REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 12 OF 2018

GEOFFREY ODHIAMBO OTIENO .....APPELLANT

-versus-

REPUBLIC .....RESPONDENT

(Being an appeal from the judgment by Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's

Court Criminal Case No. 624 of 2014 delivered on 18/42018).

JUDGMENT

On 22/9/2014, the appellant, **Geoffrey Odhiambo Otieno** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that on 21/9/2014, at [Particulars Withheld] Sub location, Migori County, intentionally caused his penis to penetrate the vagina of VAO a child aged fourteen (14) years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He is alleged to have intentionally touched the vagina of VAO a child aged fourteen (14) years with his penis.

After a full trial, the appellant was convicted and sentenced to serve fifteen (15) years imprisonment. Being dissatisfied with the court's judgment, the appellant filed this appeal on 11/11/2018 based on the following grounds;-

1. **That the complainant's age was not proved;**

2. **That the appellant's defence evidence was not considered;**

3. **That the charge of defilement was not proved to the required standard;**

4. **That the sentence meted on the appellant is harsh.**

The appeal was filed by the appellant in person. Later, the appellant's counsel **Omonde Kisera Advocate** came on record but I have not seen any further grounds filed save for other grounds contained in the submissions filed by appellant's counsel on 9/12/2019. They are as follows:

1. **That the trial was illegal and unfair;**

2. **That the medical evidence was not produced by the maker;**

3. **That the case was not proved to the required standard of beyond reasonable doubt;**

4. **That the judgment by the trial court did not comply with Section 169 of the Criminal Procedure Code.**

The appeal was opposed and **Mr. Joseph Kimanthi,** Learned Senior Principal Prosecutor Counsel filed his submissions on 3/3/2021.

This is a first appeal and this court has the duty to examine all the evidence that was tendered before the trial court, analyse it and come to its own conclusions. Even in doing so, this court has to bear in mind that it neither heard nor saw the witnesses testify and should make allowance for that. I am guided by the decision of **Okeno vs Republic (1975) EA 32** where the court said:-

""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 Vs. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first 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 vs. 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."

Briefly, the case before the trial court was that on 19/9/2014, VAO left home to visit her aunt at [Particulars Withheld] Centre. The Appellant called her on phone before she left home and she informed him that she was going to school and he followed her to [Particulars Withheld] and convinced her to go with him to Migori. They returned to [Particulars Withheld] at 9:00 p.m; He refused to let her go back home and he took her to a house where they slept together and he forced her to have sex with him. Later that night, her aunt and the Chief came to that house and both her and the appellant were taken to the police station.

PW2's names were initialed as PAO, mother to the complainant (PW1). She recalled that on 20/9/2014, she dispatched PW1 to return to school but that at 8:00 p.m her sister PA (PW3) called to inform her that PW1 had been seen at [Particulars Withheld] Centre that day. PW3 called to inform her that PW1 had been found in a lodging with a man and they were taken to the police station. PW2 found PW1 at the police station. PW1 was taken to hospital for examination.

PW3 recalled that on 20/9/2014, she got information from one A that PW1 had been seen at [Particulars Withheld]. PW3 confirmed from PW2 that PW1 had left home that day for school. PW3 traced PW1 in a house where she was sleeping with the appellant and with the help of the chairman of the area, Michael Ouma Ochieng (PW4) and some youths, they removed PW1 and the appellant from the said house and took them to Maclader Police Station.

PW5 Assistant Chief of [Particulars Withheld] recalled, 21/9/2014 at midnight, he received a call from PW4 who reported that he had arrested a man and school girl in a lodging. PW5 found the arrested couple at the police station.

Duke Omondi Ojwang (PW6) a clinical Officer from Maclader Sub District Hospital produced the P3 forms in respect of both the appellant and the complainant. They had been examined by his colleague.

PW7 PC Bishan Ahmed Abdul of Maclader Police Station rearrested the appellant from PW5. He is the Investigating Officer in this case. He caused both the complainant and appellant to be examined by a Doctor and recovered the complainant's biker and pants. He produced the complainant's birth certificate in evidence as exhibits.

After PW7 testified, the prosecution closed its case and the matter was reserved for ruling on 18/6/2015 but the appellant disappeared till 13/7/2015 when he was availed in court claiming to have been sick. The court gave him the benefit of doubt and called upon him to defend himself.

At the appellants request, the defence was adjourned severally till 10/11/2015 when again, the appellant failed to attend court for his defence and a warrant of arrest was issued. He resurfaced on 8/2/2017. From the record, there is no explanation given to the court as to what happened to the appellant from 10/11/2015 to 8/2/2017, over one year later. The court gave the prosecution time to avail any witnesses when the appellant applied that the matter should start *de novo*. Thereafter, the prosecution indicated that the victim could not be traced and on 5/4/2017, the same court directed that the matter proceeds from where the Magistrate reached because the victim could not be traced. However, PW2, PW3, PW4, PW5 were recalled and again, the court ruled that the appellant has a case to answer and after several adjournments, he gave his unsworn evidence on 28/3/2018.

