REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 29 OF 2018

DERICK OLANDO ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence Hon. M. Chesang, RM

delivered on 11th July, 2018 in criminal case No. 17 of 2016 at Kajiado)

JUDGMENT

1. The appellant was charged with the offence of sexual assault contrary to Section 5(1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 21st day of May, 2016 at [Particulars withheld] Academy in Kitengela Township, within Kajiado County, he unlawfully used his finger to penetrate the private organ of CG aged 9 years.

2. The appellant faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the same Act. Particulars being that on the same day at [Particulars withheld] Academy, he intentionally touched the private parts of CG a child aged 9 years with his fingers.

3. The appellant went through a trial in which the prosecution called 6 witnesses and two witnesses by the defence, the trial court convicted the appellant and sentenced him to 10 years imprisonment. The appellant was aggrieved with both the conviction and sentence and lodged the present appeal raising the following grounds, namely:

> ***1. The Honourable Court erred in law and fact by failing to consider the appellant's evidence merely because the appellant held the opinion that the complainant did not speak English.***
>
> ***2. The learned Magistrate erred in law and fact in evaluating the evidence of DW2 on record and arriving at a wrong decision.***
>
> ***3. The Honourable court erred in law and in fact by relying on evidence that was not corroborated as required by law.***
>
> ***4. The Honourable court erred in law and fact by failing to determine the relationship, if any, between the medical report and the appellant.***
>
> *5. The Honourable court erred in law and fact by failing to uphold the test required for criminal convictions, to wit, beyond reasonable doubt.*

4. During the hearing of the appeal, the appellant who was unrepresented, relied on his written submissions and urged the court to allow the appeal, quash the conviction and set aside the sentence.

5. In the written submissions, the appellant argued that the prosecution led scanty evidence and that there was no fair trial as guaranteed by Articles 50(2) and 25(c) of the Constitution. According to the appellant, PW1 was not truthful and that the prosecution failed to call necessary witnesses who had been mentioned by PW1. He further submitted that the prosecution's case was full of assumptions and presumptions, was inconsistent and contradictory.

6. The appellant further submitted that one of the ingredients of the offence namely; identification of the perpetrator was not proved. The appellant argued, therefore, that the prosecution did not prove its case beyond reasonable doubt as required by law. The appellant went on to

submit that the medical evidence did not connect him with the offence.

7. The appellant also argued that the trial court violated Section 200(3) of the Criminal Procedure Code, in that the incoming trial magistrate did not comply with that section given the case having been heard by a different Magistrate.

8. Mr. Njeru, learned Assistant Deputy Prosecution Counsel conceded this appeal. According to counsel, Hon. Mbicha heard the matter up to 28th October, 2016 while the appellant was represented. The matter was then taken over by Hon. Chesang on 9th March, 2017. The appellant was not represented on that day and the trial court did not explain to him his rights under section 200 of the code. That, he submitted, violated the appellant's right to fair trial. He also admitted that the prosecution did not prove its case beyond reasonable doubt.

9. According to counsel the appellant faced a sexual offence which was brought under section 5 of the Sexual Offences Act. he submitted that whereas the evidence of the minor, PW1, was that the appellant used his finger to penetrate her private parts, the evidence of PW4 contradicted that of PW1 by concluding that penetration was by a male organ which was not supported by evidence.

10. Mr. Njeru further pointed out that the evidence of PW3, a teacher from the school, did not support the prosecution's evidence that the appellant touched the minor's private parts. According to counsel, it was evident from that evidence that the child was being forced to say something. He also argued that the evidence of PW6 is contradictory to that of the minor and that the evidence of the Doctor was not convincing that the offence was committed.

11. I have considered this appeal, submissions by the appellant and those on behalf of the respondent, perused the record of the trial court and the impugned judgment. This appeal has been conceded by the respondent. it does not follow that the court must agree with the state and, therefore, allow the appeal. That is; concession of an appeal does not lead to allowing an appeal as a matter of course. The appellate court must consider the appeal and make a determination on it.

12. In ***Odhiambo v Republic*** [2008] KLR 565, the court stated:

> ***"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 evidence."*** (See also Paul Thiga Ngamenya v Republic [2018] eKLR)

13. In that regard, this being a first appeal, this court as the first appellate court, has a duty to re-evaluate, reconsider and reassess the evidence and make its own determination giving reasons for it. In ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the Court of Appeal stated that:

> ***"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."(See also Njoroge v Republic [1982 – 88] 1 KAR 1134 and Mwangi v Republic [2004] 2 KLR 28.

