REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 7 OF 2015

(Being appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Narok Criminal Case No. 350 of 2012)

ERICK SIMIREN……..……APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

J U D G M E N T

1. The Appellant was arraigned before the Principal Magistrate's Court, Narok charged with two counts of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on 27th March 2012 at [particulars withheld] Trading Centre, Kajiado he caused his penis to penetrate the vagina of C S a girl aged 14 years in the first count, and in the second count, of a second girl named R K aged 13 years.

2. He was charged with two corresponding alternative counts, of Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act, the particulars being that on the same date and place he intentionally caused his penis to come into contact with the vagina of C S, a girl aged 14 years in the first alternative count, and in the second alternative count, of a second girl named R K aged 13 years. The record of the lower court shows that the trial commenced immediately after the Appellant pleaded to the charges.

3. His counsel, Mr. Kilele apparently showed up just in time to cross-examine the first complainant C S and the second complainant (PW1 & PW2). It is after the two had testified that he sought to be supplied with witness statements, exhibits etc. Thereafter the trial court heard a further three prosecution witnesses and placed the Appellant on his defence by a ruling delivered on 8/3/2015. It would appear that the trial magistrate was subsequently transferred or otherwise ceased to exercise jurisdiction before the defence could commence.

4. Appearing before the new trial magistrate on 3/6/2013 counsel for the Appellant addressed the court as follows:-

> **"It is for defence hearing. I would apply for the recall of both complainants under Section 200 of the Criminal Procedure Code. The reasons are that later evidence indicates that the 2 were coerced into implicating the accused in the commission. I showed the prosecutor that letter suggesting coercion. I want them recalled for their cross-examination on that letter."**

For his part the prosecutor responded:-

> **"I cannot guarantee their attendances. The court should take judicial note of the nomadic lifestyle of the community from which they come. We shall endeavour to produce them."**

5. As it turned out, the complainants were never recalled, and after the Appellant closed his defence, the matter was set down for judgment. The conviction and sentence handed down in the said judgment on both alternative counts is the subject of this appeal. The initial petition was filed by the Appellant in person. No request for leave was made to the court to lodge the new petition filed by his advocate on 6/3/2015, but I note that it incorporates the original grounds of appeal.

6. In the absence of any objection, the new petition will be deemed to be the Appellant's amended petition. The latter lists 14 grounds of appeal. Of these, grounds 2-12 attack the adequacy and quality of evidence upon which the conviction was based. Grounds 13 & 14 challenge the legality and extent of the sentences. Ground 1 states:-

> **"THAT the learned trial magistrate erred in law by contravening the mandatory provisions of Section 200 of the Criminal Procedure Code."**

7. Counsel for the Appellant, Mr. Kamwaro filed written submissions which he also highlighted at the hearing of the appeal. Citing several legal authorities he reiterated the now well-known principle that the failure by a succeeding trial magistrate in a part heard case to comply fully with the provisions of Section 200 (3) of the Criminal Procedure Code vitiate the trial. Regarding the 2nd and 3rd grounds of appeal he highlighted inconsistencies in the prosecution evidence and the alleged failure by the prosecution to call what he referred to as essential witnesses. These include one Tom and a Ms Sointa who were referred to by PW2 and PW4 respectively, in the course of their testimony.

8. For the first proposition he cited among others, the quintessential case of **Ndungu Kimanyi –Vs- Republic Criminal Application No. 22 of 1979**, and concerning the failure to call crucial witnesses relied on the authority in **Bukenya & Others –Vs- Uganda (1972) EA 549**. He contended that the Appellant's alibi was not given proper consideration and further that the Appellant's duty in that regard and did not amount to proving his innocence. A matter not raised in the grounds of appeal was canvassed at the hearing. This related to the alleged failure by the prosecution to provide statements of witnesses to the accused before the testimony of PW1 and PW2 was taken. The said failure, it was asserted, resulted in a violation of the Appellant's right to a fair trial thereby occasioning him prejudice.

9. Mr. Kibelion appearing on behalf of the Director of Public Prosecutions opposed the appeal. He submitted that the evidence tendered at the trial established every element of the charge. With regard to compliance with Section 200 of the Criminal Procedure Code, he argued that it was not mandatory that the court itself gives the direction, pointing out that the Appellant's advocate himself made the election to recall PW1 and PW2.

