REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS
CRIMINAL APPEAL 154 OF 2006

MUSILI MULATYA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The Appellant herein, Musili Mulatya was charged with the offence of a defilement of a girl under the age of 16 years contrary to section section 145 (1) of the Penal Code. It was alleged that on 2.12.2002 in Mwingi District he had carnal knowledge of MM, a girl under the age of 16 years. He denied the charge and after trial was convicted and sentenced to life in prison.

2. It is his case on appeal that section 200 of the Criminal Procedure Code was not complied with and therefore the trial was a nullity and in any event, the charge against him was not proved beyond reasonable doubt. Further, that the evidence on record was contradictory and yet his defence was not taken into account and had that been done as it would have overturned the weak evidence presented by the prosecution.

3. I note from the record that the evidence of PW1, the complainant (MM aforesaid) was taken by Hon. D.O. Ondabu, SRM as was the evidence of PW2, RMM, PW3, K M, PW4, P.C Dominic Nganyi and PW5, Peter M Thereafter the evidence of PW6, JM, and the Appellant's evidence in his defence as well as the judgment was recorded and delivered by Hon. J.K. Ngarngar, SRM respectively.

4. There is no record whatsoever that section 200 of the code was complied with when Hon. Ngarngar took up the case and therefore the Appellant's complaint in that regard is valid. What is the effect of non-compliance with that section? Section 200 of the Code Provides as follows:-

> " ***(1) Subject to sub-section (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 re-summon the witness and recommence the trial.***
>
> **(2)** ***Where a magistrate who has delivered judgment in a case but has not passed sentence,***

ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) ***Where an 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 that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial***."

5. The effect of non-compliance with that section 200 (3) as I understand it, is that the trial is rendered a nullity and our Court of Appeal has said so on more than one occasion- **see** Gor vs Republic.

6. The above being the law, it follows that I am appropriately bound and will declare the Appellant's trial a nullity and quash his conviction and set aside the sentence imposed.

7. Should I order a retrial? In Muiruri vs Republic [2002] KLR 552, it was held inter alias follow;

"(***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 require 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."

8. That is the applicable law and in the present case, none of the parties addressed me on the subject. The complainant at the time of the incident was 7 years old. It is now 7 years since the incident and she is 14 years old and probably in Std 8 as she was at the time of the incident in Std 1. The evidence against the Appellant was compelling and there is no doubt that he was otherwise properly convicted. I have taken into account the time lapse and a more important issue; the complainant is by now a young lady probably focused on her life after the ordeal she was subject to. Can I fairly put her in a position where she has to relive that ordeal in court all over again? On the other hand should the Appellant walk away scot-free for a traumatizing act on his part? Should he not face justice and his accusers for justice to be seen to be done?

9. My mind is titled towards ordering a retrial because the Appellant should he be found guilty, should face the sword of justice and if not, let him then walk away after a fair trial.

10. In the end, I will allow the appeal but the Appellant will be retried at Mwingi SRM's court by any magistrate other then Hon. D.O. Ondabu and Hon. J.K. Ngarngar.

11 Orders accordingly.

Dated and delivered at **Machakos** this **29th** day of **October 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Wang'ondu for Republic

Appellant present

Isaac Lenaola

Judge