**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HCCRA NO. 21 OF 2019**

**HNM.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction & sentence of the Senior Principal Magistrate Hon.***

***B. M. Ochoi dated 21/03/2019 in Mukurweini SPM Sexual Offence Case No. 20 of 2016.)***

**JUDGMENT**

1. **HNM** the Appellant was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the unknown date between 5th day of October 2016 and the 26th day of November 2016 at [Particulars withheld] village, Ithanji sub-location in Mukurwe-ini sub-county within Nyeri county, with another before court, intentionally caused his penis to penetrate the vagina of **LW1** aged 19 years, a person with visual disabilities.

2. He faced an alternative count of committing an indecent act to an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006. The particulars being that on the unknown dates between 5th day of October 2016 and the 26th day of November 2016 [Particulars withheld] village, Ithanji sub-location in Mukurueni sub-county within Nyeri county intentionally touched the vagina of **LW1** aged 19 years with his penis, a person with visual disability.

3. He denied the charges and the matter proceeded to full hearing with the prosecution calling seven (7) witnesses. The Appellant gave a sworn statement without calling any witness. Later he was found guilty and convicted of the principle count. He was thereafter sentenced to fifteen (15) years imprisonment.

4. He was aggrieved by the judgment and filed this appeal in person. When Mr. Njuguna advocate for the Appellant came on record for him, the same grounds were maintained. These are:

a) **That** the trial Magistrate erred in both law and fact while basing his conviction in relying on the complainant that she was telling the truth without considering the created doubts in identification of the Appellant since the evidence reveals the victim was blind since childhood.

b) **That** the trial Magistrate erred in both law and fact in believing the evidence of DNA results and failed to consider the police officer who took his samples was below the rank of corporal, that the same was left in doubt unsafe to base a conviction thus section 26(1)(5) of the Sexual Offences Act.

c) **That** the trial Magistrate lost direction in law after being influenced by the evidence of identification of voice by the complainant which the evidence reveals the victim identified somebody else but not the Appellant.

d) **That** the trial court lost direction after being impressed with the mode of his arrest which was left in doubt of as how it took too long until when the complainant was noted being pregnant.

e) **That** the trial Magistrate further lost direction by rejecting his sworn defence which was not displaced by the prosecution side as per section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya

5. A summary of the case is that the complainant (LW) who is visually challenged was on a date between 5th October and 26th November

2016 at home alone washing dishes, when she was accosted by two men whom she identified as HN and Ezekiel Muchine. They were well known to her as villagers and she identified them by their voices.

6. They grabbed her after telling her they wanted to arrest her and take their things. They removed her clothes and underpants. They covered her mouth when she tried to scream. The Appellant was the first to rape her. When through they threatened her with death if she revealed them. They took off upon hearing a motorbike outside. She showered and washed her clothes. She only informed her mother (Pw1) of the incident when she missed her periods and she was then taken to hospital.

7. In cross examination she said she identified the Appellant by voice and knows him very well. LW1 was recalled for cross examination when Mr. Mbao for the Appellant came on record. She repeated that she identified the Appellant by voice. She denied having a boyfriend or indulging in sex. She said she was hearing she is pregnant. The pregnancy must be as a result of the rape. She said she lives with her mother, grandparents and others but on this day she was home alone.

8. Pw1 the mother to LW1 could not tell the exact date of the offence. She had left LW1 with her grandmother at home. She said LW1 told her of the threats by the Appellant and another hence the fear to reveal the matter to her in good time. She only talked about it when she missed her monthly periods.

9. **Pw3 Dr. Gichuhi Mungai** of Mukurweini produced the P3 form and PRC documents (*EXB1 and 2*) in respect of LW1. He confirmed that LW1's hymen was broken and she was pregnant. As at 1st December 2016 she was four (4) weeks pregnant. **Pw4 APC Alexander Mukundi** together with officer **Godfrey Githungo** were the arresting officers.

10. **Pw5 No. 107568 Fresia Wamaitha** investigated the case and recorded witness statements. She produced LW1's birth certificate No. [xxxx] (EXB3) showing she was born on 18th April 1997. She also produced the birth certificate for LW2's baby born on 30th July 2017 at PGH Nyeri. She is LW2. Birth certificate No. [xxxx] was produced as EXB4. She also produced an exhibit memo form for the DNA samples (EXB7).

11. **Pw6 Nelly Maureen Papa** is a government analyst from the Government chemist Nairobi. It was her evidence that on 12th February 2018 their facility received from **PC John Mwaka No. 75957** of Mukurweini police station certain items for examination to determine the paternity of the child. The items received were:

i. Blood sample in a container marked A LW2 the child in question.

ii. Blood sample in a vacitaner marked B HNM (*1st accused*)

iii. Blood sample in a vacitaner marked C Ezekiel Muchira Njau (*2nd accused*)

iv. Blood sample in a vacitaner marked D. LW2 (*complainant*)

12. After analyzing the samples she generated profiles and her findings were as follows:

i. There are 99.99+ more chances that HNM is the biological father to LW2 who is LW1's child.

ii. That Ezekiel Muchira Wanjau is excluded to be the biological father of the child.

She produced her report as EXB6. In cross examination by the Appellant she said she received the blood sample marked in the Appellant's name.

13. **Pw7 Ayub Muriuki Gatimu** is the laboratory manager Mukurweini hospital. He said he received a court order on 8th February 2018 for certain blood samples to be examined in their laboratory and they were labeled accordingly as follows:

· Sample A – a child LW2

· Sample B – HN – suspect

· Sample C – Ezekiel Muchine – suspect

· Sample D – LW1 (mother of minor)

They preserved them until police officers picked them for onward transmission to the Government chemist. He signed and stamped the court order (EXB8) after taking the blood samples.

14. In his sworn defence the Appellant denied the charges. He said he was working on their shamba on 27th November 2016 when he was arrested by officers. He stated that on the mentioned dates of the alleged offence he was just at home where he works. He had left Nairobi two weeks prior to the date of the alleged offence.

15. In cross examination he said he used to work in Nairobi with Outrean travellers Sacco but had no employment details. He denied having

been in an intimate relationship with LW1.

16. The appeal was canvassed by written submissions.

17. Mr. Njuguna counsel for the Appellant argued this appeal on four grounds. On the ground of the charge being defective he submits that the charge sheet was amended on 12th November 2018 after the close of the prosecution case. This was contrary to the provisions of section 124 Criminal Procedure Code. He further submits that the charge that was amended on 12th November 2018 is itself defective. Section 10 Sexual Offences Act provides:

> *"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.*

He submits that the charge offends section 134 Criminal Procedure Code.

18. Counsel also refers to the first amendment of 11th July 2018 and submits that the court never asked the Appellant if he wished to recall any witness yet four (4) witnesses had testified. The Appellant and his co-accused were not represented by then.

19. It is his submission that the record does not show how L.w's evidence was taken and she does not state when she was gang raped. It's not shown when the PRC form was filed.

20. He challenges the manner in which the extraction of the blood samples for the DNA profiling, were taken. They were taken long after majority of the witnesses testified. That even the Appellant had objected to the outcome of the DNA report. He submits that section 36(5) Sexual Offences Act was departed from it provides as follows.

> ***"Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so***
>
> ***requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned."***

Counsel refers to the evidence of Pw7 who he says never took the blood samples.

21. Counsel submits that the trial court fell into error by basing his conviction only on the DNA report, and thereafter passed a harsh and excessive sentence. He relies on the case of **Evans Wanjala Wanyonyi –vs Republic Court of Appeal Eldoret) Criminal appeal No. 312 of 2018,** on the issue of sentence.

22. The Respondent opposed the appeal through learned counsel M/s Martha Ndungu. She submits that the assailants spoke to the victim in very certain words before raping her. She knew the Appellant as a neighbor. Further that the DNA analysis linked the Appellant to the crime as he was found to be the father of the born child. She argues that counsel referred to section 26(1)(5) Sexual Offences Act No. 3 of 2006 which basically deals with the offence of intentional transmission of HIV. It's her submission that the order for extraction of samples for DNA testing was made by the court following a consent by the parties.

23. Counsel submits that the delay in reporting was because of the threats issued by the assailants to LW1. She lived in fear for over a month. She further submits the Appellant in his defence contradicted himself and his defence was a mere denial.

