REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 112 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 16 OF 14)

(Being an appeal against Conviction and sentence in Narok Criminal Case No. 160/2013- T. A. Sitati Ag. SRM)

JUSTUS ORINYI OTIENO…….APPELLANT

VERSUS

REPUBLIC……RESPODENT

J U D G M E N T

1. The Appellant herein was charged with Defilement of a girl aged 14 years contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. The particulars state that on 15th February, 2013 at total area, Narok he committed an act that caused his penis to penetrate the vagina of G.L., a girl aged 14 years. He denied the charge and the alternative count of Indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. He was found guilty, following a full trial, convicted and sentenced to 20 years imprisonment.
2. In his Petition of appeal to this court, through his Advocate, Mr. Adiso, the Petitioner raised 5 grounds of appeal.

   Grounds 2,4 and 5 challenge the adequacy of the evidence upon which the conviction was based. In ground 3 the Appellant complains that his defence was erroneously dismissed while in ground 1 he alleges breach of procedure in the taking over of the case by the trial magistrate.

3. While the first part of the Appellant's written submissions dwelt at some length on the failure by the trial court to comply with the provisions of Section 200 (3) of the Criminal Procedure Code, the second portion of the submissions attack the evidence without reference to the grounds of appeal, in some instances introducing new grounds in what appears to be an incoherent mix of issues. This is quite surprising given that the Appellant was represented by counsel. Further, copies of the authorities annexed to the submissions were for the most part illegible and not mentioned in the submissions.
4. During oral submissions the Appellant's counsel abandoned ground 3, arguing ground 1 alone and grounds 2, 4 & 5 together. The oral submissions, with the exception of references to authorities took the same course as the written submissions.
5. Mr. Kibelion, appearing on behalf of the DPP opposed the appeal, affirming that the case against the Appellant was proved.

   He disputed that any prejudice was caused to the Appellant by the court's admitted failure to comply with section 200 (3) of the criminal procedure code. I will deal with the respective

submissions in my evaluation of the evidence tendered at the trial.

6. The prosecution case was that the Appellant was in the material period the Complainant's maths teacher having befriended her and became her lover in 2012. She was 14 years old in 2013. On the evening of 15/2/2013 the Complainant was at her home at total area, Narok, tutoring the Complainant's cousins. At the home was also the Complainant's grandmother **M.K.L. (PW2)** who was asleep. The mother was away visiting a relative.
7. After supper, the Appellant watched news then pretended to leave, only to send the Complainant a message that he would be back at the home in ten minutes. When he returned the Complainant ushered him to the bedroom as he did not want to go to the main living room. The Appellant and the Complainant sat on the mother's bed and he asked for sexual intercourse before undressing. The Complainant too undressed and eventually they had sex on the mother's bed and apparently stayed on. But they were caught by the grandmother M.K. L. (PW2) at 4.00 a.m.
8. The Appellant went under the bed when PW2 entered the room, but she turned on the lights and called her son and brother to come and flush out the Appellant. He was trussed with a rope. Two packets of condoms were found in his clothes while a blood stained lesso and panty worn by the Complainant was retrieved and handed over to police who came to the scene on the same night to effect arrest. On the next day the Complainant was examined by **Edwin Kurere Kiprotich (PW3)** a clinical officer at Narok District Hospital. At the close of the prosecution evidence; the Appellant was placed on his defence. He elected to remain silent.
9. This appeal in my considered view turns on the first issue raised in the Petition of appeal. Evidently, the trial commenced before a different magistrate (C.A. Nyakundi) who, for reasons not stated, ceased to exercise jurisdiction and the matter proceeded before Sitati Ag. SRM on 8/1/14. This second magistrate heard only one witness in the case as others had already testified before the preceeding trial magistrate C. A. Nyakundi, PM.
10. The record shows that there was no compliance with section 200 (3) of the Criminal Procedure Code, which states:

> **"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 that jurisdiction, the succeeding magistrate may –**
>
> **(a)……,**
>
> **(b) ……,**
>
> **(2) ……,**

(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

11. And the last portion of Section 200 CPC states:

(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.

