REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 161 OF 2018

BETWEEN

JAMES MWANGI WAIRIMU....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 491 of 2012 delivered by Hon. A. R. Kithinji (SPM) on 5th July, 2018).

JUDGMENT

1. The Appellant, **James Mwangi Wairimu** was charged with two counts of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of count I were that on the 22nd day of January, 2012 at [Particulars Withheld] Centre, Ruai Location, Njiru District within Nairobi County intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of **EW** a child aged eight (8) years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006.** The particulars thereof were that on the 22nd day of January 2012 at [Particulars Withheld] Centre, Ruai Location, Njiru District within Nairobi County intentionally and unlawfully committed an indecent act.

3. In count II it was alleged that on the 22nd day of January, 2012 at [Particulars Withheld], Ruai Location, Njiru District within Nairobi County intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of **LW** a child aged three (3) years.

4. He also was charged with alternative counts to each of the charges 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 he intentionally and unlawfully committed an indecent act with the minors by touching her private parts namely vagina.

5. The Appellant pleaded not guilty to all the offences. Upon trial, the trial court found that he was not guilty of any of the offences for which he was charged. Instead, the court found him guilty of two counts of sexual assault contrary to **Section 5 (5)** of the **Sexual Offences Act** and convicted accordingly under **Sections 215** and **186** of the **Criminal Procedure Code.** He was thereafter sentenced to serve ten (10) years imprisonment for both counts. Aggrieved by both the conviction and sentence, he preferred the instant appeal to this court.

6. In his Amended Petition of Appeal filed on 4th June, 2019 alongside his written submissions, the Appellant was aggrieved that he was convicted on the basis of evidence adduced by a hostile witness. He was dissatisfied that **Section 214 (1)** of the **Criminal Procedure Code** was not complied with. He complained that the trial magistrate imposed the sentence without considering the requirements of **Section 333 (2)** of the **Criminal Procedure Code**. Finally, he was dissatisfied that the learned trial magistrate shifted the burden of proof upon him when he rejected his truthful defence.

Determination

7. Before delving into the summary of the evidence, I will first consider the pertinent legal issues raised by the Appellant. This is in view of the fact that should the same be determined in his favour, the court will definitely rule that the trial was a mistrial.

8. The Appellant's contention that the provisions of **Section 214 (1)** of the **Criminal Procedure Code** were not complied with. On this issue, he pointed out that upon the amendment of the charge sheet on 2nd August, 2017, the trial magistrate failed to inform him of his right to either recall all or any of the witnesses who had already testified for further cross examination or for fresh testimony. He also argued that he was not supplied with the substituted charge sheet to enable him adequately cross examine the prosecution witnesses on the amendments. He submitted that the failure to comply with the provisions of **Section 214 (1)** of the **Criminal Procedure Code** rendered the entire trial a mistrial and urged this court to find that the trial was a nullity.

9. Learned State Counsel, Ms. Akunja conceded to the Appeal on this basis. She noted that upon the amendment of the charge sheet, the Appellant was called to plead afresh but the procedure of taking plea was not followed. She stated that the trial court only indicated that the Appellant had said he was not guilty but failed to enter the plea taken. She however submitted that there is sufficient evidence against the Appellant that would likely result to a conviction and urged that a retrial be ordered.

10. In rebuttal, the Appellant contested the idea of a retrial arguing that his right to a fair trial will be violated in case the prosecution tries to frame him. He therefore urged this court to set him free.

11. Section 214 (1) of the **Criminal Procedure Code** provides as follows:

> **"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—**
>
> > **i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
> >
> > **ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."**

12. It is evident from the trial court's proceedings that the prosecutor applied to amend the charge sheet on 2nd August, 2017. The said proceedings were recorded as follows:

> **"2.8.17**
>
> **Before: Hon. A R. Kithinji SPM**
>
> **Prosecutor – Fatma**
>
> **Court clerk – Gakuya**
>
> **Accused – present**
>
> **Inter – Eng/Kisw**
>
> **Two witnesses' present and investigating officer**
>
> **Court:**
>
> **It is already 4pm and due to pressure of work hearing adjourned.**
>
> **Prosecutor**
>
> **I apply to amend charge sheet.**
>
> **Court**
>
> **Amended charge sheet read to accused who replies**
>
> **Accused – count 1 – not true**
>
> **Accused – count 2 – not true**
>
> **Court**
>
> **Due to time which is already 4pm, hearing is adjourned.**

Hearing 24.8.17

Mention 10.8.17

Hon A. R. Kithinji

SPM"

13. The record does not indicate the nature and/or the extent of the amendment that was made to the charge sheet even though it is evident that the amended charge sheet, which this court has not had sight of, was read out to the Appellant and he responded ***"not true"*** to counts 1 and 2. I note that there was an anomaly in the manner of plea taking. This is because from the judgment delivered by the trial court, it can be concluded that the Appellant pleaded to all charges. In contrast, the record attests that after the charge sheet was amended he was not called to plead to the amended charges.

