#) by stating that:
- “No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed; violated or abandoned when it comes to protecting the liberty of the subject.....the statutory and time-honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained. A magistrate who did not observe the evidence is not in position of to assess the credibility and personal demeanour of all the witnesses.”
25. The failure of the successive trial magistrates to explain Section 200(3) of the [Criminal Procedure Code](#) to the appellant herein violated his right to a fair trial as encapsulated by Article 50 of [the Constitution](#) of Kenya. The trial court had a duty to safeguard the right of the appellant to a fair trial by informing the appellant about his rights under section 200 of the [Criminal Procedure Code](#).



26. On the effect of the failure to comply with Section 200(3) of the *Criminal Procedure Code*, Section 200(4) of the *Criminal Procedure Code* provides that a new trial may be ordered by the High Court where it is found that an accused has been convicted by a magistrate who did not wholly record all the evidence and if it is of the opinion that the accused person was materially prejudiced. The grounds for ordering a retrial under the above cited section have been enumerated and reiterated in numerous judicial precedents.
27. Khamoni J in *Laban Kimondo Karanja v Republic* [2006] discussing grounds for ordering a retrial, reviewed several court of appeal decisions on the subject and concluded as follows: -
- “...At the end,the principles an appellate court should apply in determining whether to order a retrial are as follows: -
- i. A retrial may be ordered only when the original trial, was illegal or defective.
 - ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person.
 - iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result...”
28. In the case of *Fatehali Manji v Republic* [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -
- “...In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it...” (See *Philip Kipngetch Terer v Republic* [2015] eKLR)
29. In *Mwangi v Republic* [1983] KLR 522, the Court of Appeal held at page 538 that: -
- “...We are aware that 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. In our view, there was evidence on record which might support the conviction of the appellant.”
30. Another material irregularity which was pointed out by the appellant was that the trial court in its judgment indicated that the victim was aged 4 ½ years old and that the complainant’s mother had testified as PW2. I have carefully examined the trial courts judgment and in paragraph 16, the trial magistrate stated that the complainant was 4 ½ years old and her birth certificate was produced as evidence of her age. This is contrary to the evidence in the court proceedings where the complainant testified to being 14 years old. There was no birth certificate produced but only age assessment report was produced as P. exhibit 1 which showed that she was 13 years old at the time of the defilement. The judgment also wrongly refers to the names of PW2 and PW3. The evidence that was adduced by the prosecution witnesses in court and that which was evidently analysed by the trial magistrate in her



judgment are incongruent. This is clearly unacceptable and a serious dereliction of duty on the part of the trial court when dealing with a serious matter affecting the liberty of a citizen. It is my finding that the trial court arrived at its decision having analysed evidence that was never presented before it which is definitely makes the said judgment a nullity.

31. Even without delving further into any other ground of appeal, I opine that the two major grounds clearly demonstrate that these were defective proceedings. The trial itself was defective and to make matters even worse, so was the judgment which was based on evidence not adduced at the trial. The appellant has been terribly prejudiced firstly by failure of the trial court to comply with mandatory legal requirement meant to secure his fair trial and secondly, being convicted on the basis of non-existent facts and particulars. Having considered the evidence that was adduced by the Prosecution however, I see the need to balance interests of justice of the appellant on one hand and those of the complainant on other and thus consider that this is a suitable case for a retrial.
32. I thus set aside the conviction and sentence by the trial court.
33. It is ordered that the appellant be released to Busia Police Station to facilitate his presentation before another magistrate of competent jurisdiction other than Hon. Mrs L. Ambasi (CM) to take a fresh plea not later than 14 days from the date of this order.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF APRIL 2023.

L.N MUGAMBI

JUDGE

