



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 188 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 143 of 2011 of the Senior Principal Magistrate's Court at Voi – S. M. Wahome, PM)

KAMBE NDAIKWA KAMBE APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant has appealed against conviction and sentence for the offence of rape contrary to Section 3 of the Sexual Offences Act.
2. Senior Principal Magistrate – E. M. Muriithi (*as he then was*) received the prosecution's evidence of PW1 to PW3. The case was taken over by the Principal Magistrate – S. M. Wahome who then received the evidence of PW4 and the Appellant's defence and finally wrote the judgment.
3. In doing so the learned Principal Magistrate – S. M. Wahome failed to comply with the provisions of Section 200 of the Criminal Procedure Code Cap 75. That Section provides as follows-

“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”.

4. Sub-Section 3 of that Section is relevant to this case. The learned Magistrate – S. M. Wahome should have informed the Appellant of his right to have the trial afresh or to recall any of the witnesses. Having failed to do so, the whole trial was vitiated and was rendered a nullity.
5. Learned Counsel for the Republic during the hearing of the Appellant’s appeal requested the Court to order a re-trial in view of that failure to comply Section 200. In making those submissions the learned Counsel however failed to inform the Court whether the witnesses were available to attend such a retrial.
6. The principle that should guide the Court in ordering a retrial were discussed in the case **MUIRURI -VS- R [2003]KLR 552** where the Court stated-

“It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zedekiah Ojuondo Manyala v Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the Court’s”.

7. The Court of Appeal in the case **BENARD LOLIMO EKIMAT -VS- REPUBLIC CR. APPEAL NO. 151 OF 2004** set out what should be considered when ordering a retrial as follows-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

8. The Appellant was arrested in February 2011. He remained in custody through out his trial and upto the date of conviction and sentence. He therefore has been in custody for now two years and nine months. The trial as stated before was vitiated by an error of the Court and not of the prosecution. But if a retrial was ordered it should not be an opportunity for the prosecution to fill in the gaps in the evidence and should not also prejudice the Appellant.
9. In this case, the complainant on reporting the rape to the police stated that she would be able to recognize the person who had raped her. The rape incident took place during the day and after the complainant and the rapist had been in each other's company for some hours. Before that date the complainant did not know the person who raped her.
10. The police having that knowledge failed to conduct an identification

parade. Instead, the police called the complainant to the Police Station after arresting the Appellant and this is what the complainant said-

“One Sunday, the police telephoned me asking me to go to Samburu town where there is a Police Station. I found two people. I was asked whether one of them was the man who raped me. I was to able to confirm it was the one. The man is the accused before the Court.”

11. In the case **SIMON KETER -V- REPUBLIC KERICHO HIGH CRI. NO. 34 OF 2004** the Court stated in regard to visual identification as follows-

“Visual identification of an Accused person is always supposed to be treated with the greatest care to avoid the possibility of conviction.”

12. Indeed visual identification of an accused person whom the

complainant does not know should be treated with the greatest care. Such identification should always be done by conducting an identification parade. The police having failed to conduct such a parade it would be in my humble submission prejudicial to order the Appellant to undergo a retrial.

13. In the end, the Appellant's conviction is hereby quashed and his sentence is hereby set aside. I order the Appellant to be set free unless otherwise lawfully held.

Dated and delivered at Mombasa this 27th day of November, 2013.

MARY KASANGO

JUDGE