REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U)

CRIMINAL APPEAL NO. 21 OF 2020

JOSEPH OMBATI ISABOKE .... APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(Being an appeal from the sentence and conviction delivered on 25th May 2018 by Hon. D.K. Matutu (SRM) in Kilgoris Criminal Case No. 783 of 2014)

JUDGEMENT

1. The appellant, **JOSEPH OMBATI ISABOKE**, was charged with the offence of defilement contrary to **Section 8(1)**as read with **8(3)**of the **Sexual Offences Act ("the Act")**and deliberate transmission of a life threatening sexually transmitted disease contrary to **Section 26(1)(A)**of the **Act**. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Act**.

2. He was convicted on the first count of defilement contrary to Section 8(1) as read with Section 8(3) of the Act and sentenced to 20 years' imprisonment. The particulars of the offence were that on the 19th day of May 2004 in Nyamache District within Kisii County he unlawfully caused his penis to penetrate the vagina of JN a girl aged 14 years.

3. At the hearing of the matter before the trial court, the minor, JN (PW1), recounted her ordeal at the hands of the appellant. After *voire dire* examination she testified that she had been sent to the shop by her cousin PW4 on 19th May 2014at about 6 p.m. and that on her way back, she met the appellant who held her by force and took her to his home to be his wife. They walked for a distance of about ½ a kilometer. The appellant held her by the neck and threatened that he would kill her if she screamed. At his house, the appellant removed her clothes by force and slept with her the whole night.

4. The following morning, the appellant guarded her and would escort her to the toilet and back. He did not give her food. The appellant locked her in the house and left at 8 p.m. but came back that night to force her to have sex with him again. On 21st May 2014, a neighbour saw her walking from the toilet and told PW4. The area assistant chief came to the house with his aids at about 1.pm. and arrested them both. The minor explained to the assistant chief what had transpired. She was taken to the police station by PW4 where she recorded her statements and later went to the hospital. The minor told the trial court that she did not know the appellant before that. She testified that he was the first man she had slept with and added that she started feeling pain in her private parts and in her legs after he had slept with her.

5. WM (PW4) confirmed that he had sent the minor to the shop on the evening she was accosted by the appellant. He testified that when she failed to return home that evening, he tried to look for her but did not find her. He resumed his search the following day. He went to her school but she was not there. PW4 testified that the minor was spotted with the appellant by his wife. He informed PW2 of her location and the appellant was arrested.

6. Charles Ayata Ogechi (PW2), the area assistant chief received the information about the disappearance of the minor on 22nd May 2014. He got information on the whereabouts of the minor and proceeded with a clan elder to the appellant's house where he found the minor and the appellant. The assistant chief testified that he knew the appellant as one of his locals. He also testified that the appellant was like a cousin to him and that he was married and had children and an estranged wife.

7. Robert Moi Onyiego (PW3) simply testified that he witnessed the appellant being arrested at the chief's office.

8. Anne Nyabuka (PW1), a clinical officer at Nyamache sub-county hospital testified that her examination of the minor revealed no injuries on the neck and her upper and lower limbs. She however noted that the minor's labia were swollen and her hymen was absent. She also noted

a whitish PV discharge indicative of a venereal disease. She stated that laboratory examination confirmed the disease and that the minor had been given treatment for the infection.

9. The investigating officer CPL Olivia Ledonyo (PW5) narrated the information she had gathered from the witnesses concerning the disappearance of the minor, her sexual assault by the appellant and how the minor was found in the house of the appellant and his arrest by PW2. PW5 stated that she issued the minor with a P3 form and accompanied her to hospital. She testified that the lab report and treatment notes showed that a venereal disease had been detected and also confirmed penetration. She took the appellant to the hospital and he was found to have the same venereal disease as the minor. She charged him with defilement and transmission of the disease. PW5 also produced the minor's clinical card and birth certificate.

10. The appellant gave a sworn testimony in his defence. He told the court that he was a cattle businessman and that he had given PW3 a cow which he sold when he got sick. He later refused to pay him and told him that he would do something to him. He reported the matter to the chief but was later arrested and charged with defilement.

11. The appellant has challenged his conviction and sentence for the offence of defilement in his Petition of Appeal filed in this court on 20th February 2020. He canvassed his appeal by way of written submissions which I have duly considered.

12. The State concedes the appeal and Mr. Otieno for the D.P.P. gave the following reasons for the concession; first, the matter proceeded to hearing despite the appellant's indication that he did not have an advocate and second, the appellant sought to recall PW1 and she was not recalled thus the appellant was not accorded a fair trial as envisaged by the law.

13. Despite the State conceding the appeal, this court still has a duty to ensure that it re-evaluates the evidence afresh and makes its own findings. This obligation was set out in the case of ***Odhiambo vs Republic [2008]KLR 565*** thus:

> *"The court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence."*

14. Having considered the material before this court, I find that issues arising for determination in the appeal are:

> **a. Whether the appellant was accorded a fair trial;**
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> **b. Whether the trial court erred in adopting the evidence of the complainant;**
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> **c. Whether the prosecution proved its case against the appellant to the required standard;**

15. I will deal with the first and second issues jointly, as they are interconnected. The ideal point of departure in determining these two issues is an evaluation of what transpired before the trial court after the appellant took plea. The record shows that immediately after taking his plea of not guilty, Hon. A.R. Kithinji took the minor's testimony despite the appellant's protest that he did not have an advocate.

16. Afterwards, Hon. D.K. Matutu took over the conduct of the matter following the transfer of Hon. A.R. Kithinji. The learned magistrate explained the provisions of **Section200** of the **Criminal Procedure Code** to the appellant who elected to have the matter start afresh. The testimonies of the rest of the prosecution's witnesses were taken by the magistrate but the complainant was never availed to give her evidence afresh.

17. Before the prosecution closed its case, the matter was adjourned severally to allow the investigating officer find the complainant. Due to the futility of the efforts made to trace the complainant, the prosecution made an application to have the testimony of the complainant adopted by the court pursuant to **Section 34(1)** of the **Evidence Act**. The trial court found the application by the prosecution merited and adopted the evidence previously given by the minor.

18. The appellant contended that the prosecution did not make efforts to produce the complainant due to the evidence by prosecution witnesses that she had gone back to her parents. The appellant complained that he did not understand the meaning of Section 34 of the Evidence Act which the trial court referred to in adopting the testimony of the minor.

19. Mr. Otieno conceded that the appellant was not given a fair trial as envisaged by the law. He submitted that after taking his plea of not guilty, the trial court ordered the appellant to proceed even after he had indicated that he had no advocate.

20. Regarding compliance with Section 200 of the Criminal Procedure Code, learned counsel for the State submitted that the appellant had been blamed for the absence of the complainant without reason. He submitted that the testimony of PW1 was adopted under Section 34 of the Evidence Act for the reason that she could not be found, despite PW4's testimony that the complainant was living with her parents. Counsel contended that the violation of the appellant's right to an advocate and the right of recall under section 200 marred the whole trial.

21. **Section 200 (3)** of the **Criminal Procedure Code** provides the process to be followed upon the transfer of a magistrate who has partly heard a criminal matter. It stipulates:

> *"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."*

22. The above provision only requires the succeeding magistrate to inform the accused person of his right to have the matter re-heard. The provision does not make it mandatory for the magistrate to re-summon a witness once the accused person elects to have the witness re-summoned. In the case of ***Joseph Kamora Maro v Republic Criminal Appeal No. 57 of 2014 [2014] eKLR*** the Court of Appeal held:

> *"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 the jurisdiction of the court as was the case here or some may even have 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 de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."*

23. In this case, the appellant was informed of his right to have the matter reheard under Section 200 by the succeeding magistrate, Hon. D.K Matutu. He elected to have the matter start afresh and the trial court allowed his application. That was as far as the trial court's duty went under Section 200.

24. The minor was the only witness who had testified when Hon. D.K Matutu took over the conduct of the matter. The written proceedings show that the prosecution did make considerable efforts to get the complainant to give her evidence afresh but she was never availed before the court for reasons that were not disclosed.

25. On 10th April 2017, the prosecution informed the court that despite warrants being issued, the complainant could not be found. However, PW4 who gave his evidence thereafter told the court that the minor was with her parents at Emeruro. On 22nd August 2017, the investigating officer, who was the prosecution's last witness, testified that she did not know whether the complainant was in school. On the same day, the prosecutor told the court that since she testified, the minor had become very difficult to trace and asked for more time to find her. Finally, in January 2018, the prosecution made the application under section 34 (1) to have the minor's earlier testimony adopted, having failed to locate her.

26. Evidence taken at an earlier stage of court proceedings may be adopted at a later stage of the same proceedings if the circumstances set out under **Section 34 (1) (a)** of the **Evidence Act** are met. The provision stipulates:

> *34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—*
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> > *(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;*

27. The trial court's decision to allow the prosecution's application to adopt the minor's evidence under Section 34 (1) was informed by its observation that the presence of minor could not be obtained without an amount of delay. The decision of the trial court was well grounded as it would not have served the interest of justice to have the matter stuck in limbo, given the effort and time taken to trace the minor three years after she had testified.

28. However, the manner in which the preceding magistrate took the evidence of the complainant left a lot to be desired. In my view, the approach taken by the magistrate at the commencement of the matter was prejudicial to the appellant and in violation of his right to fair hearing for reasons that shall become apparent shortly.

