REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 56 OF 2020

BETWEEN

JM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.S. Abuya (SPM) in Meru Criminal Case S.O No. 1604 of 2013 delivered on 03rd May 2017)

JUDGMENT

1. JM (*Appellant*) was charged with the offence of incest contrary to **Section 20 (1) of the Sexual Offences Act No. 3 of 2006 (the Act)** . It was alleged that on 28th April 2010 at [Particulars Withheld]Village Kiitua sub-location, in Meru Central District within Eastern Province being a male person caused of his penis to penetrate the vagina of **BN** a female person who was to his knowledge his niece.

2. He also faced an alternative charge 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 the same day and place, he intentionally touched the vagina of **BN** a child aged 8 years with his penis.

3. The prosecution called five (5) witnesses. **PW1 BN**, the complainant stated that she was 12 years and in class 5 at [particulars withheld] Primary School. She recalled that on 28th April 2010, she was sleeping on the same bed with aunt J and Appellant whom she referred to as uncle M when uncle defiled her as J slept. That luckily aunt J woke up and when she pulled her away from Appellant, he set upon her and beat her. That complainant and aunt J went and slept in the kitchen ran and left Appellant on the bed. That aunt J washed her the following morning and did not take any action until complainant reported the matter to her JK after she visited 3 days afterwards. JK, the mother of complainant stated that she was born on 10.08.2002 as shown on the certificate of birth PEXH. 2. Upon receiving complainant's report on 02.05.2010, she escorted her to hospital and later reported the matter to police and Appellant was subsequently arrested. She identified Appellant as husband to her sister. JM stated that he was sleeping with her husband, Appellant herein, and complainant on the night of 28.04.2010 when she woke up in the night to find Appellant defiling complainant. She confirmed that Appellant's daughters slept in the kitchen on the material night. Complainant was examined by Dr.Macharia on 25.05.2010 who found that complainant's hymen was broken as shown on the P3 form PEXH. 1. Dr. Irene Gichuru who testified on behalf of Dr. Macharia stated that the age of the injury was not indicated. Complainant's complaint was investigated by CPL Nancy Thuo who caused Appellant to be charged.

4. Complainant was examined on 01.03.2018 by **PW3 Geoffrey Muthomi,** a clinical officer who found that her hymen was torn upon which he formed an opinion that complainant had been defiled. He tendered complainant's P3 form as PEXH. 1.

THE DEFENCE CASE

5. In his sworn defence, recalled that his wife had called the complainant to sleep on their bed on the material night but went to sleep with his children after he protested that he could not sleep on the same bed with the child. He said he was framed by his wife JM after he quarreled her for selling his three bags of maize without his consent. He His uncle who was his witness stated that Appellant and his wife used to quarrel frequently.

6. The learned trial magistrate considered the evidence and finding the main count proved sentenced Appellant to 23 years' imprisonment.

The Appeal

7. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 6 grounds of appeal which were later amended in his submissions to 4 grounds which I have summarized as follows:

a. Section 200 (3) of the Criminal Procedure Code was not complied with

b. Prosecution case was not proved

c. The sentence meted is harsh, unfair and excessive sentence

Analysis and determination

*8. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See **Okeno vs. Republic [1972] E.A.32**).*

9. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of the Appellant the state not having filed any. Although all the grounds raised by the Appellant are important questions, I am of the view that the ground on Section 200 of the Criminal Procedure Code deserves my full consideration before dealing with the grounds proffered by the Appellant.

10. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern. As much as it is practically possible, it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses (See **Abdi Adan Mohamed v Republic [2017] eKLR)**.

11. Section 200 of the CPC provides in pertinent areas that;

"(1) Subject to sub-section (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) …..

(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 re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) ….."

12. Section 200 envisages three situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. 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 re-heard and the succeeding magistrate shall inform the accused person of that right.

13. The court record reveals that prior to his transfer, Hon. B.Ochieng heard the whole of the prosecution case. On 16.06.2016, the case was taken over by Hon. Abuya who proceeded with the defence case without complying with **Section 200(3)** of the CPC.

14. In the case of **Anthony Musee Matinge vs Republic v Republic (2012) eKLR**, the learned judge with reference to Section 200 of the CPC stated as follows:

"The above provisions of law are couched in mandatory terms..... In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. .....The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."

15. From the record, it is apparent that the trial court did not comply with Section 200(3) of the CPC and I similarly find that this appeal has to succeed on this technicality.

16. Because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge, Section **200(4)** 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."

17. I have considered whether this court should order a retrial. **Benard Lolimo Ekimat v Republic [2005] eKLR** when the Court of Appeal stated as follows:

'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."

18. The foregoing decision was echoed in the case of **Dennis Leskar Loishiye v Republic [2015] eKLR** where the Court of Appeal cited the case of **Muiruri v R [2000] KLR 552** with approval and observed that:

Generally, whether a retrial should be conducted or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not

19. The Appellant was allegedly committed on 28.04.2010 which is 10 years and 7 months ago. *A retrial if ordered is likely to be affected by non*-availability and possible loss of memory of the witnesses and to greatly prejudice the Appellant who has been in custody for over 10 years a retrial having been ordered by a judgment of this court dated 30th October, 2013.

20. Accordingly, I find there was a mistrial and that it will serve no meaningful purpose to analyze the other grounds of appeal. For the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DELIVERED AT MERU THIS 25*TH* DAY OF NOVEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki