MMM v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 18035 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E012 OF 2022

AK NDUNG'U, J

MAY 24, 2023

BETWEEN

MMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 54 of 2018 – B Mararo, PM)

JUDGMENT

1. MMM (the appellant), was convicted after trial of incest contrary to section 20(1) of the *Sexual Offences Act*, No 3 of 2006. On February 2, 2022 he was sentenced to fifteen (15) years imprisonment. The particulars were that between December 2016 and April 2018 within Laikipia East sub county in Laikipia County being a male person, intentionally caused his penis to penetrate the vagina of FK a female person who was to his knowledge a daughter and aged 15 years old. He has appealed against both conviction and sentence.

2. The conviction and sentence have been challenged upon the following grounds –

    i. The trial magistrate after taking over the matter from another magistrate failed to inform the Appellant of his right to recall the witnesses in line with section 200(3) of the *Criminal Procedure Code*.

    ii. The learned magistrate failed by finding corroboration in complainant's evidence whereas there was no corroboration.

    iii. The learned magistrate erred convicting the Appellant on uncorroborated evidence of the minor without satisfying himself that the victim was telling the truth.

iv. The learned magistrate erred by failing to record whether the victim was telling the truth or not and reasons for such belief.

v. The learned magistrate failed to direct himself to the fact that he could not ascertain whether the victim was telling the truth or not since he did not have an opportunity to observe her demeanor.

vi. The learned magistrate erred relying on hearsay evidence.

vii. The learned magistrate erred by failing to consider the principle that requires corroboration in sexual offences.

viii. The learned magistrate erred by relying on uncorroborated evidence of the minor without warning himself of the danger to do so.

ix. That the charge against the appellant was not proved beyond reasonable doubt.

x. The appellant was convicted whereas there was no evidence to connect him to the commission of the offence.

xi. The learned magistrate failed to consider the Appellant's defence.

xii. The learned magistrate failed to comply with section 169(1) of the *Criminal Procedure Code* while writing the judgment.

xiii. The learned magistrate erred sentencing the Appellant to an offence that was not proved.

3. The appellant through his learned counsel filed written submissions. Counsel argued that the honourable magistrate B. Mararo took over the matter from another magistrate and upon taking over the matter, he failed to inform the appellant of his right to recall witnesses in line with section 200(3) of the *Criminal Procedure Code*. It is urged that failure to do so rendered the entire trial a nullity. Reliance was placed on the case of *Director of Public prosecutions vs Peter Onyango Odongo & 2 others*(2015) eKLR, *Kipkemoi Richard Towet vs republic* (2020)eKLR and *Morris Ochieng Oduor vs Republic*(2020) eKLR.

4. Counsel submitted that the medical evidence did not corroborate the complainant's evidence to proof the offence. Further, evidence of PW2, PW3 and PW6 was hearsay as they did not give direct evidence and therefore their evidence was inadmissible. That the evidence of the prosecution witnesses did not corroborate the complainant' evidence hence the trial court erred by finding that her evidence was consistent, corroborated and overwhelming. Since the evidence was not corroborative, the trial court should have relied on section 124 of the *Evidence Act* which it failed to do. That the trial court did not indicate the instances of demeanour which he noted and which he relied upon to convict the Appellant. The trial court failed to state the instances as to how he thought that the complainant was a truthful witness. Further, the trial court could not have commented on the demeanour of the complainant since the trial court did not take the evidence of the complainant which was taken by another magistrate.

5. On this ground, counsel relied on the case of *Abdi Ismael Moulid v Republic* (2019)eKLR where the court observed that the trial court could not use the demeanour of the complainant to gauge whether she was telling the truth or not since he did not have a chance to see the witness testify but relied on what was recorded. In the instant case, the Appellant submitted that the trial court relied on what was recorded hence could not have gauged the complainant's demeanour and therefore he could not use the demeanour to gauge whether the complainant was telling the truth. Furthermore, the trial magistrate

never warned himself of the danger of convicting the Appellant on uncorroborated evidence of the victim as required under section 124 of the *Evidence Act*.

6. It is submitted that the trial court failed to consider and analyze the appellant's defence as the judgement only reproduced the appellant's defence. The trial court failed to weigh the defence to state whether he believed or disbelieved the Appellant and the reasons thereof. That the trial court failed to comply with section 169 of the *Criminal Procedure Code* by failing to comprehend points for determination that were in issue and also failed to specify the section of the law under which the Appellant was convicted. Reliance was placed on the case of *James Nyanamba v Republic* (1983)eKLR.

7. Learned counsel for the respondent supported the conviction. In the written submissions filed, it is argued that the complainant was not a child of tender years whose evidence would have required corroboration as per section 124 of the *Evidence Act*. Furthermore, corroboration is not necessary in sexual offences cases. Further, the complainant's evidence was corroborated by the medical evidence and the evidence of other prosecution witnesses including PW2 and PW3.

8. Counsel further submitted that, even though the trial court did not see and hear the complainant testify, section 200(1)(b) of the C*riminal Procedure Code* allows the court to write a judgment based on the evidence recorded by its predecessor. That the trial court would not have commented on the demeanour of the complainant since he did not have the benefit of observing the complainant but convicted the appellant based on the totality of all the evidence tendered. It is submitted that the complainant's evidence together with the totality of the prosecution's case was credible and truthful. Further, the evidence of the complainant was taken pursuant to a voir dire, hence, the court satisfied itself as to the truthfulness and competence of the witness. Reliance was placed on the case of *J.W.A vs Republic* (2014)eKLR.

9. Counsel urges that the appellant's defence was duly considered by the trial court vis-à-vis the evidence tendered by the prosecution and the trial court found the prosecution case unshaken. The respondent's counsel noted the instance that the trial court considered the appellant's defence and especially on page 71-72 of the trial court proceedings.

10. As to non-compliance with section 169 of the *Criminal Procedure Code*, counsel submitted that the trial court duly complied with the said section by discussing one issue at a time and convicted the appellant on incest as charged. Furthermore, the trial court had on the onset of the judgement stated the offence which the Appellant was facing and therefore, the trial court was not obligated to restate again the section at the end of the judgment. The appellant was also aware of the offence that he was being convicted of. It is urged that the error was curable under section 382 of the *Criminal Procedure Code*. Reliance was placed on the case of *Isaack Makoli vs Republic* (2020)eKLR, *Hawaga Joseph Ansanga Ondiasa vs R* Criminal Appeal No84 of 2001 and *Samwiri Senyange v R* (1953) 20 EACA where the court held that no prejudice was occasioned to the Appellant and the same cannot invalidate the conviction.

11. As to whether the court complied with section 200(3) of the *Criminal Procedure Code*, the respondent's counsel submitted that even though the trial court did not comply with the said proviso, the appellant was not prejudiced in any way since the succeeding magistrate took over the matter after the close of the prosecution's case. Furthermore, the appellant did not make any application for the recall of the witnesses. The counsel submitted that in case this court finds that the appellant was prejudiced for non-compliance of section 200(3), a retrial should be ordered other than setting the appellant scot free since the prosecution presented admissible evidence which resulted in a conviction.

12. This being the first appellate court, my duty is well spelt out, namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the findings of the trial court. See *Okeno v Republic* [1972] EA 32.

13. I have therefore considered the submissions and the authorities relied on by the parties. I have also read through the evidence as recorded by the trial court with a view to re-evaluating it and thereupon make my own findings as per the dictates of the law. I have borne in mind, however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

14. I need to say something about ground 1 in the appeal which ground has the potential to dispose of the appeal and which ground by its very nature needs to be considered first as a preliminary point for the reason that should it succeed, a re-trial could be ordered. In such an eventuality, it would be unnecessary for the court to consider and pronounce itself on the other grounds of appeal since a positive finding thereon would dispose of the appeal, and, in any event, any findings on the merit would prejudice the parties should a retrial be ordered.

15. Ground 1 is worded as follows;

    I) The trial magistrate after taking over the matter from another magistrate failed to inform the Appellant of his right to recall the witnesses in line with section 200(3) of the *Criminal Procedure Code*.

16. At some stage of the trial, the presiding magistrate proceeded on transfer and was succeeded by another magistrate. The succeeding magistrate took over the matter after the prosecution had closed its case. The magistrate only took the Appellant's defence and there is no indication on the trial court record that he complied with section 200(3) of the *Criminal Procedure Code* which provides as follows –

    (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."

17. As conceded by the prosecution counsel, the appellant herein was not informed of that right. Our courts have held in several instances that the provisions under section 200(3) is couched in mandatory terms and failure to comply with the said provisions renders the trial a nullity, it is prejudicial to the accused person and it violates the accused's rights to fair trial. See the case of *Peter Kangethe Makari v Republic* [2008] eKLR (M. Koome, D.K Maraga) where the court held that;

    " There is no doubting that this is a mandatory provision and failure to comply with it may cause prejudice to the accused person."

18. In *David Kimani Njuguna v Republic*, Nakuru Criminal Appeal No 294 of 2010, the court reviewed a number of authorities relating to compliance with section 200 (3) and came to the conclusion that:-

    " All of these decisions declare that the provisions of section 200 (3) of the Criminal Procedure Code are mandatory and a succeeding judge or magistrate must inform the accused directly and personally of his right to recall witnesses. It is a right excisable by the accused person himself and not through an advocate and a judge or magistrate complies with it out of a statutory duty requiring no application on the part of the accused. Further, failure to comply by the court always renders the trial a nullity".

19. Likewise, in *Henry Kailutha Nkarichia & Another v Republic*, Criminal Appeal No 21 of 2013 the court held:

> " The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial."

20. Guided by the above authorities, it follows therefore that the appellant's trial before the trial court was a nullity and I hereby quash the appellant's conviction and the sentence.

21. Having quashed the appellant's conviction for failure of the trial magistrate to comply with the provisions of section 200(3) of the *Criminal Procedure Code*, the next question is whether the appellant should be set at liberty or a retrial should be ordered.

22. Section 200(4) of the *Criminal Procedure Code* provides that:

> " 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." (Emphasis mine)

23. Section 200 (4) empowers the appellate court to order for a retrial where it is of the view that the accused person has been materially prejudiced in a trial through non-compliance with section 200 (3) of the code.

24. The principles upon which a retrial can be ordered were restated in *Fatehali Manji –vs- Republic* [1966] EA 343 as follows:-

> " They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".

25. In *F W N v Republic* [2017] eKLR the court of appeal quoted the following cases on factors to be considered before ordering for a retrial.

In *Muiruri v Republic*, (*supra*) this Court rendered itself as follows:

> "It, (retrial), will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedikiah Ojuondo Manyala v Republic (Criminal Appeal No 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts".

And in *Mwangi v Republic* [1983] KLR 522, this Court, following *Braganza v Republic* [1960] EA 854, stated, at paragraph 538, thus:

> " ... 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".

26. The trial in this court commenced on July 30, 2018. The complainant testified on November 7, 2018. The appellant testified on May 26, 2021. This means that five years have lapsed since the complainant testified. Given the circumstances of this case as seen earlier, the gravity of the matter and interest of justice, it is my opinion that a retrial is still feasible.

27. I accordingly allow the appeal, set aside the conviction and sentence imposed and order that the appellant shall be retried before another magistrate of competent jurisdiction other than B. Mararo on the charges as originally drawn against him. He shall be placed in custody at the police station where the case was handled to be produced for plea taking within 14 days hereof.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 24TH DAY OF MAY 2023

A. K. NDUNG'U

JUDGE