Murira v Republic (Criminal Appeal 89 of 2019)
[2023] KEHC 23161 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 89 OF 2019

PM MULWA, J

OCTOBER 5, 2023

BETWEEN

JOHN NDUNGU MURIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that on the 28th day of October 2017 in Juja sub county within Kiambu county, intentionally and unlawfully caused his penis to penetrate the vagina of CWA a child aged 9 years.

2. He also faced an alternative charge of committing an indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*.

3. The Appellant denied the charges. At the conclusion of the trial he was convicted on the main count and sentenced to life imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

4. He initially filed an appeal to this court through a memorandum of appeal filed on 11th October 2019 but he subsequently filed amended grounds of appeal together with his written submissions albeit without leave of the court. These grounds are as follows;

    i. The charges as drafted were bad in law therefore precarious enough to cause detriment.

    ii. The trial was unfair as per Articles 25, 47, 49 and 50 of the (new) Constitution.

    iii. The Prosecution did not prove vital features to the threshold required in such serious matters.

iv. Positive penile penetration was not legally proved.

v. Pw1's age was not proved as per the statutory legal framework.

vi. The Appellant's defence was disregarded without cogent reasons.

vii. There was a clear crystal grudge which existed between the Appellant and the family of the Complainant.

5. The appellant prayed that the appeal be allowed, conviction quashed and the sentence set aside.

6. The appeal was disposed of by way of written submissions. In a synopsis, the appellant contends that on the totality of the evidence, the prosecution failed to prove the charge to the required standard. He also submitted that the charge sheet was defective and that the appellant did not get a fair trial. He prayed that the conviction and sentence be quashed.

7. The appeal is contested by the State. Learned State Counsel, Mr. Baraka, relied wholly on his submissions dated 23rd January 2023. In a synopsis, he contended that all the ingredients of the offence were proved beyond reasonable doubt. He urged the court to dismiss the appeal.

8. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent. I have also read the judgment of the learned trial magistrate. Having done so, I find the issues for my determination are;

i. Whether the learned trial magistrate did comply with the requirement of section 200(3) of the *Criminal Procedure Code* Cap 75 Laws of Kenya upon taking up the matter from the previous magistrate.

ii. What was the effect of failure to comply with the said provisions (if there was any)?

iii. Whether the prosecution did establish its case beyond reasonable doubt.

9. The role of this Court as the first appellate court is well settled. It was held in the case of Okeno v R [1977] EALR 32 and further in the Court of Appeal case of Mark Oiruri Mose v R [2013] eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. Before delving into the other grounds of appeal and whether they are meritorious, I first observe that the appellant raised a ground of appeal which in my view is so fundamental in the justice system that it forms part of the constitutionally guaranteed right to fair trial. In his submissions, the appellant submitted that the trial magistrate breached section 200(3) of the Criminal Procedure Code. He submitted that the succeeding magistrate who took over from Hon. C.A Otieno did not comply with the said section. The appellant relied on the cases of Ndegwa v Republic [1985] eKLR 534 and Paul Kithinji v Republic [2009] eKLR where it was held that failure to comply with the provisions of section 200(3) of the Criminal Procedure Code Cap 75 of the Laws of Kenya ought to render a trial a nullity.

11. In my view, this is a serious issue of law as opposed to facts which ought to be determined at the preliminary stage or rather before the other issues can be determined. This is because, if found that the learned trial magistrate was in violation of section 200(3) of the Criminal Procedure Code, the trial ought to be declared a nullity.

12. Section 200 of the Criminal Procedure Code deals with instances where a criminal trial is handled by more than one magistrate. The said provision stipulates:

'(1) Subject to subsection (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 resummon the witnesses 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 exercise 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 appellant 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.

13. According to this provision of the law, it is clear that it is the trial court that is legally bound to take the initiative and inform the accused of his right whenever one trial magistrate takes over a trial from the preceding or a previous trial magistrate, it is incumbent upon the succeeding trial magistrate to inform the accused of his right to demand that any witness who has testified before the previous magistrate be resummoned and reheard afresh.

14. I have perused the record of the trial court and it shows as was submitted by the appellant that indeed Hon C.A. Otieno took evidence of PW1, Pw2, Pw3 and Pw4. On 27th March 2019 the case was reallocated to a different magistrate. Thereafter, on 23rd April 2019, the matter was taken over by Hon N.M. Kyanya and this is how the proceeding of that day went;

Accused: I wish for the case to proceed from where it had reached.

