



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.69 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. A. Onginjo - CM delivered on 28<sup>th</sup> January 2015 in Kibera CM. CR. Case No.4389 of 2012)*

**NICHOLAS MUTUNGEI PASSERELA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Nicholas Mutungei Passerela was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that between the months of January and July 2012, at unknown date and time, at Tuala Township in Kajiado County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of N N M (the complainant), a child aged 11 years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that between the same period and in the same place, the Appellant intentionally and unlawfully touched the vagina of the complainant with his penis. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main charge of **defilement**. He was sentenced to life imprisonment. He was aggrieved by his conviction and sentence and has appealed to this court.

Although the Appellant raised several grounds of appeal challenging his conviction and sentence, during the hearing of the appeal, it became apparent to the court that in the proceedings before the trial magistrate's court, the convicting magistrate had not complied with **Section 200(3)** of the **Criminal Procedure Code**. This section requires a magistrate taking over proceedings from another magistrate who has either been transferred or ceased to have jurisdiction to explain to the accused his right to recall any witness who had testified before the previous magistrate. In the present appeal, it was clear that the convicting magistrate did not explain this right to the Appellant as a result of which the Appellant's right to fair trial was compromised. Ms. Kule for the State conceded to this fact but urged the court to order a retrial. She submitted that there was sufficient culpatory evidence which had been adduced by the prosecution witnesses to secure the conviction of the Appellant if a retrial is ordered. On her part, Ms. Odembo for the Appellant urged the court not to order for a retrial. She explained that the prosecution's evidence did not establish to the required standard of proof beyond any reasonable doubt the Appellant's guilt. She was of the view that it would not be in the interest of justice for the Appellant to be retried.

As stated earlier in this judgment, **Section 200(3)** of the **Criminal Procedure Code** provides that:

***“Where a succeeding magistrate commences the hearing of the proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.”***

In the present appeal, it was clear that the succeeding magistrate did not inform the Appellant of his right under **Section 200(3)** of the **Criminal Procedure Code**. On that ground, this court will allow the appeal, quash the conviction and set aside the sentence that was imposed upon the Appellant by the trial court.

The issue that remains for determination is whether or not the court should order the Appellant be retried. The principles to be considered by this court in determining whether or not to order a retrial are not in doubt. In **Sinaraha & another –vs- Republic [2004] 2 KLR 328** at page 330, the court held thus:

***“The issue remaining for determination by this Court is whether a retrial of the appellants should be ordered. The principles governing whether or not a retrial should be ordered was enunciated in Fatehali Manji –versus- Republic [1966] EA 343 Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:***

***“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 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”***

***In M’Kaname –versus- Republic [1973] EA 67, it was held that a retrial should not be asked for the prosecution to fill gaps in the evidence or to rectify faults of the prosecution’s case. In Mwangi -versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that:***

***“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza versus R [1957] EA 469, Pyarala Bassan versus Republic [1960] EA 854.”***

Having re-evaluated the evidence adduced by the prosecution witnesses in the vitiated trial, this court is unable to agree with the argument advanced on behalf of the Appellant to the effect that the prosecution did not adduce sufficient evidence to prove the guilt of the Appellant on the charge that he was convicted. The prosecution established that indeed the complainant was defiled. Medical evidence proved that the complainant was defiled. Appellant raised the issue of the delay in the reporting of the defilement and the fact that crucial witnesses were not called to testify in the case. This court was not persuaded by this submission. The prosecution was under obligation to adduce only the evidence that is sufficient to establish its case. It was under no obligation to call all persons that were likely to be witnesses in the case unless the Appellant proved that he was prejudiced by the failure to call such witnesses. This court has taken into consideration the fact that the Appellant was on bond during trial. The period that he has been in prison is not sufficiently long to prejudice him if a retrial is ordered. The fact that the offence that the Appellant was charged with has a mandatory sentence of life imprisonment means that the period that the Appellant has been in prison cannot be said to constitute injustice on the part of the Appellant if a retrial is ordered.

For the above reasons, the appeal is allowed, conviction quashed and the sentence imposed on the Appellant set aside. However, the Appellant shall be retried before the Kibera Chief Magistrate’s Court before a magistrate with jurisdiction other than Hon. C.A. Onginjo. The Appellant shall be presented to that court on 25<sup>th</sup> April 2016 for the purpose of taking plea in the retried case. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2016**

**L. KIMARU**

**JUDGE**