He stated that he met the complainant at a hotel where she worked in July 2014. He met her severally and wanted to marry her and made his intentions known to the complainants' brother who was the owner of the hotel, and they met and talked with the elder sister. They had other meetings which included his mother. On 19/9/2014, he went to get the girl to take her home. They went out drinking and returned to the house and at midnight, he heard a knock and found it was Pamela, PW3 and PW4; that PW3 said that the complainant was with a school girl. He said he was surprised because he had met the complainant working in the hotel and there had been marriage negotiations.

The appellant's submissions were as follows; on the **legality** and **fairness** of the **trial**, it was submitted that in compliance with Section 200 Criminal Procedure Code, the court ordered that the case start *de novo* and that therefore the prosecution evidence was discarded and that the witnesses should have testified afresh and have been subjected to cross examination but that PW1 was not availed to testify afresh but only some were availed; that on 5/4/2017, the court made a different order that the matter proceed from where it had reached because the victim could not be traced. It was counsel's submission the two orders caused confusion and that the confusion renders the whole trial illegal and unfair.

On the issue of **medical evidence,** counsel submitted that PW6 was not the maker of the P3 form but his colleague and no good reason was given why the maker could not produce the documents especially that the appellant objected to PW6 testifying; that despite the fact that the court made an order to start de novo, the prosecution still recalled PW6 instead of the maker of the P3 Form and the therefore the appellant did not have an opportunity to cross examined the maker.

On PW1's age, it was submitted that though she said she was born in 1998, the birth certificate indicated that she was born in 2000 which was contradictory. As to whether there was penetration, that the only evidence available was the presence of spermatozoa but the same was not linked to the appellant.

As regards the judgment, it was submitted that the court merely summarized the evidence and made conclusions without analysing the evidence.

In opposing the appeal, the Respondent's counsel Mr. Kimanthi it was submitted that after the magistrate ordered the case to start *de novo*, the prosecution objected urging that the matter was a 2014 matter and it would be difficult to get the witnesses, that the court directed that the matter proceeds from where it had stopped; that though the matter was at defence hearing, the court gave the appellant a chance to recall and examine the other available witnesses; that the two orders could not apply simultaneously; that the court went further to order that the appellant be furnished with written statements. Counsel relied on **CRA 1/2017 Abdu Aden Mohamed vs Republic** which considered when an order of de novo hearing could issue.

As regards the medical evidence, it was submitted that Section 33 and 77 of the Evidence Act was complied with, the appellant cross examined PW6 and no prejudice was suffered by the appellant.

Counsel urged that despite the complainant's conduct, she was still a minor; that though the appellant seemed to raise a defence under Section 8(5) Sexual Offences Act, he never questioned PW1 in court; that the appellant was sentenced under Section 8(4) Sexual Offence Act and was not prejudiced.

On failure to comply with Section 169 of the Criminal Procedure Code, counsel urged that the judgment cannot be invalidated on that basis and no injustice was suffered.

I have now considered all the evidence on record and the submissions of both counsel. I wish to start with the last ground, that the trial court failed to comply with Section 169 of the Criminal Procedure Code on the structure of a judgment. I have seen the judgment of the trial court and I fully agree with the appellants submission that the court did not comply with the requirements of Section 169 Criminal Procedure Code. The magistrate should have the points for determination, the decision thereon and reasons for the decision. The Magistrate merely summarized the evidence and arrived at a conclusion. My finding is however that the failure to comply with the said section did not prejudice the appellant because this being the first appeal, this court is enjoined to re-examine all the evidence tendered in the trial court, analyse it and arrive at its own conclusions.

Whether there was an illegality in the trial.

The relevant provisions of law are section 34 of the Evidence Act and Section 200 of the Criminal Procedure Code.

Section 34 provides as follows:-

> ***" (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceedings, or at a later stage in the same proceeding, for the purposes of roving the facts which it states, I the following circumstances-***
>
> ***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;***
>
> ***and where, in the case of a subsequent proceeding-***
>
> ***b) the proceeding is between the same parties or their representatives in interest; and***
>
> ***c) the adverse party in the first proceeding had eh right and opportunity to cross examine; and***
>
> ***d) the questions in issue were substantially the same in the first as in the second proceedings.***
>
> ***2) For the purposes of this section –***
>
> ***a) the expression 'judicial proceeding' shall be deemed to included any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and***
>
> ***b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused."***

Section 200 Criminal Procedure Code provides as follows;

> **"(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-**
>
> **(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."**

After **Hon. Sindani** placed the appellant on his defence and the appellant disappeared, at some point Hon. Sindani was transferred and Hon. Nyagah PM took over the matter. On 8/9/2015, when the appellant reappeared he was excused but he vanished again on from 10/11/2015 till he was arrested on 8/2/2017. Surprisingly, the court did not address the issue of where the appellant had been for over one year. Instead, once he appeared before Hon. Nyagah, he requested that the matter start *de novo*. It is not recorded whether the court had explained to the appellant what his rights were under Section 200 Criminal Procedure Code but from the appellant's request, the court must have done

so.