10. Referring to the proceedings at pages 26 – 30 Mr. Kibelion contended that efforts to trace the two witnesses were unsuccessful. He disputed the Appellant's assertion that there were contradictions in the evidence of the two complainants and PW4. He urged the court to find that there was no material contradiction and assign to any inconsistencies in the evidence of PW1 and PW2 to their vulnerable age.

11. Mr. Kibelion further stated that the evidence of the minors, if found believable by the trial court, was sufficient on its own to found a conviction, hence there was no necessity for calling other witnesses. He disputed assertions that prosecution evidence was circumstantial and stated that the Appellant's alibi was dislodged by his admission to have met the two complainants on the material evening. Regarding the complaint that the Appellant did not receive witness statements ahead of

the commencement of the trial, Mr. Kibelion submitted that this matter was never raised by his counsel in the trial and that no prejudice was occasioned.

12. I have considered the proceedings in the lower court and the submissions made in respect of the grounds of appeal. The first appellate court, is obligated to re-evaluate the evidence on record and to draw its own conclusions (**Okeno -Vs- Republic [1972] EA 32**). In Kariuki Karanja –Vs- Republic [1986] KLR 190 the court held that:

> **"On a first appeal from a conviction by a Judge or a magistrate, the Appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."**

13. The prosecution evidence at the trial was as follows. The two complainants C S and R K were minors aged 14 and 13 years, respectively. Both were students at [particulars withheld] Primary School and were in Standard 8 in 2012. A few days before the 27/3/2012 they were dispatched home to collect their birth certificates for purposes of registration for national exams. On the way back to school, the two girls met at [particulars withheld] on 27/3/2012 and at 7.00pm boarded the Canter vehicle driven by the Appellant, arriving at the town centre called [particulars withheld] at 10.00pm.

14. The Appellant offered them accommodation in his house for the night in light of the hour, on the pretext that he would seek alternative accommodation for himself. The girls freshened up and slept, only for the Appellant to return at midnight, claiming he could not get other accommodation. He then proceeded to ensconce himself between the two girls who shared a bed, and to make sexual advances. Stripping naked, he first had sexual intercourse with C.S. and thereafter he pursued and had sexual intercourse with R.K.

15. The girls slept until the next morning and left the house to arrive in school on the evening of 28th March 2012 and did not report their ordeal. Unfortunately a relative of one of the girls (C.S.) visited the school on 29th and discovered that the girls got back to school a day late. Inquiries began with the headmistress of the school J T S (PW3) questioning the girls, who admitted spending the night of 27th with the Appellant and having sex with him. The matter was reported to police who carried out further investigations.

16. The Appellant gave a sworn defence statement and called his two friends Tom Topoika (DW1), Silakei Kilani (DW2), a clinical officer Enoch Kotikoti (DW3) and his employer Dixon Barta (DW4 erroneously referred to as DW5 in the proceedings) in his defence. The gist of the defence is that the Appellant was a driver of the Canter lorry; that the two complainants were among his passengers on 27/3/2012 on the trip from [particulars withheld]. That at [particulars withheld] they alighted with other travelers and went their way while he and DW3 spent the night in his house.

17. Further that prior to the incident there existed a grudge between him and PW3 over a transport charges debt she delayed in settling hence the fabricated charges. He claimed that complainants later delivered a letter to him through DW1 apologising for participating in the conspiracy to lay false charges against him.

18. Having now considered the submissions in light of the evidence on record, it is my view that this appeal really turns on one ground, namely, the 1st ground with regard to the failure by the court to comply fully with the provisions of Section 200 (3) of the Criminal Procedure Code. Section 200 of Criminal Procedure Code is in the following terms:-

> **"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.

(4) ……"

19. There is no dispute that the duty to inform the accused his rights under Section 200 (3) of the Criminal Procedure Code lies with the succeeding magistrate who takes up a matter partly heard before another magistrate (**See Samuel Kabiru –Vs- Republic [2004] eKLR**). The right to recall a witness who has testified is essential to the conduct of a fair trial in that context. This is reinforced by the mandatory nature of the provision and the next following subsection. Section 200 (4) of the Criminal Procedure Code provides that:

> **"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."**

The key words are "materially prejudiced," as rightly observed by Mr. Kibellion.

