REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 213 of 2013

(from original conviction and sentence in Criminal Case No. 1230 of 2009 of the

Senior Resident Magistrate's Court at Eldama Ravine – M. Kasera)

KENNETH WAMUGOTA WALELA ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

This is an appeal from the decision of M. Kasera, Senior Resident Magistrate, Eldama Ravine in Criminal Case No. 1230 of 2009. The appellant was charged with the offence of defilement of a child contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with the offence of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006.** After full trial, the appellant was convicted for the offence of defilement of a child and sentenced to 25 years imprisonment. Being aggrieved by that decision, the appellant has filed this present appeal. The grounds of appeal are found in the petition of appeal and the written submissions and they can be summarized as follows:

1. That though the trial was conducted by two magistrates, the succeeding magistrate did not comply with section 200 (3) of the Criminal Procedure Code;

2. That the learned magistrate erred by not establishing the age of the child at the onset.

Mr. Marete, the learned State Counsel opposed the appeal. He contended that the prosecution had proved its case beyond doubt; that the child knew the appellant as he lived only 50 meters from their home; that she reported the incident to her mother when she returned home; The doctor's evidence did confirm that the child had been defiled. He therefore urged the court that the appellant's allegation that he was framed by the child's mother was false and the court should not interfere with the judgment.

It is a fact that the trial in the lower court was handled by two magistrates. Hon. D.M. Machage SRM last handled the case on 22/9/2010. Hon. Kasera SRM seems to have taken over the matter under unknown

circumstances. She wrote the judgment and delivered it on 14/10/2010. From the record, it appears that Hon. Machage heard the entire case whilst Hon Kasera wrote and delivered the judgment only.

The appellant contends that **Section 200** of the **Criminal Procedure Code** was not complied with. The section provides:-

"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) ...

(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."

This case falls under **Section 200 1(b) of the Criminal Procedure Code** because the case had been heard by Hon. Machage and Hon. Kasera only wrote the judgment.

Section 200 (3) of the **Criminal Procedure Code** is mandatory. The succeeding magistrate should have informed the appellant of his right to recall witnesses or opt to start the case de novo or proceed from where the case had stopped. The record before the trial court does not show that the learned magistrate actually informed the appellant of his right to recall witnesses nor does it show that the appellant elected to proceed without recalling witnesses. The provisions of the law being mandatory, failure to comply with **Section 200** of the **Criminal Procedure Code** renders the whole trial a nullity. It follows that the subsequent conviction and sentence are a nullity. The conviction is hereby quashed and sentence set aside.

So should the court order a retrial? In the case **Ahmed Sumar Vs. Rep (1964) EA 481 at page 483,** the court stated as follows regarding retrial in criminal cases:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."

This means that it is not in all cases in which an appellate court quashes a conviction on technical grounds, that it has to order a retrial. There are several facts that the court needs to consider before ordering a retrial. The case of **Patel Ali Manji Vs. Republic (1960) EA 343** laid down the following considerations:-

1. **"In general a retrial will be ordered when the original trial was illegal or defective;**

2. **That each case must depend on its own facts and circumstances;**

3. **That an order of retrial should only be ordered where the interest of justice requires it;**

4. **A retrial will not be ordered if by so doing an injustice will be caused or occasioned."**

Another consideration was introduced in the case of **Alloys Awori Vs. Uganda (1972) EA 469** which is:

5. "A retrial will not be granted for purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial."

In the case of **Ratilal Shah v Republic (1958) EA 3,** the court held that

6. "A retrial should be ordered when the court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result."

In this case, I do take note of the gravity of the offence. The appellant was sentenced to 25 years imprisonment on 14/10/2010. So far he has only served slightly over 2 years of the term. I do not think that the appellant would be prejudiced at all since he has not served a substantial portion of the sentence. I further note that the omission warranting a retrial was occasioned by the court. Without saying much for fear of prejudicing the defence, I am of the view that in consideration of the potentially admissible evidence, a conviction on retrial might result. The witnesses were professionals and relatives of the child, so getting the witnesses to testify at the retrial should not be a problem. To my mind, justice will be better served for both the appellant and complainant if a retrial is ordered.

In the end, I order that the appellant be retried by a court of competent jurisdiction, other than the two magistrates (Machage and Kasera) who handled the trial herein. For the trial to commence, the appellant shall appear before the Senior Resident Magistrate's Court, Eldama Ravine on 4/4/2013 and pending such appearance, the appellant shall remain in custody. The court further directs that the trial court do expedite the trial. It is so ordered.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

The appellant present

Mr. Chirchir for the State

Kennedy – Court Clerk