REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 150 of 2016

SAMSON NJUGUNA NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. E. S. Olwande, PM

delivered on 14th October 2016 in Criminal Case 1977 of 2012

at the Chief Magistrate's court at Makadara.)

JUDGMENT.

Background.

Samson Njuguna Njoroge, the Appellant herein was charged, in count 1 with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. The particulars of the offence were that on the night of 6th and 7th April, 2012 at Machakos Country bus terminus in Nairobi within Nairobi province, jointly with others not before court being armed with a dangerous weapon namely a knife robbed MNM of cash Kshs. 2,000/-, baby clothes valued at Kshs. 1,500/-, a scarf worth Kshs. 600/-, a mobile phone make Nokia 2680 valued at Kshs. 3,000/-, all items valued at Kshs. 7,100/- and immediately before the time of such robbery threatened to use actual violence to the said MNM.

In count II he was charged with the offence of sexual assault contrary to **Section 5(1)(a)(ii)(2)** of the **Sexual Offences Act No. 3 of 2006(2007).** The particulars of the charge were that on the night of 6th and 7th of April, 2012 at Machakos Country bus terminus in Nairobi within Nairobi province unlawfully penetrated the vagina of MNM with fingers manipulated by him. There was an alternative charge to this count of committing an indecent act with an adult contrary to **Section 11(A) of the Sexual Offences Act No. 3 of 2006(2007)** in that the Appellant intentionally touched the breasts and the vagina of MNM with his fingers against her will.

The Appellant was arraigned in court and at the conclusion of his trial found guilty in both counts. He was sentenced to death in count 1 and sentence in Count II held in abeyance. He was dissatisfied with both the conviction and sentence and has lodged the present appeal. His grounds of appeal are annexed to the written submissions filed on 5th December, 2017. In summary, they were that **Section 200(3) of the Criminal Procedure Code** was not complied with, that the charge sheet was defective, that crucial witnesses were not called, that the case was not proved a reasonable doubt and that his defence was not considered.

Submissions

The Appellant faulted the non-compliance with **Section 200 of the Criminal Procedure code** after Hon. Olwande took over the conduct of the trial. He submitted that at that time, one witness had already testified yet the learned magistrate did not inform him of his right to elect to recall the witness or to have the matter heard *de novo.*

He then submitted that the charge sheet was defective as the evidence adduced did not support the charge itself. He cited the fact that the learned trial magistrate in her judgment observed that he ought to have been charged of attempted rape as opposed to sexual assault. In that case, he was of the view that the prosecution ought to have amended the charge sheet so that it could conform to the evidence adduced.

The Appellant further faulted the failure by the prosecution to call crucial witnesses. He cited the persons who allegedly arrested him as the material witnesses to the prosecution's case. He submitted that their failure to testify ultimately weakened the prosecution case. He was also of the view that in that respect he was not properly identified in which case no evidence linked him to the offence.

The appellant also faulted the manner in which investigations were carried out which he termed as shoddy. In this regard, he faulted the fact that the P3 form was given to the complainant to take it to the medical officer against the required procedure of the officer accompanying the complainant with the P3 form to the hospital.

Learned State Counsel, Ms. Nyauncho made oral submission in opposing the appeal. She submitted that the case was proved beyond a reasonable doubt. Her view was that although the person who arrested the Appellant did not testify, the same did not affect the substance of the evidence against the Appellant. She submitted that the learned magistrate, Hon. Olwande was not required to comply with **Section 200 of the Criminal Procedure Code** when she took over the conduct of the trial because no evidence had been recorded prior to her taking over the matter. She urged the court to dismiss the appeal.