14. PW1 CG a nine (9) years old minor, testified that she was a pupil at M school and was previously at [Particulars withheld] Academy. She told the court that on 21st May, 2016, a Saturday, she attended tuition; that she later went upstairs to pick a tissue where she found a teacher called Derick. The teacher told her to close the door which she did. The teacher then put her on his lap, removed her underwear and put a finger in her private parts. He then put a hard object into her private parts. The teacher then called the other pupil and continued with lessons. When she went home, she told her mother what had happened and the mother called the head teacher of the school. In cross examination, she said she was slightly injured on the left hand and was bleeding when she went to class. She said that when she went home that day she was feeling pain.

15. PW2, FW and mother to PW1, told the court that on 21st May, 2016 PW1 went to school for tuition as usual and when she went back home at 12.30, she told her what had happened at school. PW2 testified that she called the head teacher and went to school with PW1. They then went to the police station with the teacher and later to hospital where a P3 form was filled. They were also given a PRC and the minor was admitted. In cross-examination, the witness told the court that PW1 appeared to be in fear when she was talking to her about what happened at school.

16. PW3, PVK, the head teacher of the school, testified that on 21st May, 2010 at 1pm, PW2 called and told and informed her that something had happened at school. They met at school at 2pm with PW1 but by that time, the appellant had already left. She called the appellant back and then PW1's father came with police officers. According to the witness, PW1 told them that the appellant touched her waist and thighs. Then PW1 said she had an injury on the hand which he found to be a slight injury. The appellant denied doing anything to the minor. They went to Kitengela Police Station where she recorded a statement and PW1 was taken to hospital.

17. In cross-examination, PW3 told the court that the appellant had been at the school since 2015 and she had never had any complaint against him. It was the witness's evidence that PW1 was under pressure to say something and that the police were using harsh tone forcing her. She also told the court that the appellant was not given time to explain himself. She was of the view that investigations should have started at the school given that witness were next to where the incident is alleged to have taken place.

18. PW4 Ruth Lengete, an employee of Nairobi Women Hospital, testified that she worked with Dr. Dere and had known him for 3 years and was, therefore, familiar with his signature. The witness told the court that Dr. Dere filled a P3 form for PW1 following a history of defilement. According to the P3 form, there were bruises on Labia Manora which had a fresh tear and bruises. He produced the P3 for as Pex.1. He told the court that the PRC also filled by Dr. Dere showed whitish discharge and bruises on both Labia Majora and Manora and that the tear was fresh. The conclusion was that PW1 had been defiled and the object used was a male organ. In cross-examination, the witness testified that the hospital collected samples which the police were to take for forensic examination to identify the person who defiled

PW1.

19. PW5 No. 2007148304, PC Mutua attached at Athi River Prison, testified that on 21st May, 2016 at 2 pm he was called by Sgt Felix Mukirenze who instructed him to go to [Particulars withheld] academy which is about 200m from the facility. He proceeded there and found a school teacher Derick, PW1 and a parent. They were told them that the minor had been defiled. They questioned PW1 and the teacher and asked them to settle the matter at Kitengela Police Station where they took PW1 and the teacher. He told the court that he was sent to the school because there was commotion.

20. PW6 No. 88796, PC Alice Njanja and the investigating officer in the case, testified that on 22nd May, 2015, she found a report that had been made at the police station about a defilement case; that she went to see PW1 in hospital; that the child was in trauma and shock and that she had been admitted to hospital for one week.

21. The appellant, who testified as DW1, told the court that on the material day, 21st May, 2016, he was at the school when PW1 went to class after break crying that she had been injured. She had a wound on the hand which he attended to and bandaged it using a tissue paper. The class then proceeded as normal and pupils went home and he also went to his house. Later that afternoon, the head teacher called him and when he arrived at the office, he found 3 people with the head teacher. The head teacher told him that he had a case to answer. PW1 was asked what he had done but she was unable to state in English. She was asked to speak any language she was comfortable with. She then said the teacher had done bad manners to her. At that point, he was arrested and he was later charged in court.

22. DW2, MK also teacher at the school, testified that on 21st May, 2016 he was at school for tuition with the appellant. The appellant told him that he was not feeling well and left to buy medicine leaving him with the pupils. After break, they went back to class and later released the pupils. They both left the school and went home. At 2pm, he was called by the head teacher who informed him that the appellant had been arrested after one pupil reported that he had defiled her. He told the head teacher that he had not heard anything about that issue and did not anything about it.

