REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 16 OF 2019

BETWEEN

KIPKEMOI RICHARD TOWET.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court

at Makadara in Cr. Case No. 3785 of 2014 delivered by Hon. A. R. Kithinji (SPM)

on 26th October 2018).

JUDGMENT

1. The Appellant, **Kipkemoi Richard Towet**, was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the 31st day of July, 2014 in Industrial Area within Nairobi Area, intentionally touched the vagina of **MM**, a child aged four (4) years with his finger. The Appellant pleaded not guilty to the charge. Upon trial, he was found guilty and convicted accordingly. He was sentenced to serve ten (10) years imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

2. The appeal is premised on seven grounds of appeal that was filed contemporaneously with written submissions in person on 18th December, 2019. The grounds can be summarized as follows:

> ***i. That the learned trial magistrate erred in both law and fact by convicting the Appellant on the basis of PW1's unsworn statement.***
>
> ***ii. That the learned trial magistrate erred in both law and fact by convicting the Appellant in reliance on the prosecution witnesses (PW1 and PW2) statements which were contradictory, inconsistent and untrustworthy.***
>
> ***iii. That the learned trial magistrate erred in both law and fact by convicting the Appellant on the basis of PW4's statement which contradicted that of PW1 and PW2.***
>
> ***iv. That the learned trial magistrate erred in both law and fact by convicting the Appellant without considering that Dr. Shako who examined PW1 and filled the P3 form was not summoned to testify.***
>
> ***v. That the learned trial magistrate erred in both law and fact by convicting the Appellant whereas the provisions of Section 200 (3) of the Criminal Procedure Code were not explained to him.***
>
> ***vi. That the learned trial magistrate erred in both law and fact by failing to comply with the provisions of Section 213 of the Criminal Procedure Code thus rendering the trial defective.***
>
> ***vii. That the learned trial magistrate erred in both law and fact by rejecting the Appellant's defence without giving cogent reasons.***

Summary of Evidence

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32).**

4.The Prosecution's case can be summarized as follows: In her unsworn evidence, the complainant **PW1, MM** then a minor aged four (4) years stated that the Appellant was known to her by the name Mnandi. She stated that the Appellant lived near their home and she knew where his house was. PW1 recalled that when she returned back home from school on 31st July, 2014, she found their door locked with a padlock. She went to play but saw the Appellant then covered herself with a curtain which was hanging outside their house over the door. The Appellant called her to his house which was near theirs and inserted his finger in her private parts which she pointed at in court. Thereafter, the Appellant went away in the company of another man. When her mother returned home, she told her what the Appellant had done to her as she was feeling pain in her genitals. She never saw the Appellant again thereafter.

5. PW1's mother **PW2, AS** testified that when she returned home on the material day at around 4.15 pm, she found PW1's school bag at the door but PW1 was not there. PW1 was hiding somewhere. She called her out and when PW1 came, she asked her what was happening. PW1 told her that their neighbour Mnandi, was calling her. PW1 told her that the Appellant had inserted his hand in her underpants and touched her vagina. PW2 checked PW1's vagina and saw a small wound thereon. PW2 looked for the Appellant and found him at the chemist. She confronted him but he denied. PW2 reported the incident to the police. The following day, she took PW1 to the hospital where it was confirmed that PW1 had bruises. PW2 took the medical report to Industrial Area Police Station and was issued with a P3 form which was filled. PW2 confirmed that she had no grudge with, and had never, differed with the Appellant.

6. On 11th August, 2014, PW2 identified the Appellant to **PW3, Sergeant Peter Wangora** formerly of Lunga Lunga Administration Police Post and his colleague Kellen leading to his arrest. The case was investigated by **PW4, Inspector Beatrice Maithya** formerly of Industrial Area Police Station. PW4 produced PW1's P3 form which had been filled by a Dr. Shako.

7. The Appellant (DW1) elected to give a sworn testimony and called one witness. He testified that he was a security guard with Bob Morgan (BM) Security. On the material day, he left work in the morning and went home. He took tea, slept and woke up at 11.00 am. He found some water directed at his house. He removed the stove outside. As he was going out with Mutai, he found PW1 standing where he had placed the stove. He removed it and went to the clinic for treatment. PW2 went to the clinic and asked them who was joking with her child. Later on 10th August, 2014, two police officers went to his house, woke him up and told him that he had indecently assaulted a child. He was later taken to court. On cross examination, he stated that they had differences with PW2 but had never differed with PW1.

8. **DW2, Kipkemoi Mutai** testified that on the material day, he went to wake up the Appellant at 3.00 pm as he was unwell and wanted the Appellant to assist him to get treatment. They proceeded to a clinic entrance where there was a child. The Appellant asked the child who had blocked the water. DW2 heard a lady shouting "*leave my child alone*". Later, the Appellant told him that the child's mother went to quarrel him in his house.

Analysis and Determination

9. This Appeal was canvassed by way of both written and oral submissions. The Appellant filed his written submissions on 18th December, 2019 and appeared in person. The Respondent on the other hand was represented by the learned State Counsel, Ms. Akunja who tendered oral submissions.

10. I note that the Appellant has raised one key issue of law whose consideration may determine the fate of this appeal without delving into more. He faulted the trial court for non-compliance with **Section 200(3)** of the **Criminal Procedure Code.** He submitted that when Hon. A. R. Karanja took over the conduct of the proceedings in the trial court from Hon. E. K. Nyutu, his rights under **Section 200(3)** were not explained to him. He argued that by failing to do so, the trial court violated his constitutional right to a fair hearing under **Article 50(2)** of the **Constitution.**

11. **Section 200(3)** of the **Criminal Procedure Code** provides as follows:

> ***"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".***

12. A perusal of the trial court's proceedings reveals that the trial commenced before Hon. E. K. Nyutu, Principal Magistrate who only took the evidence of PW1 after which she was transferred to another court station. Thereafter, the case was reallocated to Hon. A. R. Kithinji, Senior Resident Magistrate and directions under **Section 200(3)** of the **Criminal Procedure Code** taken on 24th November, 2015. The proceedings on the said date were recorded as follows;

> ***"Before: Hon. A. R. Kithinji PM***
>
> ***Court clerk: Eunice***
>
> ***Prosecutor: CI Bahati state Kuiyoni***
>
> ***Accused: Present***

Court: Case is partly heard by Hon. Nyutu on transfer. Provisions of Section 200 CPC complied with.

Accused: My lawyer is not in. I ask for another date.

Chief Inspector Bahati: His lawyer is not in court and it is not stated why. I object.

Court: Last adjournment granted to defence. Hearing 4.5.2016"

13. Come the 4th May, 2016, the prosecution was not ready to proceed and an adjournment was granted and ahearing set for 31st October, 2016. On this date, PW2 testified without the court revisiting compliance with Section 200(3). Clearly therefore, the succeeding trial magistrate, Hon. Kithinji did not appreciate the mandatory nature of **Section 200 (3)** of informing the Appellant of his right to elect to recall the witness who had testified for purposes of either testifying afresh or for further cross examination. And even if this were done by deduction from the fact that it was indicated that the provision had been complied with, the court failed to accord the Appellant an opportunity to respond to what choice he had made.

14. I effect, Section 200(3) was breeched, consequent which, the trial was vitiated. In the case of **John Bell Kinengeni vs. Republic [2015] eKLR**, the Court of Appeal stated as follows regarding non-compliance with this requirement of the law:

"….the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006, the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses resummoned and reheard is placed on the magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandiga (supra) the court ruled that the mere mention in the judgment that section 200(3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law."

15. Further, in the case of **Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 Others [2015] eKLR** Makau J. stated as follows when considering the constitutionality of the said provision:

"16. Section 200(3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

17. It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

18. Section 200 (3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010……

21. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50 (2) of the Constitution which states every accused person has the right to a fair trial, which includes other rights as set out thereunder."

16. I cannot add more save to state that, in view thereof, I find that the Appellant's right to a fair trial under **Article 50** of the **Constitution** was infringed by the failure by the succeeding magistrate to comply with the mandatory provisions of **Section 200(3)** of the **Criminal Procedure Code.** This effectively vitiated the entire trial and rendered it a nullity. The Appellant's conviction was therefore, not safe.

17. I will now grapple with the question of whether a retrial should be ordered. The principles upon which a retrial can be ordered are well settled. In the case of **Ahmed Sumar v Republic (1964) EA 481** at Pg. 483 the Court of Appeal stated thus;

"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.

18. Further, in the case of **Benard Lolimo Ekimat v Republic [2005] eKLR** the Court of Appeal stated thus;

"…the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

19. In the instant case, the prosecution was enjoined to prove two elements. These are the positive identification of the offender and contact between any body part of the offender with the genital organs, breasts or buttocks of the minor which does not include an act of penetration. The Appellant was well known to PW1 as he was their neighbour hence his identification was by way of recognition. As regards the second element, it is instructive to note that no medical evidence is required to prove it. As such, I am of the view that a retrial is likely to found a conviction.

20. However, I note that the key prosecution witness, PW1, testified in November, 2014 which is almost six years ago. She then was only four years old. As such, there is a high possibility that even if she was called to testify in a fresh trial, she may not be able to recall some important details. In the premises, it may not be in the interest of justice to order a retrial.

21. I accordingly allow the appeal, quash the Appellant's conviction and set aside the sentence. I order that the Appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered

Dated and delivered in Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence:

1. Appellant in person.

2. Miss Chege for the Respondent.