



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 150 OF 2017

MERCY MUGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. J. Irura, Senior Resident Magistrate in Nkubu Senior Resident Magistrate's Criminal Case No. 471 of 2014 delivered on 05/09/2017)

JUDGMENT

1. **MERCY MUGURE**, the appellant herein, was first arraigned before the Senior Resident Magistrate's Court at Nkubu in **Criminal Case No 471 of 2014** (hereinafter referred to as '**the Criminal case**') for purposes of taking a plea on 08/04/2014. That however did not happen. Instead, the prosecution pointed out that the then charge was defective and prayed for time to amend it.
2. The then charge was **Entering a dwelling house with intent to commit a felony** contrary to **Section 305(2)** of the **Penal Code**. The particulars of the charge were that '*on the night of 4th April 2014 at about 10:50pm at [particulars withheld] village in Imenti South District within Meru County, entered into a dwelling house of K M with intent to commit a felony namely rape to the said K M.*'
3. The appellant was again arraigned in court on 09/04/2014 and the charge was substituted with '**Entering a dwelling house with intent to commit a felony** contrary to **Section 305(1)** of the **Penal Code**. The particulars of the charge were that '*on the night of 4th April 2014 at about 10:50pm at [particulars withheld] village in Imenti South District within Meru County, entered into a dwelling house of K M with intent to commit a felony namely stealing.*' The appellant denied the charge and a trial was ordered.
4. On 13/06/2014 the complainant, **K M, (PW1)** testified. He clearly narrated the events of the night of 04/04/2014 which led to the appellant be charged. Before PW1 could finish his examination-in-chief, the prosecution once again applied to amend the charge and the request was granted. The appellant was charged afresh on a substituted charge on 19/06/2014 with the offence of '**Rape**' contrary to **Section 3[1][a][b][3]** of the **Sexual Offences Act** No. 3 of 2006. The particulars were that '*On the night of 4th April 2014 at about 10:50pm at [particulars withheld] village in Imenti South District within Meru County, intentionally and unlawfully caused her vagina to be penetrated by the penis of K M without his consent.*' The appellant was also charged with an alternative count of committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. She denied both counts.
5. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code**, the appellant opted to have the trial begin *de novo* and a hearing date was set for 30/12/2014 with witness summons to issue. The matter however proceeded on 29/05/2015 where one **Beatrice Mbae** testified as **PW1**. The said PW1 was referred to by the prosecution as '**the complainant.**' The hearing was then adjourned and was eventually heard on 01/02/2016 where two witnesses testified. They were a Clinical Officer from Kanyakine Hospital called **Saberina Kaimatheri (PW2)** and one **Charles Kirimi (PW3)** who was an eye-witness.
6. It happened that the trial magistrate was then transferred, and the matter was taken over by another learned magistrate. **Section 200** of the **Criminal Procedure Code** was complied with and the appellant opted for the case to proceed from where it had reached. The trial court did not however explain to the appellant her right to recall the witnesses who had already testified.
7. The investigating officer testified on 30/05/2017 and the prosecution closed its case. The court in a ruling found the appellant with a case to answer and placed her on defence. The appellant gave an unsworn testimony and the matter was set for judgment which was rendered on 05/09/2017 and the appellant was found guilty of the offence of rape and convicted. She was, upon mitigating, sentenced to 10 years imprisonment.
8. Being dissatisfied with the conviction and sentence the appellant filed a Notice of Motion dated 27/09/2017 on 31/10/2017 seeking leave of this Court to appeal out of time alongside the Petition of Appeal which raised nine grounds of appeal challenging both the conviction and the sentence.

9. The appeal was eventually heard by way of written submissions and it was also deemed as filed with the leave of this Court. The prosecution did not appear at the hearing of the appeal despite service and the Court placing aside the file as the Court Assistant got in touch with the prosecutor who indicated to be on the way to Court but in vain. The appeal was heard at 12:18pm on 12/06/2018.

10. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences were proved. It is on that footing that I perused the record and came across an issue which although it was not canvassed by the parties, it is so fundamental in the justice system as it forms part of a fair trial. The issue is how the matter was handled by the succeeding Honourable magistrate.

12. **Section 200** of the **Criminal Procedure Code** deals with instances where a criminal trial is handled by more than one magistrate. For ease of reference the said provision states 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 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 resubmit 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 exercise 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 resubmitted 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.

13. **Sub-section (3)** is the most relevant in this case. Since the criminal case had been partly heard and the evidence of three witnesses recorded by the preceding magistrate then the succeeding magistrate was under a mandatory duty to fully comply with that legal provision. The succeeding magistrate was to inform the appellant of his right to request that some witnesses who had testified be resubmitted and recalled. I must however clarify that the duty on the part of the succeeding magistrate is only limited to informing the accused person of that right. The succeeding magistrate is however not bound to oblige the request which may thereupon be made by the accused person. The magistrate must consider the request, if any, in light of the circumstances of the case and upon hearing all parties. The court may or may not accede to the request made by the accused person.