24. She argues that the amendment of the charge sheet after closure of the prosecution case was by consent. The amendment was only to correct the section under which the Appellant had been charged. The particulars of the charge remained intact. No evidence was adduced after this and no prejudice was caused to

the Appellant. She referred to the case of **Josphat Karanja Muna –vs- Republic Nyeri Court of Appeal Criminal appeal No. 298 of 2006 (2009) eKLR** where it was stated:

> ***"That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal procedure Code resulted into injustice to the Appellant.***

25. Lastly she urged the court to dismiss the appeal.

**Analysis and determination**

26. This is a first appeal. The duty of the first appellate court is to re-analyse and reconsider the evidence tendered before the trial court with a view to arriving at its own independent conclusion. See **Okeno –vs- Republic (1972) E.A 32. In Kiilu** & **Another –vs- Republic (2005) I KLR 174** the Court of Appeal stated thus:

"*An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*

*It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide*

*whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*

27. The same was reiterated in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

28. I have considered the evidence on record, the grounds of appeal both submissions and the law and I find the following issues to be falling for determination:

i. Whether the charge was defective and whether the correct procedure was followed while amending the charge sheet.

ii. Whether LW1's evidence was properly taken.

iii. Whether the extraction of blood samples for DNA profiling was procedurally done.

iv. Whether the case against the Appellant was proved beyond reasonable doubt. In other words, whether the ingredients of the offence of gang rape were proved.

29. Part of Mr. Njuguna's argument on the first issue is the amendment of the charge: Section 214 of the Criminal Procedure Code which deals with amendment of the charge provides as follows:

*(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*

**Provided that-**

*i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

*ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last –mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross examination*

*(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*

*(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as descried in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.*

30. When this case took off for the first hearing, the Appellant and his co-accused were not represented. Mr. Mbao came on record on the second hearing date which was 3rd May 2017 and Pw3's evidence was taken. Thereafter, Pw1 and LW1 were recalled for cross examination. Pw4 testified on 6th June 2017. The learned trial Magistrate V. Ochianda was transferred and Mr. B.M Ochoi took over the matter on 3rd October 2017. Directions were taken under section 200 Criminal Procedure Code and the matter was to proceed from where the case had reached. On 17th October 2017 Mr. Mbao ceased acting for the Appellant and his co-accused. On 27th November 2017 an amended charge sheet was presented to the court. The amendment involved the change of the age of 17 years to 19 years as per Pw1's birth certificate and changing the charge from gang defilement to gang rape. The matter was then fixed for hearing after a fresh plea was taken.

31. The court did not ask the Appellant and co-accused if in the light of the amendments they would wish to recall any witness. (*See section 214(1) (ii) Criminal procedure Code*). On 5th December 2017 the case proceeded to hearing.

32. Pw5 testified on 5th December 2017, was cross examined and was strangely stood down for purposes of availing a birth certificate of the

baby that was born. On 7th February 2018, Pw5 was recalled to produce the said birth certificate. It is nowhere shown that he was sworn before testifying. Again on this date the record shows that it is only A2 who cross examined him. The record is silent on whether A1 (*Appellant*) cross examined him or had no question in cross examination.

33. On 11th July 2018 after Pw6 testified the prosecution again applied to amend the charge sheet to separate the names of the accused persons who had been dumped together in one count. This was done and a fresh plea taken. At that point, theprosecution applied to recall the investigating officer to produce all documents marked but not produced. Again the Appellant and co-accused were never asked if they would wish to recall any witness in view of the amendment.

34. The prosecution closed its case after Pw7 testified and the accused persons were later placed on their defence on 26th July 2018. On 3rd September 2018 Mr. Baru came on record for the Appellant's co-accused.

35. On 31st October 2018 the matter came for defence hearing when again the prosecutor made an application for amendment of the charge sheet to correct the section under which the accused person had been charged. She wanted the charge to read "gang rape contrary to section 10 of the Sexual Offences Act.

36. Mr. Baru for 2nd accused did not object to the application and so did the Appellant. The fresh charge was again read to them. M/s M. Ndungu for the Respondent only addressed the last amendment made on 12th November 2018.

37. From what I have outlined above, it's clear that there were three applications for amendments in this matter. The first one of 27th November 2017 involved two amendments i.e.

i. The age of the complainant.

ii. The charge from gang defilement to gang rape. The accused persons were never given an opportunity to state whether they wanted to recall any witness or not.

38. The same happened on 11th July 2018 when the charge was amended to create a new count for each accused. The final amendment only involved correction of a section under which the accused persons had been charged, otherwise the offence and the particulars remained the same. The Appellant had also indicated he had no problem with it.

39. My only issue is with the procedure adopted in the amendments of 27th November 2017 and 11th July 2018 when the accused persons were not represented. Secondly the investigating officer (Pw5) who was recalled two months after initially testifying was not sworn before testifying. He could not be assumed to be testifying under the initial oath. I find the manner in which the case was conducted by Mr. B. Ochoi P.M to have been very causal and amounted to a mistrial.

40. I have also noted the issue raised by Mr. Njuguna in respect of the evidence of Pw1 and LW1. I also noted the omission of a part of the proceedings in the typed set. However I had the original record which I quickly checked and found the handwritten notes to be intact. They have the full evidence of Pw1 and LW1 and how it was taken.

41. I have found that the procedure adopted by Mr. B. Ochoi Principal Magistrate in allowing amendments on 27th November 2017 and 11th July 2018 was not in line with the requirements under section 214 Criminal Procedure Code. I have further found that the investigating officer (Pw5) when recalled to testify on 7th February 2018 ought to have taken oath before testifying which was not done. There was also an omission in showing whether the Appellant was given an opportunity to cross examine Pw5 on this date. My conclusion is that this was a mistrial and the conviction is not safe.

42. The next issue is whether the Appellant should be acquitted or a retrial ordered. The general principle in regard to retrials is that a retrial should only be ordered where the justice of the case demands so.

43. In the case of **Ekimat –vs- Republic (2005) I KLR 182**, the Court of Appeal stated thus:

*(5) "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 follow that a retrial should be ordered.*

*(6) A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made w here the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.*

44. In **Obedi Kilonzo Kevevo –vs- Republic (2015) eKLR** the Court of Appeal held that:

*"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of **Muiruri –vs- Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:-*

*"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case.*

*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."*

*In the criminal justice system, the law requires that the right of the Appellant must be weighed against the victim's right. In this case the Appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court."*

45. In **John Njenga Kamau –vs- Republic Criminal appeal no. 203 of 2016 (2018) eKLR** the court of appeal further held that:

*"The unmistakable thread in all the authorities is that each case must depend on its particular facts and circumstances an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the Appellant"*

*The court went on to explain the "interest of justice" in the following terms:-*

*"Explaining what the 'interests of justice' entail, and in its own summary, the court, in the* ***English case of Reid –vs- Republic – (1978) 27 WIR 254,*** *held:-*

*"The interest of justice that is served by the power to order a new trial is the interest for the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge*

*in the conduct of the trial or in his summing up to the jury … It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:*

*(a) The seriousness and prevalence of the offence;*

*(b) The expense and length of time involved in a fresh hearing;*

*(c) The ordeal suffered by an accused person on trial;*

*(d) The length of time that will have elapsed between the offence and the new trial;*

*(e) The fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;*

*(f) The strength of the case presented by the prosecution, but this list is not exhaustive."*

46. In **Jackson Githinji Karani –vs- Republic (2019) eKLR** the court observed that:

*"The criminal justice system requires that the court balances the rights of the accused and those of the victim and the society at large.*

*(26) Where the trial was flawed, the court orders a retrial. This calls for consideration as to whether the accused has had a proper trial. A retrial will be ordered where a trial was illegal or defective. This depends on the circumstances of each case. A retrial will be ordered where the interests of justice is required and will not occasion an injustice to the appellant.*

*(27) In the case of* ***Muiruri vs- Republic (2003) KLR 552****, the court considered a similar situation and held as follows, inter alia:*

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

*2. 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.*

*(28) In this case the Appellant was sentenced in 2016. The Appellant was not tried. The offence involves use of violence the interests of justice require that the case be re-heard. I find that a retrial will be appropriate in the circumstances of this case."*

47. The Appellant herein was charged with the offence of gang rape contrary to section 10 of the Sexual offences Act and was convicted and sentenced to 15 years imprisonment. The offence involves the interests of a person living with visual disabilities and a child born out of this act. The interest of justice requires that the case be re-heard.

48. I therefore allow the appeal, quash the conviction and set aside the sentence and order for a retrial.

i. The Appellant to be arraigned before the Principal Magistrate's Court at Mukurweini on 23rd November 2020 for a fresh plea to be taken. The matter to be heard by any competent Magistrate at Mukurweini besides Mr. B.M Ochoi – Senior Principal Magistrate.

ii. The trial should be concluded within 12 months.

iii. In the event of a conviction the period the Appellant was in custody after cancellation of his bond on 31st May 2018 and the period he has served sentence since the date of sentence on 21st March 2019 MUST be taken into account.

Orders accordingly.

***Dated and signed this 10th day of November 2020, in open court at Makueni.***

**.....**

***H. I. Ong'udi***

***Judge***