20. In the present case, the Appellant's advocate addressed the court ahead of any direction by the new trial magistrate and made an election to have PW1 and PW2 recalled on the first appearance before the succeeding magistrate. I do not think that Section 200 (3) of the Criminal Procedure Code requires a merely formalistic compliance. In the circumstances of the case, it would have been superfluous when the counsel had quickly taken it upon himself to make the election under Section 200 (3) of the Criminal Procedure Code, for the court to do more in purported compliance of the requirement to inform the Appellant of his rights.

21. Counsel did not wait to hear the court's explanation of Section 200 (3) of the Criminal Procedure Code but went ahead to make an election on behalf of his client. In my view there was sufficient compliance with Section 200 (3) as far as information and election was concerned. (**See Kossam Ekiru -Vs- Republic [2004] eKLR**). In response to the request by counsel for the Appellant to recall the complainants, the court issued and continued subsequently to issue summons to the complainants with a view to procuring their attendance. Between the date of the first summons (3/6/2013) and the 14/11/2014 when the defence closed its case, the record does not indicate any report to the court by the prosecution regarding efforts made to avail both PW1 and PW2 to give evidence. Instead, the record shows that on 25/9/2013 Mr. Kilele offered to assist police "track down" the witnesses and eventually on 13/11/2014 he stated that the two complainants could not be traced.

22. He then said that he would call his last witness and recall the Appellant to produce a letter allegedly written to the Appellant by the two girls exonerating him. To which the prosecutor responded: **"I do not oppose."** For this part the trial magistrate did not make any inquiries as would have been expected pursuant to his recall orders. The girls were scholars in a local school previously and it cannot be that their home particulars could not be found.

23. It seemed as though the learned magistrate considered his duty under Section (3) of the Criminal Procedure Code done upon issuing the order and summons for PW1 & PW2. The letter allegedly written by the two girls was actually tendered as an exhibit. Infact on that date the matter was further adjourned at the request of the defence to call the final witness, DW5, who testified on 14/11/2014.

24. The right to a fair trial under article 50 (2) (K) of the Constitution includes the right to adduce and challenge evidence. Implicit in the right to demand recall of a witness under Section 200 (3) of the Criminal Procedure Code is the expectation that the prosecution will make all efforts to avail recalled witnesses. The importance of this provision is underscored by Section 200 (4) of the Criminal Procedure Code. This means that beyond the formal duty of informing the accused of his rights under Section 200 (3) of the Criminal Procedure Code, the court must as much as practically possible endeavour to ensure compliance by the prosecution where an order of recalling witnesses has been made. In my own view the facts of this case were compelling.

25. In the circumstances of this case, I think that the failure by the prosecution to avail the key prosecution witnesses PW1 and PW2 and the trial magistrate's failure to make due inquiries was materially prejudicial to the Appellant. It is equally surprising that both the court and the prosecution seemed to relinquish the duty of tracing the witnesses to the defence and actually accepted the defence counsel's report that PW1 and PW2 could not be traced.

26. Not having had the advantage of the witness statements at the initial trial, and subsequently denied the opportunity to challenge the evidence of PW1 and PW2 before the succeeding magistrate the Appellant's right to a fair trial under article 50(2) K) of the Constitution was in my view violated. The appeal must be allowed upon that ground alone. I do therefore quash the conviction and set aside the sentence.

27. On the other hand, considering the admissible and potentially admissible prosecution evidence, it is my view that if properly considered, the same might be strong enough to support a conviction. (**See Mwangi –Vs- Republic [1983] KLR 522**). In considering whether to order a retrial under Section 200 (4) of the Criminal Procedure Code, I am guided by the principles stated by the Court of Appeal in **Fatehali Manji –Vs- Republic 1966 EA 343** 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 prosecutor 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."** (See also Muiruri –Vs- Republic [2003] KLR 552).

28. This case involved serious allegations of sexual molestation of two minors by the Appellant. I am of the view that the interest of justice will be served if a retrial is conducted. There is no likely prejudice to be occasioned upon the accused as he has only served about six months of his prison term. In the circumstances I do order a retrial before a different trial magistrate.

The Appellant will be produced before the Chief Magistrate Narok on 10th August, 2015 for purposes of taking plea. Meanwhile he will remain in prison custody.

Delivered and signed at Naivasha, this 31st day of July, 2015.

In the presence of:-

State Counsel :

For the Accused :

C/C : Steven

Accused :

C. MEOLI

JUDGE