14. On the importance of compliance with the said procedural requirement, my brother *Makau, J.* in the case of **Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others High Court at Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR** rightly so expressed himself while considering whether **Section 200 (3)** of the **Criminal Procedure Code** was unconstitutional. The learned Judge delivered himself thus: -

'16. Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

17. It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. Tis Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross – examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross – examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

18. Section 200 (3) of C. P. C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.

19.

20. In the case of *R V. Wellington Lusiri [2014] e KLR* the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.

21. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50. (2) of the constitution which state every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of CPC as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.

22. The question therefore is do the silence on the rights of the complainant under Section 200 (3) CPC mean the complainant's rights are not protected? The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as Section 200 (3) is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with Section 200 (3) of CPC in a isolation of several articles of the constitution dealing with the Bill of rights as section 200 (3) of CPC is not exhaustive in itself. The succeeding Magistrate is supposed to be guided by Article 27 (1) of the constitution, which states every person is equal before the law and has rights to equal protection and equal benefit of the law. This means the protection to fair trial is automatically granted to both the complainant and the accused. This means as I understand the said article, before final order is made on the accused demand in terms of Section 200 (3) CPC the complainant should be afforded an opportunity to be heard on the application. A blatant granting of the application without hearing the complainant would in my view not only be against the rules of natural justice but would amount to a violation of the letter and the spirit of our constitution and would not be in the best interest of achieving a fair trial, If the complaint is completely overlooked on the issue.

23. In considering Section 200 (3) CPC as regards the information given to the accused, the same information should be extended to the complainant in equal measure, Article 159 (2) (a) (b) and (d) of the constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural technicalities and discrimination.

24. The court in determining an application under Section 200 (3) of CPC should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under Article 47 (1) of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 53 (d) of the constitution states every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and Article 53 (2) provides a child's best interest are of paramount importance in every matter concerning the child.

15. The learned Judge further rightly concluded that '.....Section 200 (3) of the **Criminal Procedure Code** was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010.....'

16. The appellant's right to a fair hearing under **Article 50** of the **Constitution** was therefore infringed by the failure by the succeeding magistrate to fully comply with **Section 200(3)** of the **Criminal Procedure Code**. In essence all the subsequent proceedings were veiled with that unconstitutionality and cannot stand in law. That is why this Court will not deem it necessary to deal with the rest of the appeal on its merit. I will however consider the possible way forward; that is If the appellant is to be set at liberty or be re-tried.

17. The principles upon which this Court can order a retrial are well settled. 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 where the conviction is set aside because of insufficient 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 v. 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. Applying these principles to this appeal and considering the nature of the evidence on record and the charge, I do not find in favour of the prosecution. There was indeed great uncertainty on the nature of the charge against the appellant. The same had to be substantively amended three times. Upon settling on the main offence of rape and an alternative count of committing an indecent act, the evidence tendered was horrible. A look at the evidence on record clearly does not describe a rape ordeal.

20. There is evidence by the only eye-witness (PW3) who was the first one to arrive at the scene and stated that he found the appellant and K M fighting. That is why the investigator opted to charge the appellant with entering a dwelling house with intent to steal. The issue of rape was clearly an afterthought and it buttresses the defence tendered by the appellant that there was a grudge between herself and the complainant's relatives and as such she was framed up.

21. Another issue is how come K M testified so well when the charge was '**Entering a dwelling house with intent to commit a felony** contrary to **Section 305(1)** of the **Penal Code**', but suddenly happened to be so mentally challenged to testify when the charge was substituted to rape. Even the way the trial court handled the issue of determining that K M was a '**vulnerable witness**' hence could not testify was without any reasonable legal basis given that the witness had earlier on testified before court and the trial court did not make any observations on his mental or otherwise challenges.

22. Further there was the issue of the P3 Form which was produced as an exhibit. It was filled in on 12/11/2015, which was 1 year 7 months post the alleged incident and around 1 year 6 months after K M testified in court. Although reliance was made on the treatment notes from Mitunguu Medical Services Nursing & Maternity Home to fill in the P3 Form, I have carefully perused the said notes and noted that there is no date on which the said notes were recorded. The said notes are thereby highly suspicious and cannot therefore be a basis of the contents in the P3 Form. Both the treatment notes and the P3 Form were of no probative value at all and any reliance thereto remained irregular.

23. Consequently, this Court finds that subjecting the appellant to a retrial will be highly infringing on her right to a fair trial under **Article 50** of the **Constitution**. This Court now upholds the appeal, quashes the conviction and sets-aside the sentence. The appellant shall be forthwith set at liberty unless otherwise lawfully held.

24. Orders accordingly.

DELIVERED, DATED and SIGNED at MERU this 19th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mercy Mugure the Appellant in person.

Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Mutua – Court Assistant