REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL N0. 46 OF 2019

MARTIN MULI MUTAVA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court at Kithimani (Hon. E. W. Wambugu, RM), delivered on 15th May, 2019 in Sexual Offence Case No. 12 of 2016)

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN MULI MUTAVA.....ACCUSED

JUDGEMENT

1. The appellant herein, **Martin Muli Mutava**, was The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act, Act No. 3 of 2006. Particulars were that on diverse dates in the month of June 2015 in Yatta Sub-county within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **AMM** a child aged 15 years. In the alternative, he was charged with the offence of an Indecent Act contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on the said date and the same place at the same time, he intentionally touched the vagina of **AMM**, a girl aged 15 years with his penis.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the offence of defilement, convicted him accordingly and sentenced him to 10 years' imprisonment.

3. In the submissions filed in this appeal, the appellant through his legal counsel, **Mr Ngolya**, has taken issue with the manner in which the trial was conducted. It was submitted that the appellant's trial in the Subordinate Court was not only a mistrial but also null and void. According to the appellant, the trial Court erred in law by convicting the appellant in a trial which was not conducted in accordance with both the statute law and The Constitution of Kenya. It was submitted that the case in the Subordinate Court commenced before **Honourable Opanga**, Senior Resident Magistrate on 15th June, 2016 before whom three prosecution witnesses testified. Thereafter, the said **Honourable Opanga** was transferred to another station and the matter was taken over by the **Honourable E. W. Wambugu**, Resident Magistrate, who heard the prosecution's remaining witnesses and ultimately convicted and sentenced the Appellant.

4. According to the Appellant, his major grievance is that his right to a fair trial as enshrined in The Constitution of Kenya was grossly violated in that the succeeding judicial officer failed and/or neglected to comply with the mandatory provisions of Section 200 (3) of the ***Criminal Procedure Code***, Cap 75, Laws of Kenya, which, according to the Appellant, imposes a mandatory statutory duty on the succeeding Magistrate to explain to an accused person his right under the said Section. Failure to do so materially prejudices an accused person and any conviction flowing from the trial will be null and void. It was submitted that the trial Court's record is clear that **Honourable E.W. Wambugu** did not comply with Section 200(3) of the ***Criminal Procedure Code***, Cap 75 Laws of Kenya and was accordingly, divested of jurisdiction to continue handling the Appellant's case before her.

5. Apart from that it was submitted that on 22nd January, 2019, the trial court pronounced itself thus:

"I note prosecution has no objection to application by defence counsel but as a Court I am not persuaded since this is a 2016 case involving a minor which has not been concluded for the last 2 years. Accused person has caused great delay after he sought a 2nd DNA re-examination of which I allowed him in the interest of justice. The handwriting on the file is legible and counsel can peruse to save on time before proceeding or specify which evidence in particular is not legible for purposes of typing."

6. According to the Appellant, the charge facing him was that of Defilement and the prosecution was legally bound to prove the age factor among other ingredients. However, from the proceedings, it appears that the trial Court had already determined the age factor yet the prosecution had not closed their case. It was submitted that the Appellant was highly prejudiced by the said action of the learned trial Magistrate and in this regard the Appellant relied on Article 50(2)(a) of the Constitution of Kenya and contended that by pre-judging the age ingredient before the conclusion of the trial, the learned trial Court fell into a grave error of law.

7. In her response to this ground, **Miss Mogoi**, learned prosecution counsel, conceded the appeal. According to her, it is clear from the record that this matter was inherited by the magistrate who delivered the judgment after her predecessor had taken the evidence of PW1, PW2 and PW3 partly. It is clear that the court failed to comply with Section 200(3) of the ***Criminal Procedure Code*** making the trial a mistrial as per Section 200(4).

8. It was learned prosecution counsel's view while conceding the appeal that the matter ought to go for a re-trial considering that there was sufficient evidence and that failure was occasioned by the court and not the prosecution. In supporting the retrial, it was submitted that the Appellant was on bond during the trial and was sentence to serve 10 years imprisonment on 24th May, 2019. He Appealed and was released on bond pending appeal on 29th July, 2019 meaning that he only served 2 months. In view of the foregoing, it was submitted that no injustice will be suffered by the Appellant if the matter goes for re-trial. In this regard learned counsel relied on **Robert Kibet Langat vs. Republic [2014] eKLR, Ekimat vs. R [2005] 1 KLR 182** and **Njenga & Another vs. R [2006] 1 KLR 184.**

Determination

9. I have considered the proceedings before the trial court and the submissions made on behalf of the appellant and the Respondent in this appeal.