23. DW3 GM, a worker at the school, testified that he was going on with his normal duties when pupils went for tuition on that day; that he saw the appellant leave the classroom during break time and that later, he saw parents of the pupil and the police come to the school. He was told to leave for some time as they discussed some issues.

24. After considering the above evidence the trial court was satisfied that the prosecution had proved its case against the appellant, convicted and sentenced him, prompting this appeal. The trial court believed the evidence of the prosecution that PW1 was defiled. It however the defence evidence that the appellant did not commit the offence. The court stated at page 2 of the judgment:

> ***"I had opportunity to talk to the complainant alone on 24th January, 2018 since I doubted the occurrence of the incident. I noted that she had a confident demeanor and contrary to the accused's allegations that she is unable to speak English. I found her to be speaking English with a lot of ease as if it was her mother tongue".***

25. The issue that arises is whether the proved its beyond reasonable doubt. The accused was charged with sexual assault contrary to Section 5(1) (a) (i) (2) of the Sexual Offences Act, that on the 21st day of May, 2016 while at the school, he unlawfully used his finger to penetrate the private organ of PW1, aged 9 years. That charge did not require proof of age like is in cases of defilement but that the victim of the sexual assault was committed by a person against another person without the consent of the victim.

26. This is so because section 5 provides:

> (1) ***Any person who unlawfully -***
>
> ***(a) penetrates the genital organs of another person with -***
>
> ***(i) any part of the body of another or that person; or***
>
> ***(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***
>
> ***(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body,***
>
> ***is guilty of an offence termed sexual assault.***
>
> ***(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.***

27. In this charge, the prosecution was to prove that the appellant used any part of his body to penetrate the genital organ of PW1. The issue of age would then not come in because the appellant was not charged with defilement. All the prosecution was required to prove was that the appellant unlawfully used any part of his body to penetrated the genital organ of PW1.

28. Although the appellant was not charged with defilement, the trial court stated that in its observation, the victim's (PW1's) age was between 10 and 11 years. that was after considering the evidence on age and the Birth certificate produced to prove the age of the victim

which is an ingredient in cases of defilement. It is not clear whether that age the trial court adverted to was age at the time of the trial of the case or at the time of the incident. Either way, that makes no meaning going by the offence the appellant faced.

29. The issue that was material to the prosecution's case was that of penetration. According to the prosecution, there was penetration. The prosecution relied on the evidence of its witness as well as documentary evidence namely P3 form and PRC. The defence held the view that there was no proof of this ingredient

30. PW1 told the court that the appellant touched penetrated her private parts with his finger and that he then used a hard object to penetrate her genitalia. She did not say what object that object was. She told the court that the appellant removed her pants before inserting the finger into her private parts ant then by a hard object; that she felt pain and bled. She also said she was injured on the hand. This evidence was denied by the appellant.

31. The prosecution relied on the evidence of PW4 who testified and produced the P3 form and PRC on behalf of Dr. Dere who examined PW1. This particular witness did not tell the court who he was and in what capacity he was testifying on behalf of Dr. Dere. He did not tell the court that he was a Doctor, Clinical officer or any other health professional. He only told the court that he was an employee of Nairobi Women Hospital and was familiar with the Doctor's signature.

32. Second, the P3 and PRC form show that there was a discharge from PW1's private parts; that there were bruises and that the hymen was broken. The conclusion reached was that there was penile penetration. The prosecution evidence particularly that of PW1, did not mention penile penetration. The victim talked of use of a finger and a hard object without telling the court what the object was.

33. The witness did not tell the court that the attacker undressed himself or unzipped or that he used his private organ to penetrate her. How then did the issue of discharge arise yet the appellant was not charged with defilement? Or how could that evidence lead the court to convict him of defilement yet ther was no evidence from the prosecution witm=nesses that there was defilement? There is also evidence from the prosecution witnesses that PW1 was admitted in hospital for one week. There is no mention of the reason why she was admitted in hospital and what she was suffering from or was treated for. Neither was a discharge summary produced to show that indeed the minor was admitted and the reason for the admission.

34. In that regard, there is doubt whether the victim was defiled her genital organs were penetrated by the petitioner using any part of his body. This is because there was no direct and cogent evidence either that a male organ or any other part of the appellant's body was used to penetrate PW1's genitalia.

35. The Proviso to section 124 of the Evidence Act allows the court to convict in sexual offences where the court believes the truth of the evidence of the victim. The section provides:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

36. The case against the appellant is solely on the evidence of the PW1 as there was no other eye witness. Her evidence on the commission of the offence is rather sketch. She told the court that the appellant used his finger and a hard object to penetrate her genitalia but could not say what the hard object was she also did not tell the court that she saw the object. The appellant testified that PW1 went to class with an injury on her hand and that he only attended to that injury and nothing more.

