REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 39 OF 2013

(From the original conviction and sentence in criminal case no. 399 of 2009 of the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – SRM)

SUDI HARUB SULEIMAN ……APPELLANT

VERSUS

REPUBLIC ……..…RESPONDENT

JUDGMENT

1. The appellant was charged in the Lower Court with two counts, namely Defilement of a girl contrary to Section 8(1) (3) of the Sexual offences Act and Concealing Birth contrary to Section 227 of the Penal Code. The particulars are set out in the charge sheet.

2. His trial, conducted before three different magistrates terminated in convictions. On 6th December, 2011 the appellant was sentenced to 15 years imprisonment on each count. His appeal to this court through Messrs Lughanje & Co. Advocates was based on four grounds. Ground 1 and 2 raised legal challenges to the effect that the trial was conducted in contravention of Section 200(3) of the Criminal Procedure Code and, secondly, that the charge in the first court was defective. Grounds 3 and 4 challenged the adequacy of the evidence upon which the convictions were based.

3. At the hearing of the appeal Mr. Nyongesa for the State readily conceded the 1st ground of appeal and stated that the State would not be demanding a retrial as the appellant has been in custody for a long period.

4. The record of the trial indicates that the trial commenced before Hon. Kiama Resident Magistrate on 23rd February, 2010. The complainant F. A. S. (PW1) was recalcitrant and appeared in her brief evidence to exonerate the appellant. She was apparently stood down and remanded at the juvenile home. She was released on 4th March, 2010 when she agreed to testify. On 30th July, 2010 a new magistrate, Hon. Gandani Principal Magistrate took over the matter and took the evidence of the doctor (PW2).

5. There is no evidence on record that she complied with Section 200(3) of the Criminal Procedure Code. A third magistrate Hon. Obura, Senior Resident Magistrate took over the matter on 12th May, 2011. Again there was no compliance with Section 200 (3) of the Criminal Procedure Code. PW1 gave evidence afresh and the trial was concluded before Obura Senior Resident Magistrate.

6. The failure by the two latter magistrates to comply with the mandatory provisions of Section 200 (3)

of the Criminal Procedure Code was fatal to the prosecution case and the State correctly concede that ground.

7. It is also my considered view that a retrial ought not to be ordered in this case. Firstly, it is true as stated by Mr. Nyongesa that the appellant has been in prison for over two years. But more importantly the court is doubtful that the potentially admissible evidence would result in a conviction. The complainant was a reluctant witness. When she testified her evidence on the first court was barely categorical. As regards the second court, it was exonerating. The charge and particulars of the second charge were not borne out in the evidence tendered during the trial. While it was alleged in the former that the appellant concealed birth by depositing the dead body of a child, the medical evidence (PW1) suggested that there was an incomplete abortion. According to the complainant, she miscarried at 1½ months.

8. In the case **Mwangi v R (1983) KLR 520,** the court, following the dicta in **Braganza v R [1957] EA 152 CCA)** stated at page 538 that:

> **"...a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."**

The principle stated in Ahmedi Ali Dharamsi Sumar V. Republic 1964 E.A. 481 **and restated in Fatehali Manji V. The Republic 1966 E.A. 343 wherein the** Court of Appeal was 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 an injustice to the accused person".***

This appeal is allowed for the foregoing reasons. The convictions are set aside and sentence on both counts quashed. The appellant is to be set at liberty unless otherwise lawfully held.

Delivered and dated at Malindi this **27th** day of **May, 2014** in the presence of:

C. W. Meoli

JUDGE