29. Soon after the appellant had taken his plea, the learned magistrate went right into the hearing of the matter, brushing off the appellant's complaint that he did not have an advocate. The learned magistrate reasoned that if the complainant was released without giving her evidence, she would be threatened and the case would be compromised. This finding by the trial court had no basis as there is no indication on record that the complainant had been threatened in any way.

30. I also note that the record is silent on whether witness statements were ever availed to the appellant when the hearing of the matter commenced. His cross-examination of the minor was brief and hardly relevant to the charges he faced. It is perhaps for these reasons that the appellant insisted on having the matter start *de- novo*. It is also noteworthy that on more than one occasion, the appellant, asked the prosecution witnesses to repeat what they had said after they had testified. Although the witnesses were speaking in Kiswahili which was the appellant's language of choice, he appeared not to comprehend what was being said.

31. **Article 50 (2) (c)** of the **Constitution** provides that every accused person has the right to have adequate time and facilities to prepare a defence. **Article 50 (2) (j)** provides that the accused has the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The accused person's right to be represented by an advocate of his choice is enshrined in **Article 50 (2) (g)** of the **Constitution**. The facts I have outlined above show that the appellant was not accorded these fundamental constitutional rights.

32. The duty of the trial court in ensuring that the accused person is given a fair hearing was aptly expressed by the Court in ***Elijah Njihia Wakianda v Republic CRIMINAL APPEAL NO. 437 OF 2010 [2016] eKLR*** thus:

> *The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.*

33. The gravity of the offence and the stiff penalty imposed upon conviction called for extra vigilance from the trial court in protecting the rights of the appellant. The trial court had a duty to ensure that the appellant was furnished with witness statements to inform him of the prosecution's case and enable him adequately prepare for his defence. The appellant's complaint that he did not have an advocate should have been given due consideration by the court and the appellant given a chance to get legal counsel before the court took the minor's evidence. The appellant likely suffered substantial injustice due to these omissions by the court. Consequently, the trial is hereby vitiated.

34. The appellant also contended that the prosecution had not proved its case to the required standard. He argued that the charges against him were malicious and fabricated by the complainant's family to "crucify" him. He argued that there was no medical evidence to prove that the minor had been held tightly and dragged as alleged and also submitted that the minor had been found on the third day but the medical evidence showed that she had an injury of one week.

35. An appraisal of the prosecution's case indicates that there was ample evidence against the appellant for the offence for which he was convicted. The production of the minor's birth certificate by PW5 confirmed the age of the minor at the time of the assault as 14 years. The identification of the appellant by the minor as her assailant was also corroborated by the evidence of PW 2 who found the minor in the appellant's company in his house a few days after she had disappeared.

36. The element of penetration was confirmed by the medical evidence given by the clinical officer. I find nothing untoward with the indication in the P3 form that the approximate age of the injuries was a week since PW1 signed the P3 form on 26th May 2014 about a week after the assault took place.

37. The discrepancies identified by the appellant, that the minor had said she had sex with him the whole night, then she said she had sex with him two times in the same night or that the minor had testified that she attended K1 primary school then testified that she attended K2 primary school while PW4 had stated that she went to K3 primary and PW5 K5 primary school were minor contradictions and typographical errors that did not cause the appellant an injustice and hence curable under Section 382 of the Criminal Procedure Code.

38. Ideally, when the prosecution has adduced sufficient evidence in support of its case but a trial is defective, an appellate court will order that the error be remedied by a re-trial. In determining whether or not to order for a retrial, the court will consider whether it is in interests of justice and whether the re-trial is unlikely to cause injustice to the appellant. The court may also consider the length of time that has elapsed since the arrest and arraignment of the appellant. (See ***Obedi Kilonzo Kevevo –VS- Republic (2015) eKLR*** and ***John Njenga Kamau v Republic Criminal Appeal No. 203 of 2016 [2018] eKLR)***

39. The Court of Appeal in the case of ***Samuel Wahini Ngugi vs R [2012]eKLR*** cited with approval the case of ***Ahmed Sumar vs R (1964)***and ***Lolimo Ekimat vs. R Criminal*** thus;

> *"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs R(1964)EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:*
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> > *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered … In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused.*
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> *That decision was echoed in the case of Lolimo Ekimat vs. R Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:*
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> > *'… the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it.'*

40. Juxtaposing the above factors with the circumstances in this case, I find that ordering for a re-trial would be appropriate as the conviction has been set aside not due to a defect for which the prosecution is to blame but by a mistake of the trial court. The nature of the evidence on record and the indication by the prosecution witnesses that they knew the whereabouts of the complainant, leads me to the finding that a re-trial will not prejudice the appellant.

41. The upshot is that the appeal partially succeeds. The appellant is hereby released into police custody and shall be produced before any other Court competent to try him within 7 days of this judgement.

Dated, signed and **delivered** at **Kisii** this **24th** day of **February, 2021.**

A. K. NDUNG'U

JUDGE