REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 34 OF 2018

PAUL MWANGI WATHIKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 25 of 2016 Hon. Ruth Kefa, Senior Resident Magistrate)

JUDGMENT

The appellant was charged in the magistrates' court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on the 5th day of June 2016 in Nyeri County within the Republic of Kenya, he intentionally and unlawfully caused his genital organ, namely, penis to penetrate the genital organ, namely, vagina, of TWW a child aged 5.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. According to this alternative count, on the 5th day of June 2016 in Nyeri County within the Republic of Kenya, the appellant intentionally and unlawfully caused his genital organ, namely, penis to touch the genital organ, namely, vagina of TWW a child aged 5.

He pleaded not guilty to both the principal and alternative counts. At the conclusion of the trial he was, however, convicted on the principal count and sentenced to life imprisonment. It is this conviction and sentence that the appellant has appealed against.

He initially filed the petition of appeal in person but later he engaged counsel who, from what I see, refined the grounds of appeal and filed a supplementary petition dated 6 February 2020; these grounds are as follows:

1. The learned trial magistrate erred in law and in fact in convicting the appellant on insufficient, inconsistent and contradictory evidence and, at the same time, failed to give adequate weight to the defence.

2. The learned trial magistrate erred in law and in fact in failing to appreciate that the magistrate who took the evidence of the victim on 22 August 2016 did not fully comply with section 19 of Oaths and Statutory Declarations Act.

3. The learned trial magistrate erred in law and in fact in failing to appreciate that very vital witnesses were never called to testify and shed light, one way or the other.

4. The learned magistrate erred in law and in fact in rejecting the applicant's application to have some witnesses recalled in compliance with section 200 (3) of the Criminal Procedure Code.

5. The learned trial magistrate erred in law and in fact in passing a sentence that was harsh and manifestly excessive.

At the hearing, counsel for the appellant urged that when the complainant was subjected to voire dire examination, she did not give any direct answer to questions asked and therefore there was no basis for the trial court to proceed on the presumption that the complainant could give unsworn evidence. While referring to the Court of Appeal decision in **Criminal Appeal No. 210 of 2003, Fuad Dumila Mohammed versus Republic** counsel urged that the purpose of voire dire is to establish whether the child understands the nature of an oath and where it so satisfied it proceeds to swear or affirm the child and record the evidence. But where it is not satisfied it should express its opinion.

Counsel urged that these steps were not followed in the appellant's trial and therefore the complainant's evidence was of no consequence. He asked the Court to invoke section 175 of the Evidence Act, cap. 80 and allow the appeal.

Again, counsel argued that although the complainant's mother testified that the complainant was playing with other children at the material time, the complainant herself testified that she was playing with one Victor. A further contradiction in the evidence of both the complainant

and her mother was that the latter testified that the complainant was enticed with a sweet to go the appellant's house, an allegation that the complainant never made reference to in her statement.

It was also not clear, according to the learned counsel, who revealed to the complainant's mother what happened to her daughter. The clothes that the complainant was said to have been wearing at the material time were not properly identified; in particular, the complainant never identified them. Although the pants are alleged to have been blood stained, the police constable who received them never testified as having seen the blood stains.

As far as the question of penetration is concerned, counsel urged the evidence given was that the hymen was 'missing'; there was no evidence that it was perforated and if it was perforated, there was no evidence as to when it was perforated. Although the complainant was alleged to have some sort of infection, apparently as a result of the defilement, it was not demonstrated that the infection was related to the appellant because the appellant was never examined any way.

Crucial witnesses, according to the learned counsel, never testified; in particular, there was a neighbour who was not named and one Victor. It was not clear from the investigations officer whether he recorded their statements. While relying on the decision of **Juma Ngodia versus Republic (1982-1988) 1KAR 454**, counsel urged that the court should find that had these witnesses been called their evidence would have been adverse to the prosecution case.

On the question of compliance with section 200 of the Criminal Procedure Code, cap. 75 counsel urged that the appellant's application for the trial to start de novo was dismissed because the learned trial magistrate misapprehended the law. According to him, the application should not have been dismissed on the ground that witnesses could not be traced yet the investigation officer did not attest to this fact; in other words, there was no factual basis for dismissal of the appellant's application for the trial to start afresh once the new magistrate took over the trial from the previous trial magistrate.

