REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 276 of 2010

FREDRICK MWANIKI KANDEGE ……..……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

The appellant was charged in count 1 with the offence of defilement contrary to Section 8 (1) (4) 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. In count 2 he was charged with the offence of unnatural offence contrary to Section 162 (a) of the Penal Code.

After the trial he was convicted and sentenced to 15 years imprisonment in count 1 and 10 years imprisonment in count 2 which sentences were ordered to run consecutively. This appeal arises from the said conviction and sentences.

The record before me shows that this case was heard by two magistrates. The first magistrate heard four witnesses and on taking over, the succeeding magistrate heard 1 witness for the prosecution, the defence of the appellant and his witnesses. When the succeeding magistrate took over the hearing, she observed:

“Trial court has since been transferred to another jurisdiction Section 200 CPC will apply.

The appellant is then recorded to have said
“I want my case to proceed de novo. I never had statements”.

The prosecutor is then recorded as objecting and the court in its brief ruling said it would be in the best interest of the minor, and interest of justice that the case proceeds from where it had reached.

It was the right of the appellant to demand his case be heard de novo. It is a right that cannot be compromised for any reason whatsoever. In this particular case, there was no consideration of his rights protected under Section 200 of the Criminal Procedure Code. The provision of the said Section are what confers jurisdiction upon the succeeding magistrate. The record of the court should always clearly show that the accused person has been informed of his rights and that he has exercised the options provided therein. Indeed, Section 200 (3) is couched in mandatory terms. The failure by the succeeding magistrate to comply therewith renders all the proceedings a nullity. **– See Cr. Appeal No. 310 of 2008 Paul Kithinji vs. Republic (2009) eKLR.** In the **Case of Ndegwa Vs Republic (1985) eKLR 534** the court observed as follows,

"1. The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2. The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.

3. No rule of national justice, statutory protection, and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.

4. The statutory and time honoured formula that the magistrate making judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.

5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of the witnesses".

It is clear from the foregoing, the learned succeeding magistrate's decision to decline the appellant's request to start the case de novo was prejudicial and thus vitiated in trial. The learned counsel for the Republic rightly concedes this appeal on the ground that Section 200 of the Criminal Procedure Code was not complied with. However, the offences with which the appellant was charged are serious. I note that he was first arrested on 14th September, 2007. The trial ended by him being convicted and sentenced on 3rd May, 2010 which is just about 2 and half years ago.

I have considered whether or not I should order a retrial of the appellant. In the case of **Mwangi vs. Republic (1983) KLR 522** the Court of Appeal stated as follows,

"**Ordinarily a retrial will be made where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely by the prosecution's making or not……..It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial" –** see also **Muiruri Vs Republic (2003) KLR 552 and Rwaru Mwangi vs Republic Criminal Appeal No. 18 of 2006 (ur).**

The appellant was sentenced to 15 years imprisonment in count 1 and 10 years imprisonment in court II which sentences were ordered to run consecutively. He has so far served just about 2 years of the total 25 years imprisonment. The offence as I have observed is serious as depicted in the penalties provided under the law. From the evidence as a whole, the conviction is likely to be entered if a retrial were to be ordered and so taking into consideration all these factors, I believe the interests of justice require that a re-trial be ordered.

Accordingly, this appeal is hereby allowed conviction quashed and sentences set aside; but a retrial against the appellant shall be conducted by a court of competent jurisdiction other than the magistrates who conducted the trial leading to this appeal. I am informed that the appellant is out on bail pending the determination of this appeal. He shall now be escorted by his learned counsel to Embakasi Police Station for appropriate action within the provisions of law.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of September, 2012.

A. MBOGHOLI MSAGHA

JUDGE