14. Further, the record does not indicate whether the trial magistrate informed the Appellant that he was entitled to demand the recall of witnesses who had already testified to give their evidence afresh or to be further cross examined as provided under subsection (1) (ii) above. This contravened the mandatory obligation imposed upon the trial magistrate by the said provision which in turn vitiated the Appellant's trial. The Court of Appeal in the case of **Silvian Ouma Owino & another v Republic [2019] eKLR** held as follows:

> **"In Harrison Mirungu Njunguna v. Republic Criminal Appeal No. 90 of 2004 (unreported) this Court held that *".....the right to hear the witness to give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to a root of a fair trial". It was further stated that the failure of the trial court to inform the accused of his rights given to him by* Section 214 of the Criminal Procedure Code was not a procedural technicality which could be cured under the provisions of Section 382 of the Criminal Procedure Code…..In Yongo – v- Republic, [1983] KLR 319 it was held that it is a mandatory requirement that the court must not only comply with Section 214 of the Criminal Procedure Code but the court shall record it has so complied."**

15. The Appellant also contended that it was undesirable for the learned magistrate to sentence him to serve ten years imprisonment without taking into account the period he spent in remand from the time of his arrest on 23rd January, 2012 to 5th June, 2018. He argued that the same contravened the provisions of **Section 333(2) of the Criminal Procedure Code** and urged this court to invoke the provisions of **Articles 159(2)** and **21(1)** of the **Constitution** to factor in the time spent in remand in case this appeal is dismissed. Foremost,

16. The sentence of ten (10) years imprisonment passed by the trial court for both counts was improper. This is because **Section 5 (2)** of the **Sexual Offences Act** prescribes a minimum sentence of ten years imprisonment for an accused person found guilty of sexual assault. The Appellant was found guilty of two counts of sexual assault. This means that he should have been sentenced to serve ten (10) years imprisonment for each count as opposed to both. Further, the sentences should have been ordered to run consecutively considering they were committed against different victims. Be that as it may, I concur with the Appellant's submissions that the trial court should have taken into account the period which he had stayed in remand when passing the sentence. This is in line with **Section 333 (2)** of the **Criminal Procedure Code** which provides that:

> **"(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."**

17. In totality, a retrial is warranted due to non-compliance with **Section 214 (1) (ii)** of the **Criminal Procedure Code.** Nevertheless, several factors must be considered before a retrial is ordered. The court must be satisfied, *inter alia,* that the retrial is likely to result in a conviction, that it will not aid the prosecution in filling up gaps in their case, that it will not prejudice an accused person and on the whole that it shall serve the interests of justice.

18. In the present case, the prosecution called four witnesses in support of its case. PW1's testimony that the Appellant lured her and her younger sister into his house and inserted his fingers in her genitals was corroborated by the medical evidence tendered by PW3. The medical evidence confirmed that upon examination, the victims' hymens were found to be intact but reddened. Further, the Appellant was known to PW1 since he was their neighbour and the incident occurred around 3.00 pm implying that he was positively identified as the offender. The victims' birth notifications were also produced in evidence confirming that they were born on 10th October 2003 and 2nd December, 2008 respectively. My view therefore is that a retrial would most likely result in a conviction.

19. However, I have taken note that the Appellant has now been in custody for over seven (7) years and six months. The victims are also fairly older now and ordering a retrial would mean that they will be subjected to reliving the traumatic experience that they went through in the hands of the Appellant. I therefore do not think that ordering a retrial would serve the interests of justice. I am also alive to the Supreme Court decision in the case of **Francis Karioko Muruatetu and Another v Republic [2017] eKLR** which declared mandatory sentences unconstitutional. In the premises, I am satisfied that the period of seven (7) years six (6) months and seven (7) days which the Appellant has been in custody is sufficient punishment for the offences committed.

20. Accordingly, I quash the Appellant's conviction and set aside the sentence imposed by the trial court. I order that the Appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 31ST DAY OF JULY, 2019.

G.W.NGENYE-NGENYE

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Akunja for the Respondent.