It is true as Mr. Kibelion has stated, that the Appellate court must consider whether such omission was prejudicial to the Appellant. That is the gist of the provisions of section 200 (4) Criminal Procedure Code. The key words in the above section are **"materially prejudiced."**

12. The fact that the bulk of the prosecution witnesses had testified when the case was taken over by Sitati Ag. SRM, presents a real likelihood that the Appellant was prejudiced. Even more so

because it appears that the evidence of the key witness, PW1 was taken soon after the plea. There is no evidence that at the time the Appellant had been supplied with witness statements even though the record of the day (18/2/13) shows that the Appellant indicated readiness to proceed.

13. lt was not until 20/3/13 that the first order was made for the Appellant to be supplied with copies of the charge sheet and witness statements. The order was repeated on 18/4/13. When PW1 was recalled on 29/4/13, it was to identify exhibits and the record does not show that the Appellant was informed that he could cross-examine in respect of her earlier evidence based on statements which, on the face of it he had received pursuant to the court's earlier order. This failure to inform the Appellant of the options available to him at that juncture though not a requirement of statute is similar to the earlier subsequent failure by the succeeding magistrate to inform the Appellant that he could demand the recall, of witnesses who had already testified before his predecessor.

14. In the case of **John Bell Kinengeni -vs- Republic (2015) EKLR** the Court of Appeal observed regarding such failure that:

> **"This court has on numerous occasions pronounced itself on the proper interpretation of these two provisions (Section 200 (3) and (4) criminal procedure code)…..In Richard Chero Mole vs Republic Nairobi Criminal Appeal No. 135 of 2004 the court approved the principles set (out) in Ndegwa versus Republic (1985) KLR 534 and stressed that the duty is reposed in the court and there is no requirement that application be made by the accused person for such compliance, and that failure to comply with the requirement would in an appropriate case render the trial a nullity……In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal appeal No. 87 & 88 of 2006 the court added that the use of the words "shall inform the accused of that right" in Section 200 (3) was clearly meant to protect the rights of an accused person and duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the(succeeding trial) magistrate in mandatory terms……"**

15. Thus the proceedings conducted before Sitati Ag. SRM vitiated the entire trial by the failure to comply with section 200 (3) of the Criminal Procedure Code. I will therefore quash the conviction and set aside the sentence imposed. As to whether or not to order retrial, in the case of **Muiruri -vs- Republic (2003) KLR 552,** the Court of Appeal stated that a retrial will only be ordered where the interests of justice require it.

16. Further the Court of Appeal of East Africa, the predecessor of the present Court of Appeal stated in **Ahmed Sumar -vs- Republic (1964) E.A 481,** that where a conviction is vitiated by a gap or other defect for which the prosecution is to blame the court will not order a retrial, but it will do so if such gap, defect or irregularity is occasioned by the trial court, and that each case must depend on its own peculiar circumstances. See also **Bernard Lolimo Ekimat -vs- Republic criminal appeal No. 151 of 2004.** A further consideration will usually be whether the potentially admissible evidence in the view of the appellate court is substantial enough to support a conviction **(See David Kiplangat Bunei -vs- Republic Criminal appeal No. 370 of 2006.)**

17. The Appellant herein was stated to be a teacher of the alleged victim and the charge against him therefore involved a child placed in his care. In the interest of justice it is proper that the Appellant be brought to answer for his alleged actions in a proper trial. The prosecution evidence revealed in the proceedings if admitted could well result in a conviction. The defect herein was not occasioned by the prosecution but by the trial court. The Appellant had been on bail during the trial and has only served about a year since sentencing. In my view he will not be unduly prejudiced by a retrial.

18. I do therefore order that a retrial be held, with dispatch. For this purpose, I order that the Appellant be produced before the Chief Magistrate's court Narok on **17TH May 2016** to take plea. It is directed that once commenced, the trial be given priority in light of the age of the original complaint.

Delivered and signed at Naivasha this **13TH** day of **May** 2016.

C. Meoli

JUDGE

In the presence of:

Mr. Koima for the DPP

Mr. Mburu Holding Brief for Mr. Adiso for the Appellant

Appellant present

Court Clerk Mr. Barasa