Court: matter to proceed from where it had reached. Further hearing on 16.5.19.

15. A further perusal of the trial court record does not show anywhere where the trial court might have indicated to the appellant his right as stipulated under Section 200(3) of the Criminal Procedure Code. It is obvious therefore that the right to recall witnesses and/or the trial starting de novo was not explained to the appellant.

16. In Raphael v Republic [1969] E.A. 544, it was held that failure to inform the accused of his right is fatal because such information is the prerequisite for assumption of jurisdiction of the succeeding magistrate. Without informing the accused, the succeeding magistrate has no jurisdiction to preside over the trial and the trial is thereby rendered a nullity.

17. Further, in Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro vs Republic; the Court of Appeal held as follows:"The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an

accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left jurisdiction of the court as was the case here or some may have even died. To this extent we are in agreement with the learned judges of the High Court that "this provision does not oblige the succeeding magistrate to start denovo" but what is mandatory is to inform an accused person of his right under section 200(3) of the Criminal Procedure Code."

18. Applying the above principles set by the Court of Appeal to the instant appeal, I find that the learned trial magistrate did not at all explain to the appellant herein the requirements of Section 200 CPC. The appellant, nonetheless, on his own accord and initiative requested for the case to proceed where it had reached.

19. Accordingly, I find and hold that the learned trial magistrate erred in law when she failed to comply with the provisions of Section 200 (3) of the Criminal Procedure Code.

20. On the effect of failure to comply with the said provision as stated above, Section 200(4) of the Criminal Procedure Code provides that:

> " 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."

21. Thus, section 200(4) of the Criminal Procedure Code gives the High Court discretionary power to set aside a conviction where the convicting magistrate convicted an accused person upon evidence not wholly recorded by him or her. The court is further bestowed with discretion (upon setting aside the conviction) to order a retrial. This was acknowledged by the High Court sitting at Meru in Mercy Mugure v Republic [2018] eKLR, Mrima J in appreciating the effects of failure to comply with section 200(3) held that:

> " The appellant's right to a fair hearing under Article 50 of *the Constitution* was therefore infringed by the failure by the succeeding magistrate to fully comply with Section 200(3) of the Criminal Procedure Code. In essence all the subsequent proceedings were veiled with that unconstitutionality and cannot stand in law. That is why this Court will not deem it necessary to deal with the rest of the appeal on its merit. I will however consider the possible way forward; that is If the appellant is to be set at liberty or be re-tried."

22. For the above reason, it is my considered view that, the failure by the trial magistrate to comply with section 200(3) of the Criminal Procedure Code makes the trial court's conviction of the appellant herein invalid and all the subsequent proceedings veiled with unconstitutionality and cannot stand. The conviction was not safe and I quash it, and set aside the sentence.

23. Having quashed the appellant's conviction and set aside the sentence imposed on him on account of failure of the trial magistrate to comply with the provisions of Section 200(3) of the Criminal Procedure Code, the next question is whether the appellant should be set at liberty of a retrial should be ordered.

24. This question was discussed by the Court of Appeal in Samuel Wahini Ngugi v Republic [2012] eKLR, where the Court held:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar v R [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'-."

25. In the instance case, in my view, if a retrial is ordered, what the succeeding trial magistrate would be expected to do is to simply comply with the provisions of Section 200(3) of the Criminal Procedure Code. Should there be any challenges in getting or tracing witnesses whom the appellant may demand and who may have left the jurisdiction of this court, that they be recalled to testify, it will be upon the prosecution to indicate to the trial court and the court will make a decision based on available evidence and in accordance with the law as analyzed in this judgment.

26. In those circumstances and balancing the rights of the appellant to a fair trial and the rights of the complainant to have administrative action that is expeditious, efficient, lawful and reasonable and procedurally fair, I find that a retrial would be suitable in this case.

27. I therefore direct for a retrial of the appellant before any other magistrate, in Thika Court, other than the one who heard and determined this matter.

28. Having so found and held, I find it unnecessary to determine the other grounds of appeal. Accordingly, and to the extent that I have stated above, this appeal is allowed. The appellant to be retried at Thika Magistrate's Court for the same offence.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 5TH DAY OF OCTOBER 2023

.....

P. MULWA

JUDGE

In the presence of:

Duale/Kinyua– court assistants

Appellant in person – present virtually from Kamiti Maximum

Mr. Gacharia– for the state