REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NUMBER 80 OF 2019

KENNETH MWATIA MWENGU……...……...…APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 2665 of 2015 Delivered on 14th May 2019 in the Senior Principal Magistrate's Court at Kapsabet by Hon. B.Wachira (Resident Magistrate)

JUDGEMENT

1. The appellant was convicted for the offence of defilement of a child contrary to section 8(1) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence are that on the 14th day of September 2015, at [Particulars Withheld] Village, Septon tea estate, within Nandi County, intentionally and unlawfully caused his penis to penetrate the vagina of MC (name withheld) a child aged 17 years and 11 months.

3. He faced an alternative charge of committing an indecent act with a child contrary to section 11 S.O.A, in which it was alleged that he unlawfully and intentionally caused his penis to come into contact with the vagina of MC.

4. In brief, the case for the prosecution was that the complainant, who was aged 16 years, was followed into her house on 14th September 2015 by the appellant under the guise of shielding himself from the rain. All of a sudden he grabbed her from behind and gagged her and defiled her. She was rescued by one Beatrice. The Appellant was arrested and subsequently charged.

5. The appellant denied the offence. At the close of the trial the appellant was convicted on the main charge and sentenced to life in prison. Being disgruntled he filed this appeal against the conviction and sentence and raised six grounds of appeal to wit:

a. that the charge sheet was defective.

b. that the appellant was not accorded a fair trial.

c. that the evidence was contradictory.

d. that penetration was not conclusively proved.

e. that the burden of proof was shifted to the appellant.

f. that the case was not proved beyond reasonable doubt.

6. This appeal turns on the single ground of fair trial. The appellant argues that the provisions of section 200 (3) of the Criminal Procedure Code were not availed to him when Hon Alego took over the case from Hon G. Adhiambo on 11th May 2016. The appellant submits that he was not allowed to recall the witnesses he would have wanted to.

7. The appellant relied on the Court of Appeal decision in **Zakayo Olukwe sikuku Vs Rep Cr. App. No 12 of (2017)** at **Eldoret-** Eklr, in which the court held that the record of the proceedings supported the appellant's submissions, that section **200(3) CPC** was not complied with. Thus the rights of the appellant were not explained to him and he was not given the opportunity to elect, whether or not to recall material witnesses for further cross-examination.

8. Learned state counsel M/S Okok conceded the appeal on this ground on behalf of the state. Counsel admitted that indeed the appellant's

rights under section 200 of the CPC were not availed to him. Counsel was however of the view that the evidence tendered in the trial court was sufficient to sustain a conviction. She prayed that the matter be referred back to the lower court for re-trial. The appellant did not object.

9. I have anxiously considered the grounds of appeal, the evidence on record and the submissions from both sides on the single issue. The grounds upon which a matter may be referred for retrial are well settled in the case of **Samuel Wahini Ngugi v. R (2012) eKLR** where the Court of Appeal 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 vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
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> > **'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'**

10. The appellant was sentenced on 8th of May 2019. Applying the principles adverted to above to this appeal and considering the nature of the evidence on record, the charge, and the possibility of availability of witnesses, I am of the considered view that this is a case suitable for retrial. The re-trial of the case is in the interest of justice for both the appellant and the complainant.

11. For the foregoing reasons the appeal succeeds on this one ground. The sentence is hereby set aside and the conviction quashed. The appellant shall be released into police custody and be produced before any other court competent to try him, other than the court that sentenced him.

DATED, SIGNED and DELIVERED at ELDORET this 9th day of SEPT. 2020

L. A. ACHODE

JUDGE