REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 212 OF 2011

CHRISTOPHER NJAU GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Nakuru C.M.CR.C. NO.240 of 2010 by Hon. B. Kituyi, R.M. dated 24th August, 2011)

JUDGMENT

INTRODUCTION

1. The appellant was charged jointly with the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Sub-Section 9(2)** of the **Sexual Offences Act** No.3 of 2006.
2. There was also an alternate count of **Indecent Act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.**
3. The particulars of the offence, in brief, are that on the 3rd October, 2010, the complainant (P.W.1) had gone to church and on her way back home, she met up with appellant who was her CRE teacher. P.W.1 stated in evidence that the appellant invited her to his house. She declined but the appellant coaxed her and took her by the hand and led her therein.
4. The grandmother RWN (P.W.2) had waited for P.W.1 till 6.00p.m. and then went out in search of her. As she passed the appellant's house she heard P.W.1's laughter and she stormed in and found P.W.1 and the appellant both seated on a chair and the appellant had his arm around P.W.1.
5. P.W.2 upon finding the two in a compromising situation was livid, and arranged for both of them to be transported to Naishi Police Station, where the appellant was charged with the offence.
6. The appellant was found guilty on the alternative count and was convicted and sentenced to serve a term of ten (10) years imprisonment.
7. Being aggrieved by the decision of Hon. B. Kituyi, Resident Magistrate, Nakuru delivered on the 28th August, 2011, the appellant preferred this appeal and listed eleven (11) grounds of appeal in his amended petition of appeal.
8. The grounds of appeal; are i*nter alia*:

i) That he did not plead guilty and firmly maintain the same.

ii) That the trial learned magistrate erred in a matter of the law and facts when he merely based the conviction on the basis of misapprehension evidence adduced in court by the prosecution without circumstance putting into consideration that the same was illegal and bellow the standard required by law of the land in criminal matters.

iii) That the learned trial magistrate once more faulted in a matter of the law and fact when he maliciously based the conviction on the purported attention claimed by the complainant yet the same were fabrication and mere couching conspired by the prosecution side on the adverse evidence evidence against me, of the attempting defilement

iiia) That the learned magistrate of the trial court erred in law and infact by finding that the prosecution had proved its case while indeed the prosecution had not proved its case its case beyond reasonable doubt

iiib) That the learned magistrate of the subordinate court erred in law and infact in finding that the prosecution had established a *prima facie* case against the appellant yet the prosecution had not established a *prima facie* case.

iiic) That the learned magistrate had erred in law and infact by failing to take into consideration the credible testimony of the appellant.

iiid) That the learned magistrate of the subordinate court had erred in law and in fact by taking into consideration irrelevant issues when making the judgment.

iiie) That the learned magistrate of the subordinate court had erred in law and in fact by failing to take into consideration the fact that there was a harmonious relationship between the appellant and the complainant

iiif) That the learned magistrate of the subordinate court had erred in law and in fact in failing to take into consideration the fact that the prosecution had not established *mens rea* at all

iiig) That the learned magistrate of the subordinate court had erred in law and in fact by not putting into consideration the fact that the complainant had not made any complaint at all against the appellant.

iiih) That the learned magistrate of the subordinate court had erred in law and in fact by relying and basing his judgment on hearsay

iiii) That the learned magistrate erred in law and in fact by failing to consider the fact that the reason why the accused was arrested was because the complainant's grandmother said the appellant was spoiling the complainant.

iiij) That the learned magistrate erred in law and in fact by failing to put into consideration the fact that the investigation officer's testimony contradicted with those of the complainant, the complainant's grandmother and the clinical officer as follows:

a) The investigation officer claimed that the accused was found in bedroom while the grandmother said she was in the sitting room

b) The investigation officer claims the doctor confirmed that the complainant was defiled yet in fact the clinical officer testified that the complainant wasn't defiled

iv. That the learned trial magistrate erred in law in not appreciating that the Provisions of Section 214 of the Criminal Procedure code were not complied with and as a result, the Appellant's rights were violated
v. That the learned trial magistrate erred in not appreciating that the evidence of the complainant was not believable and that it was raising doubts
vi. That the learned magistrate of the trial court erred in not attaching weight to the fact that the prosecution witness radically changed its version of events to the point that the charge sheet had to be amended.
vii. That the learned trial magistrate erred in finding that the appellant and the complainant had

previously had sex, a point that was immaterial to the case before the court and which in my event

viii. That the learned trial magistrate erred in believing the prosecution witness when their evidence was clearly inconsistent, flimsy and contradictory.

ix. That the learned trial magistrate made crucial error in effecting the sentence against the appellant without considering the fact that the same was harsh and extremely excessive given to the fact that the evidence on record was flimsy and inconsistence.

x. That the learned trial magistrate erred both in a matter of the law and fact when seemingly objected the appellant's defence without cogent reasons as provided by the law section 109(1) of the comprehensive in casting considerable doubts to the strength of the prosecution case.

xa) That the learned trial magistrate erred in law and in fact by passing a sentence that was harsh and excessive in the circumstances of the case.

xi. That the appellant's overall effect is that this appeal be allowed, conviction quashed and the sentence of ten (10) years set aside and he be set to liberty.

9. At the hearing of the appeal, Learned Counsel Mr. Kahiga appearing for the appellant and Learned Prosecuting Counsel for the State, Mr. Omutelema

both made oral submissions.

ISSUES FOR DETERMINATION:

10. Having heard the submissions of both counsel, this court finds the following issues for determination:

i) whether the trial magistrate complied with the provisions of

Section 214 of the **Criminal Procedure Code;**

ii) whether the court should order for a retrial.

ANALYSIS

11. This being the first appellate court, it is incumbent upon this court to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer rto Okeno V. Republic, [1972] E.A. 32

12. Counsel for the appellants submitted that the trial magistrate failed to inform or explain to the appellant of his basic rights to recall and re-examine the prosecution witnesses after the charge was substituted as provided by Section 214(i)(ii).

13. Counsel further submitted that the charge had been substituted after the prosecution had closed its case. That after the charge had been substituted and fresh plea taken, it was incumbent upon the trial magistrate to explain to the appellant that he had the aforementioned rights.

14. That failure by the trial magistrate to do so was a fatal procedural irregularity that could not be cured.

15. Counsel urged the court to allow the ground of appeal No.4 as the appellant's rights had been violated and thus the trial was flawed.

16. Counsel for the State opposed the appeal and argued that the ommission by the trial court to inform the appellant of his rights under **Section 214(2)** ibid was not a fatal omission.

17. That this omission was curable under the provisions of **Section 382** of the **Criminal Procedure Code**.

18. Counsel further submitted that even though the charge had been amended, the facts were similar and that the appellant had a clear understanding of the nature of the charge.

19. Counsel went further to compare the wording of **Section 214** of the **Criminal Procedure Code** *vis a vis* with that of **Section 200** of the **Criminal Procedure Code.**

20. That the wording of **Section 200** is set out in very express terms and makes it a mandatory duty of

the court to inform an accused person of his rights whereas **Section 214** does not expressly make it a duty of the court to do so.

21. Counsel submitted that the appellant was not prejudice by the amendment and reiterated that the errors or omissions were curable by **Section 382** of the **Criminal Procedure Code.**
22. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence.
23. This court has re-assessed and re-evaluated the evidence adduced and has had occasion to peruse the record of appeal and the proceedings therein.
24. This court has also had occasion to peruse the provisions of **Section 214** of the **Criminal Procedure Code** which provides as follows:

> **"214.(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that:**

i. **where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**

ii. **where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.**

> (2) **Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

25. This court takes cognizance of the fact that the initial charge was that of **defilement** contrary to **Section 8** of the **Sexual Offences Act**, which carries a stiff sentence
26. This charge was substituted with a lesser charge of **Indecent Act with a child** which carries a lesser sentence.
27. In this instant case, this court opines that the variance and the alteration of the charge was not inconsequential and was substantial in nature.
28. The common practice is that where the substitution is of such a substantial nature, notwithstanding the fact that the evidence may be the same, it is incumbent upon the court to inform the Accused person of this right as set out in Section 214(2)
29. From the reading of the **Section 214** and the proviso, this court opines that it is only after being duly informed of this right that the Accused (appellant) can thereafter make his demand to recall and cross-examine the prosecution witnesses.
30. Reference is made to the Court of Appeal Decision of **Harrison Mirungu Njuguna** where the court made the following observation:

> **"The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh or to be further cross-examined by him. This is not a procedural failure such as failing to ask him to plead afresh. The right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further, is a basic right going to the root of a fair trial and clearly it was the duty of the trial court to show in his record that he had informed the appellant of that right and to record further what the appellant said in answer to the information."**

31. This court is guided by the Court of Appeal's observations in the above case.

32. Upon perusal of the court record, this court notes that the trial magistrate failed to record that it had duly informed the appellant of this basic right and the record also does not reflect the appellants response.
33. This court concurs with the appellant's counsel's submissions that such failure by the trial court constituted a substantial flaw to the trial proceedings and this court finds that the trial magistrates non-compliance was prejudicial to the applicant as it constituted a violation of his rights as provided by **Section 214** of **Criminal Procedure Code.**
34. The issue that arises next relates to retrial. Having found the proceedings to be flawed, should this court order for a retrial?
35. When considering whether to order for a retrial, this court must be satisfied that there is sufficient evidence on record that can support or lead to a conviction. This court must also take into consideration whether the appellant would be prejudiced by the re-trial. The court must also take into consideration whether in the interest of justice, the case ought to be retried.
36. On the issue of sufficiency of evidence, this court has had occasion to peruse the evidence of P.W.1.
37. The evidence of P.W.1 was that the appellant touched her breasts and buttocks and requested her to have sex with him. Her evidence is that she did not oblige as she was on her monthly periods. P.W.1 also testified on her other previous sexual encounters with the appellant.
38. There is also evidence on record that supports the fact that P.W.1 was a minor.
39. This court makes reference to the provisions and proviso of **Section 124** of the **Evidence Act** on the issue of corroboration of evidence of a child in cases of sexual offences.
40. From the above, this court is satisfied that there is sufficient evidence that can lead to a conviction.
41. This court is also alive to the fact that this offence is serious and also that it is prevalent amongst teachers. That it is irresponsible for teachers to engage in sexual affairs with students who have been entrusted into their care and this court is satisfied that in the interests of justice the case ought to go for retrial and finds that the appellant will not be prejudiced by a retrial.

FINDINGS:

i. This court finds that non-compliance of the provisions of **Section 214(2**) of the **Criminal Procedure Code** by the trial magistrate rendered the trial flawed and defective.
ii. This court further finds that in the interest of justice, the case be referred for retrial.

CONCLUSION

i. The conviction is hereby quashed and the sentence set aside.
ii. The case is hereby referred back to the subordinate court for retrial.
iii. The matter be mentioned before the Chief Magistrate, Nakuru on 9th December, 2013
iv. The appellant shall remain in prison custody pending the retrial.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 6th day of December, 2013.

A. MSHILA

JUDGE