37. The Pw2 also agreed with this evidence that PW1 had an injury on the hand. There was no claim by the prosecution that the injury on the hand was caused by the appellant in the cause of committing the offence he was charged with. This coupled with the fact that the medical evidence is not conclusive on what exactly happened and in the absence other independent evidence that the appellant committed the offence, I am unable to agree with the trial court that the prosecution proved its case against the appellant beyond reasonable doubt. Simply put, I am unable to believe the truthfulness of PW1's evidence that the appellant used his finger to penetrate her genitalia.

38. The law requires the prosecution to prove its case beyond reasonable doubt. That is; at the end of the trial, the trial court should have no doubt in its mind that on the evidence on record, the accused committed the offence. That cannot be said of this appeal. It is unexplainable why PW1 was admitted in hospital for one week yet there was no suggestion that suffered injuries that required such medical intervention.

39. This view also gets credence from PW3's testimony that police pressured the victim to say something and the fact that Prisons officers were the first to go to the school because of commotion at the school yet there was no evidence of such an occurrence.

40. The trial court also mentioned in its judgment that it had talked to the victim on 24th January 2018 and noted that the victim spoke with confidence. There is nothing on record to show that the trial court **(Hon. Chesang)** talked to the victim on that day or that the victim (PW1) was in court. the record shows that PW1 testified on 21st July 2016 before **Hon. Mbicha.** There was no suggestion that the victim was recalled and appeared in court on 21st January 2018 before **Hon Chesang.**

41. That then would leave the issue of alternative count, of committing an indecent act with a child. The victim told the court that the appellant touched her private parts with his fingers. The appellant argued that he only attended to her after she went to class with an injured

hand. He bandaged the using a toilet tissue although the injury was not serious. Given this court's finding on the main count, I do not this there was evidence to support the alternative charge.

42. From a procedural point, Mr. Njeru also submitted that section 200 of the Criminal Procedure Code was not complied with. The trial court's record shows that **Hon. Mbicha** took the evidence of PW1 and PW2 on 21st July, 2016. He also took the evidence of PW3 on 28th October, 2016. **Hon. Chesang** then took over the matter and took the evidence of PW4 and PW5 on 9th March, 2017. She also took the evidence of PW6 on 6th November, 2017 as well as the defence evidence thereafter. The record does not show that **Hon. Chesang** complied with Section 200 of the Criminal Procedure Code by explaining to the appellant his rights as required by that section.

43. It is therefore correct as submitted by Mr. Njeru, that the trial Magistrates who took over the conduct did not comply with section 200 of the Code. did failure to comply with section 200 render the trial invalid?

44. Section 200 of the 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—***
>
> ***(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.***

45. The section states in mandatory terms that where the succeeding magistrate takes over a trial in which the preceding trial magistrate had recorded evidence in that trial, the succeeding magistrate must inform the accused his right to demand that the witnesses be resummoned or the trial starts ***denovo.***

46. The Court of Appeal stated in ***Abdi Adan Mohamed v Republic*** [2017] eKLR (Criminal Appeal No. 1 of 2017 Msa),that:

> ***"Section 200 envisages two 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. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. 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… Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution."***

47. In that regard, section 200 requires the succeeding magistrate to explain to the accused his rights under section 200 of the Criminal Procedure code and give him an opportunity to elect, whether to proceed with the trial from where it had reached, to commence afresh or resummon some or all the witnesses who had earlier testified.

48. The record clearly shows that this did not happen when **Hon Chesang** took over proceedings from **Hon. Mbicha** who had taken evidence of 3 witnesses but did not comply with section 200, yet proceeded take evidence from three other prosecution witnesses and the defence and delivered judgment. Failure by the succeeding magistrate to comply with the legal requirements amounted to a violation of the right conferred on the appellant by section 200(3). The subsequent magistrate neither explained to the appellant his rights nor gave him an opportunity to make an election as required by statute.

49. As the court of Appeal stated in ***Ndegwa v Republic*** [1985] KLR 535:

> ***"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."***

50. The failure to comply with mandatory statutory provisions violated the appellant's right to fair trial and, therefore, vitiated that trial. Mr. Njeru properly conceded this appeal on that ground.

51. For the reasons above, having considered the appeal, the evidence on record and submission from both parties as well as the authorities and the law I am not satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. Consequently, this appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and delivered at Kajiado this 21st day of February 2020.

E.C. MWITA

JUDGE