And as to the legality of the sentence, counsel urged it was harsh and excessive because the learned magistrate proceeded on the mistaken presumption that life sentence was a mandatory sentence yet this was not the case; counsel referred to the decision in **Criminal Appeal No. 312 of 2018 Evans Wanjala Wanyonyi versus Republic (2019) Eklr** where the Court of Appeal substituted a mandatory sentence of 20 years' imprisonment prescribed under section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006 with a sentence of 10 years imprisonment. In coming to this decision, the Court of Appeal relied on the Supreme Court decision in **Francis Karioko Muruatetu & Another versus Republic (2017) eKLR** where it was held, among other things, that mandatory sentences are unconstitutional.

Finally, the learned counsel for the appellant urged that the appellant raised a question as to his age which was never resolved. Had it be resolved, so he urged, the court would probably have come to a different conclusion.

Ms. Ndungu, the learned counsel for the state conceded that indeed there were inconsistencies in the prosecution witnesses' evidence sufficient enough to cast doubt on viability of the prosecution case; for instance, while the complainant stated that she informed her mother of the defilement, the latter, on the other hand, testified that she was informed of the assault by Victor. As such Victor was a critical witness who ought to have testified but for some unexplained reason he was not called as a prosecution witness. Again, while the complainant's father testified the complainant was examined by his wife a day after the incident, his wife testified that the complainant was examined by a neighbour on the same date of the incident. His wife also testified that the appellant was bound after the arrest but the police officer who rearrested him (PW4) testified that the appellant's hands were not tied in any manner whatsoever.

Over and above the discrepancies in the prosecution evidence, the learned counsel for the state also agreed with the appellant's counsel that section 200 of the Criminal Procedure Code was not complied with. Based on these grounds, counsel conceded the appeal.

The record shows that the complainant who was only aged 5 at the time of the trial was subjected to voire dire examination at the close of which the court was convinced that she could only give unsworn statement. She then proceeded to inform the court that was in a pre-unit at St. [particulars wittheld] Academy and that she lived with her parents. On a certain Sunday, she joined her mother and another child whom she referred to as 'Shiku'in a morning mass at their church. The mass ended at 10.30 A.M, after which she went home and later went to play at a friend's home. She identified the friend as Victor.

It is then that the appellant called her to his house and undressed her; he then defiled her. He told her not to disclose what he had done but when she returned home she told her mother what the appellant had done to her.

Her mother took her to the police station and then to hospital for examination.

The complainant's mother JKW (PW2) testified that on 5 June 2016 at about 4.00 P.M. the complainant had visited her neighbours home to play with Victor. She noticed dried tears on her face when she came back; she enquired what may have happened but her daughter did not tell her. She enquired from 'other children' whether they had assaulted her daughter; they denied but one of the boys is alleged to have said 'it is uncle'. She noticed the complainant scratching her vagina and anus. Victor told her that the appellant had 'done bad manners' to the complainant. She checked the complainant's private parts and noticed that they were bruised; her pant was blood stained.

She then took up the matter with the appellant's employer who advised that the appellant should be arrested. When the appellant returned at night they took him to Bellview police post and took the complainant to Bellview Health Centre. They then went to Kiawara police post where they were again referred to Nyeri Provincial General Hospital. She testified further that the complainant was born on 15 January 2011.

EWW (PW3) testified that he was the complainant's father and that on 5 June 2016, at about 7.00 P.M., his wife called and told him that the appellant had defiled the complainant.

Police constable Sagres Ogendi Momanyi (PW5) testified that he worked at Bell view police administration police post at the time. On 5 May 2016, at about 11.00 P.M. a group of people came to the police post. Among them were the appellant, the complainant and her mother (PW2). The latter reported that the complainant had been defiled by the appellant. He accompanied the complainant and her mother to Bellview health and found a nurse on duty. She confirmed that the complainant had been defiled. They were referred to Nyeri Provincial General Hospital where they went the following day. On the same day they went to the provincial hospital they also went to Kiawara police station.

Police constable James Nganga (PW5) testified that he was at Kiawara police post on 7 June 2016 when at 9.00 A.M., an officer from Embarigo Administration Police Camp came accompanied by the complainant, the complainant's parents and the appellant.

He received from the police officer an inner pant and a biker. He also received a post rape care form that had been filled at Bell view medical center. He interrogated the parents and asked for the complainant's birth certificate. He was given the document from which he established that the complainant was born on 15 January 2011. He issued the complainant's parents with the P3 form and referred them to Nyeri Provincial General Hospital. He also interrogated the complainant and recorded her statement.

According to this statement, the complainant was playing with Victor when the appellant called her into his house. He attempted to insert his penis into the complainant's vagina but the complainant screamed. He told her not to tell anybody. In the course of his investigations, he went to the complainant's parents' home and interrogated the neighbour. He was given a biker and white pants by PW4. He reiterated that the appellant was brought to the station on 7 June 2016 at around 10. A.M. and that he took him to court on 8 June 2016.

Dr Gor Goody Kumar (PW6) produced the P3 form which was filled by Dr. Mary Nderitu. The latter was said to be away for further studies and so the court allowed Dr Kumar to produce the P3 form having informed the court that she had worked with Dr Nderitu for a while and she was familiar with Dr. Nderitu's handwriting and signature.

Her evidence was that the complainant's pants were blood stained; the approximate age of injuries was described as 'hours' and the degree of injury was assessed as 'harm'. There was a bruise between the right labia majora and minora. Vaginal wall showed signs of penetration; it was reddish and swollen. The hymen was said to be missing. The vaginal swab showed no spermatozoa. Pus cells were noted implying that there was infection. The HIV test was 'non-remarkbale' and the syphilis test was negative. She testified that the incident occurred on 6 June 2016 and the examination was done on 22 June 2016 the same date that the P3 form was signed.

In his defence, the appellant gave sworn testimony. His evidence was that on 6 June 2016 he had been watching a movie at Belle View from 9 A.M. to 8.P.M when he returned home. He found the complainant's mother at home. She told him that there was something he had done. He denied having done anything. He testified that he had an affair with the complainant's mother and that there was a grudge between them because the complainant's mother had suspected that he was befriending a another lady. It was his case that he was framed.

On cross-examination he admitted that he knew the complainant. He also testified that he presented himself to the police.

Deffon Kanene (DW2) testified that the appellant joined him and his wife at their shop between 11. A.M and 12 A.M, and that they were together till 6 P.M. They went back home at about 8.P.M. It is at that time that the complainant's mother came and reported that the appellant had defiled her daughter. She informed them that her daughter had informed her that the appellant had defiled her. The accused denied committing the offence. They later took the appellant to the police.

In answer to questions put to him during cross-examination, he testified that he left the appellant at home when he went to church at 8 A.M. He met him again at noon.

His wife Susan Wanjiru Wanene (DW3) testified that she had employed the appellant as a farmhand. On 5 June 2016, she accompanied her husband to the church, leaving the appellant at home. They then went to their shop at 10 A.M. after the church service. The appellant joined them at 11. A.M and only left at 6 P.M. when he went to milk the cows. The complainant's mother came at their home at about 8 P.M. to complain that the appellant had defiled their daughter. The accused was later taken to the police station. She also testified that she knew Victor whom she described as a son to her daughter. She left Victor with the accused as they went to church.

Of the several grounds in the appellant's petition, and, besides the many reservations raised against the decision of the learned trial magistrate by both counsel for the appellant and the respondent, one ground that really stands out and which, in my humble view, the determination of this appeal largely revolves is the learned magistrate's decision on the appellant's application for the case to start de novo when she took over the trial from the preceding magistrate.

The application was made on 18 May 2017 before the senior resident magistrate, Hon. Ruth Kefa and this how the proceeding of that particular day went:

> ***Prosecutor:*** *This is part heard matter before Hon. Wambilyanga.*
>
> ***Court:*** *Directions under section 200 of CPC taken to which the accused responds.*
>
> ***Accused:*** *I wish the case to start afresh. I wish PW1 to be recalled, I did not cross-examine here (sic) well. PW2 also, I wish to cross-examine her.*
>
> ***Prosecutor:*** *I pray for time to discuss with the investigation officer.*
>
> ***Court:*** *Further mention 6/6/2017 for prosecutor to respond.*

On 6 June 2017 when the prosecutor was supposed to 'respond' she informed the court she had not yet got the investigation officer. The court set the matter for mention again on 13 June 2017. On that date, the prosecutor addressed the court as follows:

> ***"I wish to state that, the accused had time to cross-examine the witnesses. I have discussed with the investigating officer, the witnesses cannot be traced. The case was filed in June 2016. I oppose the application to have the case start de novo, the application is an afterthought the matter has progressed and the accused intends to delay this matter."***

In her ruling delivered on 14 June 2017, the learned magistrate dismissed the application; in so doing, she cited **Nyabuto & Another versus Republic** and **Joseph Kamau Gichuki versus Republic,** cases said to have been decided by the Court of Appeal but whose full citation was not given in the rling, and held that 'section 200 of the CPC should be used sparingly'. She continued:

> ***"The court has considered that this case was filed in June 2016, one year ago. In as much as the accused wishes the case to start de novo, the prosecution has submitted that the witnesses cannot be traced. It is in view of the above that I dismiss the submission of the accused and order the case to proceed from where it had reached."***

The learned magistrate clearly misapprehended the import of section 200(3) of the Criminal Procedure Code. In the first place no application of any sort is envisaged under section 200(3) of the Criminal Procedure Code and which an accused is enjoined to make or to which the state may respond.

