



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 114 of 2017

BETWEEN

ZACHAEUS KOMBO OLUMATETE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief magistrate's Court at Makadara Cr. Case No. 1604 of 2013 delivered by Hon. A. R. Kithinji, SPM on 24th April, 2017)

JUDGMENT.

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that On the 10th day of April, 2013 in Industrial Area within Nairobi County intentionally caused his penis to penetrate the vagina of J.D. a child aged 12 years. In the alternative, he was charged with committing an indecent act contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that he intentionally and unlawfully touched the private parts of J.D.

2. The Appellant was found guilty of the main charge and was sentenced to serve 21 years imprisonment. Being dissatisfied with both the conviction and the sentence, he has proffered the present appeal. In an Amended Petition of Appeal filed on 19th March, 2018, his counsel Ameyo Guto, Etole and Co. Advocates listed only two grounds of Appeal as follows;

*a) That, the learned trial magistrate erred in law and fact in failing to comply with **Section 200 of the Criminal Procedure Code Cap 75 Laws of Kenya**.*

*b) The learned trial magistrate failure to comply with the mandatory provisions of **Section 200 of the Criminal Procedure Code, Cap 75 Laws of Kenya** occasioned a miscarriage of justice to the appellant.*

3. The appeal was canvassed before me on 28th May, 2018. Learned counsel Mr. Etole for the Appellant in brief submission told the court that the Appellant was tried by two magistrates and the succeeding magistrate did not comply with **Section 200(3) of the Criminal Procedure Code**. He accordingly urged the court to allow the appeal by quashing the conviction and setting aside the sentence. Learned State Counsel, M.s Sigei for the Respondent conceded to the appeal on the same ground.

Determination

4. The court has considered it prudent to first address the legal issue raised by the Appellant as the same would determine whether or not a retrial shall be ordered. I say so because non-compliance by the trial court of **Section 200(3)** renders the trial proceedings a nullity. A closer look at the proceedings shows that the trial began before Hon. E. Nyutu, PM and was taken over by Hon. A. R. Kithinji, SPM on 30th September, 2015. He heard the substantive witness PW3 on 29th June, 2016. It is clear on the record that he did not undertake his legal obligation to inform the Appellant of the requirements under **Section 200 (3)**. For avoidance of doubt, the same provides as under;

“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.”

5. Having found that Hon. A.R. Kithinji did not comply with this noble requirement behooves the court to determine whether a retrial should be ordered. The case law in guiding the court in this determination is rich. In the renown case of **Opicho vs Republic [2009] KLR 369**, the

Court of Appeal held as follows:

“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 purpose 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 trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

6. In a case of defilement, the prosecution is enjoined to prove three basic elements namely; identification of the perpetrator, age of the victim and penetration. On the identification, the Appellant was identified by recognition. He was the landlord to the house where the victim lived with her family. Penetration was established by medical examination of the victim at Nairobi Women’s Hospital. It was done on the same date of offence and results were that she had been defiled. The medical evidence was further corroborated by that of the police doctor, Dr. Maundu. Age was ascertain by an immunization card which indicated that PW1, the complainant, was born on 4th November, 2001, thereby placing her age at twelve years as at the time of the incident. I have no doubt in my mind therefore that if a trial is ordered the same is likely to found a conviction.

7. On other factors for consideration before a retrial is ordered, include whether any prejudice would be occasioned to the Appellant. Under this head, the court may consider the period the Appellant has been in remand, the seriousness of the offence and any other factor affecting him personally such as illness and age. The Appellant took plea on 12th April, 2013 and paid bail on 25th April, 2013. Considering the period he has served the sentence, cumulatively, he has been in remand for only nine months and twenty days. This period does not surpass the interests of justice in trying a serious offence as defilement. Furthermore, it only serves justice to order a retrial so that even the complainant can see to it that justice has been served. It is also a serious offence that in the public interest ought to be disposed of in a trial conducted in an objective and fair manner.

8. In the end, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. I order that the Appellant be escorted to Industrial Area Police Station for purposes of preparing him to take plea afresh not later than 22nd June, 2018. The original record of proceedings shall forthwith be remitted back to the trial court.

DATED and DELIVERED this 14th day of June, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Wachira h/b for Mr. Etole for the Appellant*
2. *Mr. Momanyi for the Respondent*