



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 237 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 2125 of 2010 dated 6th September 2011 in the Senior Principal Magistrate's Court at Muranga by Hon. E. Osoro - SPM)

PETER MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant Peter Maina Mwangi was convicted for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006.

He has appealed to this Court against the said conviction and sentence. The Memorandum of Appeal had the following grounds:-

1. That the learned trial Magistrate erred in both law and facts by not considering that the complainant talked of defilement penetration instead of indecent act.
2. That the learned trial Magistrate erred in both law and fact by failing to consider that the complainant said they were playing with other children like Bryan yet they were not called as witnesses.
3. That the learned trial Magistrate erred in both points of law and in facts by not considering that the complainant's mother told the Court that she compelled the complainant to confess.
4. That the learned trial Magistrate erred in both points of law and in facts by failing to consider that the complainant alleged the act took place at a road while the parent said it took place in a house.
5. That the learned trial Magistrate erred in both points of law and in facts by failing to consider the fact that the complainant told the doctor who examined her that the act was done by a person unknown to her.
6. That the learned trial Magistrate erred in both points of law and in fact by not considering the fact that that the complainant's parent told the court that Appellant and the witnesses are family members.

He was furnished with the certified proceedings and filed additional grounds which expounded the original Grounds of Appeal. He appeared before me on 17th October 2013 and urged the Appeal. He

stated that the child stated that it occurred by the roadside while the father talks of a house. There were 4 witnesses – the father, child, the mother and grandmother who testified against the Appellant.

Mr. Okeyo learned State Counsel for the Respondent opposed the Appeal. He said that the Appellant was initially charged with the offence of defilement but it was changed to indecent act contrary to Section 11(1) of the Sexual Offences Act and he was given 10 years which is the minimum under that Section. PW4, the clinical officer did an examination on the complainant who PW2 and made an observation that there was no penetration. However, the clinical officer observed the private parts of PW2 were swollen. They were injured. Mr. Okeyo submitted that this tallied with the complainant's narration to her grandmother and her testimony in court. When asked by her parents and grandmother who had done this to her she identified the Appellant who resided with 4 other males. There was no bad blood between the Appellant, PW1 the father of complainant, PW3 the mother of the complainant and PW5 the grandmother for them to frame the Appellant.

The trial took place partially between Kaniaru PM (as he then was) and E. Osoro SPM. When the succeeding Magistrate took over the case Section 200(3) of the Criminal Procedure Code cap 75 of the Laws of Kenya was not complied with. Section 200(3) provides:-

200 (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.

It is not recorded in the proceedings whether the Appellant was advised of that right when the Hon. Osoro took over the matter from Hon. Kaniaru. The convicting magistrate heard the sworn testimony of the Appellant but did not accord the Appellant who was the accused in the trial the benefit of Section 200(3).

Section 200(4) provides that where the 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 the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial. In **Criminal Appeal No. 135 of 2004 Richard Mole v. Republic (unreported)** the Court of Appeal held that failure to comply with the provisions of Section 200 would in appropriate cases render the trial a nullity. Further, in **Bob Ayub v Republic [2012] eKLR** the Court of Appeal addressed the above provisions and said as follows:-

“The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was required of him with the provisions of Section 200 (3) of the Criminal Procedure Code which as per Section 201 (2) was to apply *mutatis mutandis* in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an Advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that Section 200 was complied with is hollow without any evidence on record”

Clearly, in the case before the trial Court below, there is no record of compliance with Section 200. The Appellant was unrepresented. I am not entirely in agreement with the Courts that hold the explanation on Section 200 must be beyond what the Section provides which is that the succeeding magistrate shall inform the accused of the right to resummons witnesses who have testified before the previous magistrate. Once the explanation is given, the Court must record the answer from the accused. The Appellant was advised of this right and thus was not granted the opportunity to recall witnesses the convicting magistrate had not heard or seen. The essence of such a recall is to ensure the accused has opportunity to have the Court rendering the verdict to be seized of the demeanour of witnesses and the convicting magistrate in the Court below did not have that benefit.

I have considered the principles that would guide the court when considering whether or not to order a retrial. In the case of ***Bernard Lolimo Ekimat vs. R Criminal Appeal No. 151 of 2004 (UR)*** the Court of Appeal stated:-

“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.”

In this case, the Appellant has been in custody for the last three years. The evidence adduced in the trial was not consistent and it would not in the circumstances be in the interests of justice to order a retrial. The issue of vendetta and malice was dismissed perfunctorily yet the Court had not observed the accusers testify. While I cannot determine the guilt or innocence of the accused, I set aside the conviction and order his immediate release as the Appeal is successful.

Dated signed and delivered this 27th day of November 2013

Nzioki wa Makau

JUDGE