According to this provision of the law, it is incumbent upon the trial court, whenever one trial magistrate takes over a trial from the preceding or a previous trial magistrate, it is incumbent upon the succeeding trial magistrate to inform the accused of his right to demand that any witness who has testified before the previous magistrate be resummoned and reheard afresh. Subsection (3) of section 200 is the relevant part of that section but for better understanding it is necessary that I reproduce the entire section here. It reads as follows:

> ***200. Conviction on evidence partly recorded by one magistrate and partly by another***
>
> ***(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) 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 exercises 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***
>
> ***(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. (Emphasis added).***

It is clear that it is the trial court that is legally bound to take the initiative and inform the accused of his right. Going by the appellant's response when "d*irections under section 200 of CPC"* were taken, it is not clear that the appellant was informed of this right in the manner contemplated under the law. I say so because an accused is not bound to justify, as the appellant appears to have been tasked, why a witness should be resummoned; rather, it is his right to demand, if he so wishes, that a witness who has been heard be resummoned again to be heard before the succeeding magistrate. I suppose this right is made available at the behest of an accused partly because it may be necessary that the succeeding magistrate has the benefit of seeing and hearing the witnesses particularly where their demeanor and general disposition may prove consequential in reaching factual conclusions.

To the extent that a trial court is bound inform the accused of his right, it has been held that failure to do so is fatal to the trial. In **Raphael versus Republic (1969) E.A. 544,** it was held that failure to iniform the accused of his right is fatal because such information is the prerequisite for assumption of jurisdiction of the succeeding magistrate. Without informing the accused, the succeeding magistrate has no jurisdiction to preside over the trial and the trial is thereby rendered a nullity.

It has, however, been held that this right to information does not, of itself, entitle the accused to an order from the court to recall or resummon the witness or witnesses that the accused wants recalled or resummoned. The discretion to resummon and rehear any witness under section 200(3) ultimately rests with the trial court; in exercising its discretion, one way or the other, the court will take such factors as may be necessary into consideration; for instance, the progress made towards conclusion of the trial; the availability of witnesses that are to be recalled and whether recalling witnesses will be prejudice the witnesses themselves, the complainant or even the state.

The Court of Appeal discussed these aspects of section 200 in **Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro versus Republic;** the pertinent part of its decision as far as it is relevant to the issue at hand, went as follows:

> ***"The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left jurisdiction of the court as was the case here or some may have even died. To this extent we are in agreement with the learned judges of the High Court that "this provision does not oblige the succeeding magistrate to start denovo" but what is mandatory is to inform an accused person of his right under section 200(3) of the Criminal Procedure Code."***

If the trial court was to be given the benefit of the doubt, that it explained to the accused his rights under section 200(3), it was then bound to make its decision to recall or not recall the witnesses based on such factors as have been mentioned but which, I must hasten to state, are not exhaustive for obvious reason that each case will always depend on its peculiar circumstances.

The conclusion that witnesses could not be traced was obviously not based on any evidence. This allegation of non-availability of the witnesses came from the bar; the investigation officer who is alleged to have been the source of this information never informed the court on oath whether he had made any efforts to trace any of the witnesses who had testified and that such efforts had not yielded any fruits. As much as the trial court retained the discretion to recall or not to recall any or all the witnesses who had testified, the decision not to recall them in this instance was more or less a speculative decision.

Having reached this conclusion, this would have been a proper case to remit to the trial court for a retrial; however, both the appellant's counsel and the state counsel were unanimous that the prosecution case was weak in several other aspects. If I was to remit it for a retrial I would only be giving the prosecution a second chance to fill in the gaps in their case against the appellant; the end result would obviously be prejudicial to the appellant. This therefore leaves me with only one alternative which is to allow the appeal. The conviction is thus quashed and sentence set aside. The appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE