No.2988

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR. APPEAL NO.68 OF 2010

D.K.M……..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from original conviction and sentence in Cr. Case No.434 of 2008 in the Resident Magistrate's Court at Kilungu on 29th September, 2009 by Hon. H. Nyakweba)

JUDGMENT

The appellant, **D.K.M** was charged before the Senior Resident Magistrate's court at Kilungu with the offence of Incest by a male person contrary to section 20(1) of the Sexual Offences Act. It was alleged in the particulars of the offence that between 13th October, 2008 and 16th October, 2008, in Makueni District within Eastern Province, the appellant unlawfully committed an act which caused penetration to the genital organ of **M.K.K**, a child aged twelve years using his genital organ a child who to his knowledge was his daughter. The appellant denied the charge and he was tried in earnest.

In her evidence, **M.K.K** "the complainant" stated that she was living with his father, the appellant in a two roomed house after he had chased away her mother, **J.N** (PW.5). Their beds were next to each other. One night on a date she could not remember but which she said was soon after he had come from prison, the appellant forced her to sleep with him. Afterwards, he threatened to kill and bury her if she told anybody of the incident. He repeated this on two other occasions. Succumbing to the threats, the complainant never told anybody of her encounters with the father. The complainant though was a standard 3 pupil. On 27th October, 2008, her class teacher noticed that she was traumatized and looked disturbed. She alerted the Head teacher, (PW.1) who called the complainant to his office and when he inquired from her what the problem was, she broke down and told him that she had been defiled by her father. The Head teacher then relayed the information to one, **Teresiah Kamanthe Ngonzi** (PW.4), a Coordinator of Kenya Women Political Caucus whose mandate is to assist women and children in such situations. In fact she is the one who was handed custody of the complainant by the DO, Kilome after he had determined that she was in need of care and protection. She had been found loitering in Kilome Market. She surrendered the complainant though, to the appellant after he came out of prison. When she got wind of the offence, she alerted the area Chief who in turn alerted the Police.

On 27th October, 2008 the complainant was taken to Kilungu Sub-District hospital in the company of two Police Officers **P.C. Nyambogo** and **P.C. (W) Naomi Mutete** (P.W.6). She was examined by **Dr. Judith Kimuyu** (PW.3). Her examination revealed that she had no bruises on her genitalia, no vagina bleeding but the hymen was broken. Tests showed few pus cells in the Vagina tract. She was of the opinion that the complainant must have slept with a person but could not tell who.

The mother of the complainant **J.N** (P.W.5) confirmed that at one time, she was married to the appellant before they separated in 1994. They had three children one of whom was the complainant. She left her behind when she walked out of the marriage. She put the complainant's date of birth to be sometimes in 1993.

In his unsworn defence, the appellant merely told the court to consider both sides before arriving at its decision.

The learned Magistrate having evaluated the evidence on record was persuaded that the prosecution had proved its case against the appellant. He therefore proceeded to convict the appellant whereupon he sentenced him to thirty (30) years imprisonment.

Aggrieved by conviction and sentence aforesaid, the appellant lodged the instant appeal on four (4) grounds; that his conviction was based on evidence riddled with doubts and contradictions, there was violation of the provisions of section 200(3) of the Criminal Procedure Code by the learned Magistrate, the case of the prosecution was not proved beyond reasonable doubts and finally, that his defence was not given due consideration.

When the appeal came before me for plenary hearing on 3rd November, 2011, the State through **Mr. Mukofu**, learned State Counsel put the appellant on notice that under section 354 (3) (a) (ii) of the Criminal Procedure Code the State was bent on asking this court to enhance the sentence imposed on the appellant if he insisted on pursuing the appeal and he lost. The sentence imposed by the trial court, according to the State Counsel was illegal. Though he was sentenced to 30 years imprisonment, the sentence ought to have been life imprisonment as the victim was a girl aged 12 years. The court having explained to the appellant at length the purport of the State's intentions and having understood the same, the appellant elected nevertheless to pursue the appeal.

In support of the appeal, the appellant tendered written submissions which I have carefully read and considered.

In opposing the appeal, **Mr. Mukofu** submitted orally that the trial court properly directed itself to the facts and the demeanours of witnesses. The court was impressed with the candidness of the complainant. The conviction was thus proper. The sentence imposed though was illegal. He therefore prayed that the sentence be enhanced to the imprisonment in accordance with section 21 of the Sexual Offences Act.

After setting out the facts and the evidence, together with the grounds of appeal and submissions, it is now my duty as a first appellate court to re-appraise and evaluate the evidence afresh with a view to reaching my own decision in the matter. The reason for my doing so, is that an appellant on a first appeal expects the appellate court to rehear the case and make its own findings. This court will do this against the understanding that it does not have the benefit of hearing and seeing the witnesses who testified during the trial. This position of course deprives this court of the opportunity to appreciate the demeanors of such witnesses. It is the demeanor of a witness that partly informs a court in deciding whether to believe this or that witness. Inspite of this handicap, this court must do its duty and satisfy the appellant that it has not simply glossed over the evidence without giving it a proper and substantive analysis. See **Pandya Vs. Republic (1957) E.A.336**, **Okeno Vs. Republic (1972) E.A. 32** and **Kariuki Karanja Vs. Republic (1986) KLR 190**.

Be that as it may, it appears to me however, that the determination of this appeal will turn on ground 2 of the petition of appeal. This is the ground in which the appellant laments:-

"***That the pundit magistrate erred in law while not fully complying with Section 200(3) of the Criminal Procedure Code".***

It is common ground that the case in the trial court was presided over by 2 magistrates *viz* **J.O. Were** SRM and **H. Nyakweba,** R.M. at different times. Indeed **J. O. Were** presided over the evidence of

PW.1, PW.2 and PW.3; whereas **H. Nyakweba** handled the evidence of PW.4 and PW.5, the defence, crafted and delivered the judgment. **H. Nyakweba** took over the case from **J.O. Were** presumably under **section 200 of the Criminal Procedure Code**. That section enjoins the succeeding magistrate, like **H. Nyakweba** in this case to inform the accused of his right to demand that any witnesses be resummoned and recalled. That section is in these terms:

"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."

The record before me clearly shows that **Nyakweba** did not comply as required of him, with the aforesaid provisions of the law. It was not enough for him to merely say in the record "***The provisions of section 200 Criminal Procedure Code explained***". The record must show that he explained to the appellant his right to demand the recall and rehearing of any witnesses as required under that provision. The trial court owed that duty to the appellant. The written law of the land makes that duty mandatory. The mere mention in the record that ***section 200 explained*** is hollow if it is without specifics as in this case. I appreciate that this issue was not canvassed before me by either of the parties. However, I came across it as I went through the record in preparation for this judgment. Since it is a matter of law, I have to deal with it. For the reason that there was no due compliance with the mandatory provisions of section 200 of the Criminal Procedure Code, I would declare the trial of the appellant in the subordinate court a nullity.

What next? It must be a retrial or the appellant walking scot free.

I have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by the Court of Appeal and this court. Suffice to mention the case of **Muiruri Vs. Republic (2003) KLR 552**. Where the Court of Appeal held inter alia as follows:-

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include, illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not..."

In this case, the offence charged is serious. The allegation is that the father had carnal knowledge of a daughter albeit unlawfully. Such an act is offensive to any right thinking person. If true, then it is traumatic to the victim and may have a lifelong impact on her. The law must therefore consider the impact of the offence on the victim and those affected. I have no doubt at all that the witnesses are still available and a proper retrial can still be mounted. The appellant was convicted and sentenced on 29th September, 2009 which is not long ago. A retrial in the circumstances would not cause injustice to him. The illegalities that have led to this state of affairs were committed by the trial court. On these grounds, I think it will be in the interest of justice and of the appellant that a retrial be ordered.

In the upshot, the appeal is allowed. The conviction and sentence imposed upon the appellant are set aside. The appellant shall however, be retried by any other magistrate of competent jurisdiction, other than **J.O. Were** and H. **Nyakweba** R.M. who presided over the initial trial. For this purpose, the appellant shall appear before the Chief Magistrate court, Kilungu on 9th December, 2011 for his retrial to commence. Pending such appearance, the appellant shall remain in custody. I further order that his retrial be concluded expeditiously.

Dated, signed and **delivered** at **Machakos,** this **30th** day of **November**, 2011.

ASIKE-MAKHANDIA

JUDGE