REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 46 OF 2015

FRANCIS MENYA ONYANGO………………………………………………….APPELLANT

VERSUS

REPUBLIC………………………………………………….......................RESPONDENT

(*Appeal against conviction and sentence meted by Hon. H.N. Ndung'u Chief Magistrate in Busia C.M. Criminal Case No. 2082 of 2014 delivered on 22nd July 2015*)

JUDGMENT

1. Francis Menya Onyango, the Appellant was charged at Busia Chief Magistrate's Court and upon trial convicted for the offences of attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006 and grievous harm contrary to Section 234 of the Penal Code. For the charge of attempted rape he was sentenced to five years imprisonment and for grievous harm he was sentenced to eight years imprisonment. Being aggrieved by both conviction and sentence, he now appeals to this Court.

2. According to the Petition of Appeal dated 13th October, 2015 his grounds of appeal are:

"1) That I pleaded guilty to the appended charges.

2) That the trial magistrate erred in law and facts by relying on the hearsay and contradicting witnesses' testimonies.

3) That the trial magistrate erred in law and facts bydisregarding the medical facts to the effect that itwas unable to support the main charge.

4) That the trial magistrate erred in law and facts by relying on the circumstantial evidence ignoring theprimary evidence.

5) That the trial magistrate erred in law and fact bydisregarding my defence.

6) That the trial court did not consider my mitigationthereby handing me a harsh and deterrent sentence."

3. In his written submissions dated 25th May, 2016 the Appellant alleged breach of his fundamental rights. He submitted that his right to a fair trial as protected by Section 200(3) of the Criminal Procedure Code, Cap 75 was breached when the trial magistrate denied him an opportunity to have the matter start de-novo.

4. Counsel for the Respondent did not address this issue both in the written submissions dated 27th June, 2016 and in the oral submissions made on 28th June, 2016. It is important to first address the question as to whether the Appellant received a fair trial.

5. Section 200 of the Criminal Procedure Code, Cap 75 provides that:

> **"200 (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 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 resummon the witnesses and recommence the trial.**
>
> **(2) Where a magistrate who has delivered judgment in acase but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**
>
> **(4) Where an accused person is convicted uponevidence 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**."

6. Of relevance to this appeal are sub-sections (3) and (4). It has been held that it is the duty of the trial court to inform the accused person of his right under Section 200 of the Criminal Procedure Code. In **John Bell Kinengeni v Republic [2015] eKLR**, the Court of Appeal addressed the import of Section 200(3) at length and concluded that "**the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate."**

7. In the case before me the trial magistrate did indeed inform the Appellant of that right. It is important to reproduce the relevant part of the proceedings of 8th June, 2015 verbatim:

> **"8/6/15**
>
> **Before Hon. Ndungu H.N. [Miss] C.M.**
>
> **C/Pros – Nyabuti**
>
> **C/Clerk – Opoty**
>
> **Interpr – Eng/Kisw**
>
> **Accused present**

PROSECUTOR - Its part heard. Three witnesses testified.

H.N. NDUNGU[miss]C.M.

COURT – Section 200(3) CPC complied with.

H.N. NDUNGU[miss]C.M.

Accused – I ask that my case starts de-novo.

H.N. NDUNGU [miss] C.M.

PROSECUTOR – The complainant has mental problem. Getting her will be quite a challenge

Parties have not changed. They are the same ones. The accused had opportunity to cross examine witness. I pray matter proceeds from where left.

Accused – nil

Court: Whereas I am alive to the fact that it is the right of the accused to have the case start denovo, the court has been told that the complainant is a vulnerable witness who has a metal disability and it will be difficult to get her and get her to testify all over again. In the interests of justice I therefore direct that case proceeds from where left. Accused to be supplied with any remaining statements he could not have received. Proceedings to be typed and hearing to be on 8.7.2015

Mention 22.6.15.

H.N. NDUNGU [miss] C.M."

8. The question that would arise is whether the court can derogate from the right of an accused person to ask for recall and rehearing of a witness who testified before the predecessor. That question was answered by the Court of Appeal in **Joseph Kamara Maro v Republic [2014] eKLR** when it stated that:

"**Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."**

9. In the cited case, the Court of Appeal held that Section 200(3) does not oblige the succeeding magistrate to start a matter de novo. However, reading Section 200(4), it is clear that even where an accused person has opted for the case to continue before a new magistrate from where it was left by the previous magistrate, the High Court, may, if it is of the opinion that the accused person was materially prejudiced, set aside the conviction and order a new trial. There is therefore a mischief that the provision intended to cure. Parliament, I presume, wanted to ensure that a convicting magistrate had, among other things, the opportunity of assessing the demeanour of the witnesses.

10. Where witnesses are available and an accused person has asked that they be re-summoned and re-heard, the trial Court should always be ready to start the trial afresh. In the case at hand, the Appellant

was clear that his trial should start *de novo*. The prosecutor indicated that the complainant had a mental problem. The magistrate then held that the complainant was a vulnerable witness and it would be difficult to get her to testify all over again. How could the magistrate have concluded that the witness was vulnerable without seeing and hearing her?

11. Section 125(2) of the Evidence Act, Cap 80 provides that:

> **“A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”**

It is therefore important to appreciate from the outset that the complainant in this matter, though alleged to be mentally retarded because of suffering from epileptic fits, was indeed a competent witness. A trial magistrate would in a situation where a witness is said to be fragile be more willing to re-summon such a witness so as to hear and see the witness in order to form an opinion on the quality of the evidence of such a witness. The Court has ways and means of ensuring that a vulnerable witness feels comfortable as he/she testifies.

12. The case in question first came for plea on 15th September, 2014. The new magistrate took over the matter on 13th May, 2015 which was hardly ten months down the line. There is no indication that the other witnesses could not be recalled to testify. There was therefore no valid reason for denying the Appellant’s request that the matter starts afresh.

13. In the circumstances of this case I find that the Appellant’s trial was vitiated by the failure to grant him his wish which is provided by statute. I therefore find that the conviction and sentence should not be allowed to stand and I quash the same.

14. The remaining question is whether a retrial should be ordered. In **Fatehali Manji v The Republic 1966] E.A. 343** it was held 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 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 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 an injustice to the accused person.”**

15. Looking at the case before me, I find that the matter is not old; there is a likelihood that the witnesses will be available; the offences with which the Appellant was charged are serious; the evidence adduced at the impugned trial is sufficient to mount a prosecution; and no prejudice will be suffered by the Appellant if he is tried afresh. All factors favour an order for retrial.

16. Accordingly, the appeal is allowed and the conviction and sentence of the Appellant set aside. The Appellant shall be tried afresh at Busia Chief Magistrate’s Court before any magistrate of competent jurisdiction other than Miss H.N. Ndung’u, Chief Magistrate. The Appellant shall be produced before the Chief Magistrate’s Court at Busia within 7 days of this decision.

Dated, signed and delivered at Busia this 28th day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT