REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEALS NO. 8 OF 2012

[CONSOLIDATED WITH CR APEAL NO. 215 OF 2011]

WILSON MULWA WAMBUA..….....1ST APPELLANT

KORDUNI OLE MOONKA……....……..2ND APPELLANT

=VERSUS=

REPUBLIC.....RESPODENT

(From the Original Conviction and Sentence in Criminal Case No. 1020 of 2010 at the Senior Resident Magistrates Court at Kajiado–Mr.S.O Temu (RM) On 23/9/2011]

JUDGEMENT.

The appellants herein **Wilson Mulwa Wambua** (1st appellant) and ***Korduni Ole Moonka*** (2nd appellant)were tried by the Resident magistrate court, Kajiado on a charge of ***Gang rape contrary to section 10 of the Sexual Offences Act No.3 2007(2006)***. Particulars were that on the 6th day of July 2010 at ***[particulars withheld] , Loitokitok District within the Rift Valley Province, in association intentionally and unlawfully caused their penises to penetrate the vagina of E. K in turns without her consent.***

They were further charged with an ***alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual offences Act No. 3 of 2006.***

Further the 1st appellant was charged with an ***offence of Assault causing bodily harm contrary to Section 251 of the Penal Code.***

Particulars being that on 6th day of July 2010 at ***[particulars withheld]***, in Loitokitok District within Rift Valley Province**, assaulted E K thereby occasioning her actual bodily harm.**

The appellants denied the charge and prosecution called four witnesses to support its case. Each of the appellant herein gave unsworn defence, denied the charges and called one witness.

At the end of the trial, the learned trial magistrate convicted both appellants under Section **10 of the Sexual Offences Act No. 3 of 2006**. Further the 1st appellant was convicted and sentenced for the offence **of Assault causing actual bodily harm**.

On Count 1, the 1st and 2nd appellants were sentenced to serve **10 years imprisonment. On Count II**, the appellant was sentenced to serve **3 years imprisonment**. However the sentences were to run concurrently.

The appellants were dissatisfied and aggrieved by the findings of the learned trial magistrate. They appealed against both conviction and sentence and relied on their Petitions of Appeal filed earlier and on their further supplementary grounds of appeal filed on the date of hearing this appeal. They also relied on their written submissions which I have considered.

Each of the appellant had filed a separate appeal but on 16/10/2013, when the appeals came for hearing, they were consolidated and heard as one Criminal Appeal No. 8/2012.

The learned State Counsel, **Mrs. Gakobo** submitted for the State. She submitted that the State did concede to the appeal on the ground that the trial court failed to comply with **Section 200(3) of the Criminal Procedure Code**. She further submitted that the matter was heard by two magistrates, **Hon.D.M Itaya(RM)** who heard two witnesses and later by **Hon.S O Temu(RM)** who heard the two remaining witnesses. **Mrs. Gakobo** submitted that **Hon. Temu,** who took over the matter, did not inform the appellants their rights to recall the witnesses under **Section 200(3) of the Criminal Procedure Code**. She also submitted that **Section 200(3) of the Criminal Procedure Code** is

couched in mandatory terms and it obligates the succeeding trial Court to inform the accused person of their rights. Therefore the State Counsel urged the Court to quash the conviction and set aside the Sentence.

She however, submitted that the court should order for retrial of the appellants herein. That the two were charged with an offence of **gang rape** and it is for the interest of justice for them to be retried. ***Mrs. Gakobo*** also submitted that the two were sentenced in the year 2011 and they have barely served their sentence of 10 years and so there will be no prejudice that will be suffered by them. That the witnesses are Kenyans and they will be available to testify if the court do order a retrial.

I have now analyzed and re-evaluated the entire record of the Lower Court as is obliged of me as a first appellate court. I have taken into account that I did not see the witnesses as they testified and so I cannot comment on their demeanor. This is in line with the findings In the case of **Odhiambo Vs Republic in Criminal Appeal No. 280 of 2004 (2005) KLR** and **Okeno Vs Republic 1972(EA) 32.**

The brief summary of this case is that on 6/7/2010, the complainant herein **PW1,** was walking home at around 8.00P.M. Then she was confronted by two men (the appellants herein).

The 1st appellant grabbed her and she fell down. That the appellants removed her clothes and pantie and raped her in turns by inserting their penises to her vagina and anus too. The 1st appellant raped her twice and later held her and 2nd appellant raped her too. In the process, 1st appellants injured her on her left hand. The complainant told the court she knew both of them and the place of the offence was lighted by electricity and so she could identify them all. Further that the complainant screamed and **PW2, Margaret Aketch** went to her rescue. She offered PW1 a leso as PW1 was naked. That PW2 organized for PW1 to be taken to hospital and PW2 saw **Wambua** and **Korduni** near the scene and she identified them due to the electricity light.

PW1 was taken to hospital and treated and PW3 produced her medical notes and her P3 forms . He also produced the P3 form for both appellants. **PW4, No. 85453 PC Woman, Everline Anyango** received the report of gang rape from PW1. She investigated the matter and charged the appellants with the present offence.

Each of the appellant gave unsworn defence. 1st appellant **Wilson Wambua** told the court on the

material day he worked the whole day and later went home. Then as he was in the house, Police officers entered the house and told him, he had assaulted a woman. He was arrested on 6/7/2010 and charged in court on 19/7/2010.

2nd appellant also a resident of Entarara told the court that he works in butchery. That on the material day he was at Ilasit and worked till 5.00pm. He went home at 7.00pm. He was arrested by Police Officers and charged with what he knew nothing about. 1st appellant had called his wife **Priscilla Pendo** as a defence witness who confirmed that 1st appellant was arrested from their house on 6/7/2010 by the police officers.

Though, the appellants raised some grounds to support their appeal, I have taken into account that the State did concede to the appeal. It was submitted that the trial magistrate did not comply with **Section 200(3) of the Criminal Procedure Code.**

Section 200(3) of the Criminal Procedure Code provides as follows:-

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

Under this provision, it is the duty of a magistrate who takes over criminal trial commenced by another magistrate to explain to the accused person the import of that section and give the accused person an election whether to recall the witnesses who had already testified to come and testify again or to be cross-examined.

I have examined the record of the trial court. It shows the trial was commenced by learned trial magistrate **Hon. D.M Itaya** who heard the evidence of two witnesses. Then **Hon.S.O Temu (RM*)*** took over the conduct of the matter on 18/5/2011. On the material day, the court records shows as follows:-

Court:- **Section 200 of the Criminal Procedure Code** explained to the accuseds person . Then each of the appellants replied:-

"***Case should proceed from where it had reached".***

Though the trial court's record shows that **Section 200 of the Criminal Procedure Code** was explained to the appellants, it was not clear

whether the trial magistrate explained to the appellants their right specifically under ***Section 200(3) of the Criminal Procedure Code. Under Section 200(3) of the Criminal Procedure Code*** the succeeding magistrate **Must** inform the accused person of his right to demand that any witness he **resummoned** and **reheard.**

That was not done in this case and ***Mrs. Gakobo*** was therefore right to concede to the appeal. Contravention of the provision of ***Section 200(3) of the Criminal Procedure Code*** rendered the trial as a whole fatally defective. I therefore proceed to quash the conviction and set aside the sentence.

The next question I will now ask is whether the court should order for retrial or not. There are four principles that are set out to govern the exercise of the appellate court's discretion in granting or refusing a retrial.

a. First, a retrial may be ordered only when the original trial was illegal or defective. This was held so in the case of **Merali and Others Vs Republic (1971) EA Pg 21.** A retrial should not be ordered where the appeal succeeds due to lack of sufficient evidence. A retrial should never be used by the prosecution to fill the gaps in its case.

b. Secondly, a retrial should be ordered where the interest of justice require it and refused where it is likely to cause injustice or prejudice to the appellant. Held so in the case of **Ahmed Suman Vs Republic (1964) EA 481.**

c. Thirdly, a retrial should be ordered only when it is likely that it will result in a conviction. This was held so in the case **of Mwangi Vs Republic (1983) KLR 522.**

d. Each case must be decided on its unique facts and circumstances.

In the instant case, the appeal had been allowed due to the contravention of **Section 200(3) of the Criminal Procedure Code**. The trial was defective and hence a nullity. The appeal did not succeed for lack of evidence.

I also find that the appellants herein were sentenced on 23/9/2011 to serve 10 years imprisonment. They have barely served part of their sentence. The gravity of the offence herein favor for grant of a retrial.

I have also perused the record of the trial court, and the findings therein. I find that the available evidence would likely return a conviction. The State submitted that the witnesses are still available and would be availed to testify.

The court is of the opinion that the circumstances of this case favour a retrial since the complainant herein alleged that she was **gang raped.** For the interest of justice, a retrial would be the best option.

For the above reasons, ***I quash the conviction and set aside the sentence.*** I however order for the **retrial of the appellants herein**. The appellants to remain in custody and be availed before the ***Senior Resident Magistrate's Court in Kajiado*** the soonest possible to take a plea on the same charges.

L. N. GACHERU

JUDGE

Dated, Signed, and Delivered at MACHAKOS this 21st day of January 2014

B. T JADEN

JUDGE