Determination

It is important that the court first determines the legal issue raised by the Appellant. He submitted that that the succeeding magistrate, Hon. Olwande failed to comply with **Section 200(3) of the Criminal Procedure Code** when she took over the conduct of the trial. The provision states:

> ***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.***

The trial was first handled by Hon. R.A.A. Otieno, PM who took the evidence of PW1. On 23rd July, 2013 the matter was taken over by Hon. V. Wakhumile, SPM who made an order that the matter begins *de novo.* On 6th September, 2013 the prosecution applied to have the court adopt the evidence on record under **Section 34 of the Evidence Act**, a prayer which the court granted. The matter did not proceed until 15th September, 2015 when it came up for directions before Hon. E. S. Olwande, PM. She recorded the proceedings as follows;

> ***I have perused the record and more particularly the proceedings of 6.9.13. The provisions of section 200(3) were complied with and since then no other evidence has been taken by any other magistrate. Given the circumstances I see no point of complying with that section again. The matter shall proceed from where it has reached. The contents of this decision and provisions of section 200(3) have been explained to the accused.***

The above ruling sets in more confusion than defining whether the court complied with **Section 200(3).** On the first limb of the ruling the learned magistrate acknowledges that she had no obligation to comply with the provision. The second limb as reflected in the last sentence depicts a situation where she confirms she informed the Appellant of the requirements of the provision. If the latter position were the case, then the Appellant would have responded to whether he had understood the provision and consequently agreed that the matter proceeds from where it had reached. Nevertheless, the learned magistrate, Hon. Olwande is not the magistrate who had taken the evidence of PW1. She was therefore obliged as a mandatory requirement and being a succeeding magistrate to comply with the provision. It is clear that the Appellant did not state his wish on how the trial should proceed after Hon. Olwande came on record which is sufficient evidence that the provision was not complied with. This effectively rendered the entire trial a nullity. The recourse hereafter is for this court to order a retrial.

A retrial cannot however be ordered before certain factors have been considered. Paramount amongst these are whether a retrial would result in a conviction, would prejudice an accused, would aid the prosecution to fill up gaps in its case and would be in the interest of justice. See: **Mwangi *v.* Republic[1983] eKLR** .

In the present case, the Appellant was caught red handed both robbing the complainant and committing the offence of sexual assault. His identification is not in any way doubtful. What the court would grapple with in the circumstances is whether the elements of the two offences were established by the evidence adduced. Having found the need for ordering a retrial it is not incumbent upon this court to thoroughly re-evaluate the evidence. It however suffices to note that the Appellant and his accomplices used actual violence in robbing the complainant of her cash, mobile phone, spectacles and clothes. This was attested by the medical notes produced by PW2 and P3 form by PW3, namely the investigating officer and Dr. Maundu respectively. The complainant, who was PW1 also candidly recalled that the Appellant's sole intention was to rape her save for the intervention of members of public. He only managed to insert his fingers into her vagina thereby establishing count II. This is a case therefore that is likely to result in a conviction.

On other factors for consideration, I take into account that the Appellant was charged on 11th April, 2012 and judgment delivered on 14th October, 2016. Since the date of the plea the Appellant who was not on bond has been in custody for close to 6 years. Whereas, following the Supreme Court decision in **Francis Karioki Muruatetu & another *v.* Republic[2017] eKLR** the provision for a mandatory death sentence has been declared unconstitutional, this court is of the view that the circumstances of the instance case do not warrant a death sentence. As such, I would be inclined to hold that the Appellant has served sufficient sentence. However, with respect to count II, under **Section 5(2) of the Sexual Offences Act**, the law provides for a mandatory minimum sentence of 10 years. In that case, further taking into consideration the seriousness of the offence, the Appellant must face a retrial. The long sentence, if convicted, shall be mitigated by the Sentencing Policy Guidelines as the period he shall have spent in custody shall be taken into account.

In the result, I quash the conviction and set aside the death sentence. I order that the Appellant be escorted to Kamukunji Police station not later than 20th February, 2018 for purposes of preparing him to appear before the Chief magistrate, Makadara Law Courts to take plea. I direct that the trial be heard on a priority basis taking into account the period the Appellant has been in custody. This order shall be served on the Chief Magistrate Makadara Law Courts for compliance. It is so ordered.

Dated and Delivered at Nairobi This 15th February, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant present in person*

2. *M/s Atina for the Respondent.*