At that juncture, the prosecution counsel informed the court that this being a 2014, matter, it would be difficult to avail all the witnesses, but the appellant insisted that the matter start *de novo*. The court went ahead and ordered that the prosecution avail witnesses and the matter proceed *de novo*.

The considerations to be borne in mind by a court when invoking Section 200 Criminal Procedure Code were considered in the case of **Joseph Kamau Gichuki & Another vs Republic (2019**). The above case quoted with approval the case of **Nyabutu & Another vs Republic (2009)KLR 409** which is relevant and the court said:-

> ***"In Nyabutu & Another vs Republic (2009) KLR 2009, the appellant had been tried before a judge of the High Court who, after having fully heard the case and received the opinion of assessors reserved the judgment to be delivered on notice. However, he died before he had delivered the judgment. The case was taken over by another judge who acted on the evidence recorded by the late judge and convicted the appellants and sentenced them to death. The appellants appealed to this court on, among others, the ground that the trial judge erred in writing and delivering the judgment without having heard any of the witnesses and upon evidence wholly recorded by another judge. In dismissing the appeal, this court stated as follows regarding Section 200(1) (b) of the Criminal Procedure Code.***
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> ***"It is plain that the late Kaburu Bauni J died after he had heard and recorded the whole of the evidence in the trial. By dint of Section 200 (1) (b) of the Criminal Procedure Code, a succeeding judge may act on the evidence recorded wholly by his predecessor. However, section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa vs R (1985)KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from he two appellants and had in fact summed up to the assessors.***
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> ***The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."***

When the appellant requested that the matter be heard *de novo,* and the State indicated that they would not be able to trace some witnesses, the court should have given the prosecution time to establish whether or not the witnesses could be availed. The court should have taken into account, the time lapse from the date the case commenced, availability of witnesses and the likely prejudice to both the parties. The court made a hasty decision in ordering that the case proceeds de novo without considering the above. The order to start the case *de novo* was obviously prejudicial to the prosecution.

When the case was adjourned further to enable the prosecution procure the attendance of the witnesses, they could not. On 5/11/2017, the prosecution requested the court to adopt the complainant's evidence on record as the complainant had gone missing since November 2016. The court changed its minds and ordered that the case proceed from where the previous magistrate had reached. The order of starting the matter de *novo* had not been set aside and both orders could not subsist at the same time. To vary or set aside the order of 8/2/2017, that the matter be heard *de novo*, the magistrate should have sent the file to the High Court for the judge to set aside the earlier order. The magistrate caused a total confusion in the matter by reversing his own order that the matter proceeds from where the previous magistrate had stopped. To add to this confusion, even though the court had changed its order to start from where the court stopped, all the other witnesses PW2 to PW7 were recalled, testified afresh and were cross examined.

In the end, it was not clear whether the case had started *de novo* with exception of PW1 or it was proceeding from where Hon. Sindani left. This confusion resulted in a mistrial and the appellant cannot be said to have received a fair trial.

This is despite the fact that the appellant was very instrumental in causing the confusion that arose in this matter, when he absconded after the prosecution closed its case; Even after arrest, he absconded again for over one year. In my view, it is very likely that the the appellant is behind the alleged disappearance of the complainant because he had vanished at the time the victim allegedly disappeared. Even after rearrest, the appellant ensured that the case did not proceed but sought very many adjournments which the court readily granted instead of putting down its foot to decline the unwarranted applications for adjournment. Obviously the appellant was out to frustrate the trial and ensure it was not concluded.

Having found that the proceedings were a mistrial, can this court order a retrial? The court of Appeal in **Ahemd Sumar vs R (1964) EALR 483** offered guideline on when a retrial may be ordered. It said:-

> ***"...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 insufficient of evidence or for the purposes 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;....."***

Ordering a retrial in this would be an order in futility because already, the key witness could not be traced. The matter being a 2014 case, it is (now over 6 years) likely that even those who were recalled may be found and of cause having been recalled, the issue of witness fatigue cannot be ruled out. An order for retrial would not serve any purpose and would be prejudicial.

In conclusion, I find it unnecessary to consider the other issues raised. The only order that commends itself is that the appeal succeeds as the conviction is unsafe and it is hereby quashed. The sentence is set aside and the appellant set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 22ND DAY OF APRIL, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Kimanthi State Counsel

Mr. Oywer holding brief Mr. Kisera for Appellant

Ms Oloo Court Assistant

Appellant present