REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 189 OF 2013

GEOFREY KIPCHUMBA RUGUT.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable B. Mosiria in Kapsabet Criminal Case No. 4092 of 2008, dated 4th October, 2013)

JUDGMENT

1. The appellant was tried and convicted of the offence of attempted rape contrary to *Section 4* of the *Sexual Offences Act No. 3* of *2006*. He was sentenced to fifteen years imprisonment.

2. The particulars of the offence alleged that on the 24th day of July, 2008 at 10.00 p.m in Nandi Central District within the Rift Valley province, in association with two others not before court, the appellant attempted to cause penetration of his penis into the vagina of *D. J* (Name withheld) without her consent in violation of *Section 4* of the *Sexual Offences Act No. 3* of *2006 (herein after the Act).*

3. The appellant was aggrieved by his conviction and sentence. He lodged an appeal to this court vide a petition of appeal filed on 11th October, 2013. He was subsequently granted leave on 21st January, 2016 to amend his grounds of appeal under *Section 350* of the *Criminal Procedure Code.*

4. In his amended grounds of appeal, the appellant basically complained that the learned trial magistrate erred in law and in fact by sentencing him to fifteen years imprisonment without appreciating the minimum sentence prescribed under the Act; in convicting him on the basis of insufficient contradictory evidence and in rejecting his defence without good reasons.

5. At the hearing, the appellant prosecuted his appeal in person. He relied entirely on his homemade written submissions filed in court on 8th December, 2016.

In summary, the appellant submitted that the sentence of 15 years imprisonment was illegal as the Act prescribed a minimum sentence of five years imprisonment; that the evidence adduced by the prosecution did not support the particulars supporting the charge and that it was contradictory. He in a nutshell contended that he was wrongly convicted and urged the court to allow the appeal.

6. The state contests the appeal. In her submissions, learned prosecuting counsel *Ms Mutheu* contended that the prosecution had proved all elements of the offence against the appellant beyond any reasonable doubt and that the sentence imposed on the appellant was lawful. She invited the court to dismiss the appeal for lack of merit.

7. In response to the state's submissions, the appellant claimed that the complainant was his girlfriend and that she had gone to his home voluntarily; that she fabricated the charges after the appellant failed to comply with her demand to drive her to town for a certain mission.

8. This is a first appeal to the High Court. I am alive to my duty as the first appellate court which is to re-examine and re-evaluate all the evidence presented before the trial court to arrive at my own independent determination regarding the validity or otherwise of the appellant's conviction and sentence. In doing so, I should bear in mind that unlike the trial magistrate, I did not have the benefit of seeing or hearing the witnesses.

See: ***Okeno V Republic 1972 EA 32***; ***Kinyanjui V Republic (2004) 2 KLR 364.***

9. I have carefully considered the evidence on record; the grounds of appeal and the submissions made by the appellant and the state.

10. I wish to start with the appellant's complaint that the learned trial magistrate erred by disregarding his defence without good reasons. I have read the judgement of the trial court and it leaves no doubt that the learned trial magistrate considered the appellant's defence but dismissed it as untruthful. Nothing therefore turns on that ground of appeal.

11. Another complaint made by the appellant is that the learned trial magistrate erred in law in failing to comply with the provisions of *Section 200 (3)* of the *Criminal Procedure Code*. I have scrutinized the proceedings of the lower court. They confirm that trial in this case opened before *Hon. G. Mutiso,* Resident Magistrate who heard two witnesses after which he proceeded on transfer. The proceedings were taken over by *Hon. B. Mosiria* on 2nd July, 2013 but regrettably, though there is an indication that the appellants counsel on record Mr. Sang claimed that he had instructions to have the case proceed from where it had reached, the record does not show that the learned trial magistrate actually read and explained to the appellant his rights under *Section 200 (3)* of the *Criminal Procedure Code (hereinafter C.P.C).* That provision is in the following terms;

> ***"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".***

12. A close reading the above provision reveals that the magistrate who takes over proceedings from another one who has ceased to have jurisdiction over ongoing criminal proceedings is as a matter of law enjoined to inform an accused person that he has a right to choose whether to apply for resummoning of witnesses to either be heard afresh or for further cross examination. The provision is absolutely clear that it is the accused person who must make the election of whether to recall witnesses or not and not his advocate.

13. An accused person's right under *Section 200(3)* of the *C.P.C* is one of the many rights enjoyed by accused persons in the course of criminal trials as one of the components of the broader right to a fair trial guaranteed by *Article 50* of the *Constitution.*

In my view, failure to comply with the requirements of *Section 200(3)* of the *CPC* is not a mere irregularity. It is a fatal omission since it compromises on an accused person's right to a fair trial.

14. Section 200 (4) of the *C.P.C* contemplated situations similar to the one prevailing in this case and provided that where a court considers that substantial prejudice has been occasioned by failure to observe *Section 200 (3)*, that in itself is sufficient ground to vitiate a conviction.

Section 200 (4) reads as follows;

> ***"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".

15. I have no doubt in my mind that the appellant in this case was materially prejudiced by the learned trial magistrate's failure to comply with *Section 200 (3)* of the *CPC*. This is because we will now never know what election the appellant who was then the accused would have made had he been informed of his right under the section especially when one considers that he had just engaged another advocate to represent him in the matter who was not part of the trial from the beginning.

16. I am thus satisfied that the appellant was materially prejudiced by the trial court's omission and I am convinced that the omission is sufficient to vitiate his conviction in this case. I am however not satisfied that this is a suitable case for a retrial. I make this finding because on my re-appraisal of the evidence on record, I agree with the appellant's submission that the evidence adduced by the prosecution witnesses was contradictory and was on the whole not sufficient to sustain a conviction. The evidence had material contradictions which casted doubt on the credibility of the key prosecution witnesses.

17. To demonstrate the nature of those contradictions, it will suffice to give one example of those contradictions. PW1 in her evidence claimed that the appellant in his attempt to rape her slapped her once on the face before she ran out of the house naked and was rescued by PW2. PW2 on his part confirmed this evidence but on cross examination, he confirmed that he did not see any visible injuries on her. However, according to PW5 the clinical officer who examined her on the same day (25th July, 2008), she noted that the complainant had multiple injuries on her face, tenderness on thorax and abdomen, human bite on waist, upper limb, tenderness on right middle finger and on lower limbs. The injuries were allegedly caused by both a sharp and blunt object. One then wonders how a slap on the face could have caused such multiple injuries all over the complainant's body including those allegedly caused by a sharp object. The complainant did not allege that the appellant attacked her with any sharp object.

It is my finding that rather than colloborate the complainants evidence, the medical evidence tendered by PW5 actually destroyed the prosecution case.

18. In view of the foregoing, I am satisfied that a retrial in this case would not meet the ends of justice especially after taking into account that the appellant has been in prison for over three years. It is my finding that he is entitled to an acquittal.

In the result, I find merit in the appeal and it is hereby allowed. I accordingly quash the appellant's conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

C. W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 23rd day of March, 2017

In the presence of:

The appellant

Miss Oduor for the state

Mr. Lobolia court clerk