10. Section 200(3) and (4) of the ***Criminal Procedure Code*** provides as follows:

(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.

11. The said provisions were extensively dealt with by the *Court of Appeal in* ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** *where it held that:*

"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. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

> **'It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. .....for these reasons we have stated, in our view the trial was unsatisfactory.'**

In other words Section 200, as was emphasised in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.

……..

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.

Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case 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. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly. The learned Judges in Ndegwa (supra) emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:

> **"…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…."**
>
> **……..**

Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution. It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, *how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;*

> **"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 v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. 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."**

Was Section 34 aforesaid intended to supply the evidence envisaged by Section 200 so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence if it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead? Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re-summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith. The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.

12. In the said case, the Court explained that:

> **"We reiterate what the Court said in Ndegwa v. R. (supra) that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the appellant the magistrate erred and the appellant was thereby prejudiced. It ought to be remembered always that where an accused person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why. Throughout the issue for some time was that the availability of the prosecution. Towards the end, it was generally intimated that the investigating officer had difficulty in tracing some witnesses. What is more telling is the fact that even after the trial magistrate ordered that the trial would proceed from where the last magistrate stopped, the prosecution sought time to**

establish who in the list of witnesses had not testified. For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable…As we conclude we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates...Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.

13. In this case, the evidence of PW1, PW2 and PW3 were taken before **Hon. M.A.O. Opanga (SRM)**. On 20th December, 2016, the said magistrate adjourned the matter to 22nd February, 2016. On that date however, the matter was placed before **Hon. E. W. Wambugu (RM)**. There was no mention in the proceedings of the whereabouts of Hon. **M.A.O. Opanga (SRM)** before whom the trial had commenced. However, **Hon. E. W. Wambugu (RM)** proceeded with the matter, took the evidence of the remaining prosecution witnesses and the defence, delivered a judgement and sentenced the Appellant. There is no evidence that section 200 of the ***Criminal Procedure Code*** was complied with. In my view section 200 of the ***Criminal Procedure Code*** is meant to advance, promote and give effect to the provisions of Article 50 of the Constitution.

14. In my view, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"

15. Regarding the proceedings of 22nd January, 2019, I with respect, disagree with the Appellant. In my view what the learned magistrate meant was that the complaint in the case was an alleged minor. That ought not to be taken to mean that the learned magistrate had determined at that stage that the complainant's age had already been proved.

16. The manner in which the proceedings were conducted before the trial court was contrary to law. It rendered the whole trial a mistrial.

17. The question then is whether the court should order for a retrial. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

"...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 insufficiency 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;....."

18. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

"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:

'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 the 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 person'

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:

'…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.'"

19. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi vs. Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA,**

343 the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

20. Makhandia J. (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."**

21. The offence with which the appellant was charged was an offence against the person. It is alleged that the said offence was committed in June, 2015, slightly more than 4½ years ago. He was arrested on 12th February, 2016, was admitted to bond. As rightly submitted by **Miss Mogoi**, Appellant was on bond during the trial and was sentence to serve 10 years imprisonment on 24th May, 2019. He Appealed and was released on bond pending appeal on 29th July, 2019 meaning that he only served 2 months. However, the offence facing him, though yet to be proved, was a serious offence. Just like the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before any Magistrate with jurisdiction other than, **Hon. Wambugu, RM** to hear and determine the matter *de novo*.

22. However, any resulting sentence, if at all, will where appropriate, take into account the period the appellant spent in custody.

23. Orders accordingly.

24. This judgement has been delivered pursuant to section 168 of the **Criminal Procedure Code** as read with Article 50 of the Constitution in the absence of the Appellant due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Appellant.

Judgement read, signed and delivered in open court at Machakos 30th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Edna Ntabo for the State

Sadique for the Prison

CA Josephine