REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 38 OF 2019

BETWEEN

ANR.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. N. Barasah, RM delivered on 11th April 2019 at the Magistrates Court in Ogembo in Criminal Case No.73 of 2018)

JUDGMENT

1. The appellant, **ANR,** was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20** of the ***Sexual Offences Act*** *("the **Act**").* The particulars of the offence were that on 21st July 2018 in Gucha Sub-County within Kisii County, he intentionally caused him penis to penetrate the vagina of VOD, a child aged 13 years who was to his knowledge his niece.

2. After the appellant denied the charges against him, trial commenced before Hon. Mutai, RM who heard the matter and after the close of the prosecution case, the accuse was put on his defence. The matter was taken over by Hon. Barasah, RM who, on 15th February 2019, recorded the following proceedings:

> *Later: Accused person wishes the matter to start afresh.*
>
> *Mr Langat: Let (him) come with the proceedings on 28/2/2019.*
>
> *Court: Reasons for the matter to start afresh be deferred to 28/2/2019 and will also double up as a hearing if the reasons aren't sufficient enough.*

3. When the matter came up as scheduled, on 28th February 2019, the prosecutor opposed the application for the matter to start afresh on various grounds including on account of availability of witnesses. The trial magistrate then ruled as follows;

> *Accused person had already been put on his defence. The application is an afterthought and has come at a wrong time when ruling has been made. Accused if he was dissatisfied with the matter should have appeal at the ruling stage. The prosecution says it will be hard to get the key witnesses to testify. Court rules that accused person seems knowledgeable and raised issues before the matter advances. Right of appeal 14 days.*

4. This is case where the magistrate who heard the case initially had left the station and the matter was taken over by another magistrate. The applicable provision for this situation is set out in **section 200(1)(b)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** as follows:

> *200(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceased to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction the succeeding magistrate may-*
>
> *(a) --------*
>
> *(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. [Emphasis mine]

5. In ***Andrew Momanyi Nyauma and Another v Republic*** **KSM CA Criminal Appeal No. 215 & 216 of 2016 [2013]eKLR**, the Court of Appeal, speaking on the application of **section 200(1)(b)** aforesaid, stated as follows:

> *In our view, it is only when the Magistrate is acting pursuant to Section 200 (1) (b) that he needs to explain to the accused his rights for in that case the Magistrate is enjoined to inform the accused that he can resummon the witnesses or can seek that the hearing recommences de novo.*

6. Although the record does not show whether the trial magistrate explained to the appellant the provisions of **section 200(1)(b)** of the ***Criminal Procedure Code***, it is clear that when the matter came up on 15th February 2019, the appellant had stated that he wished to have the matter start afresh. The ruling of the trial magistrate on 28th February 2019 seems to suggest that the plea to start the matter afresh or to recall the witnesses was denied as the appellant had already been put on his defence. The fact that an accused has been placed on his defence does not displace the requirement for compliance with **section 200(1)(b)** aforesaid. It was also improper for the trial magistrate to suggest that the appellant was knowledgeable and should have appealed against the ruling when the record does not that a ruling had been made denying the appellant the right to recall or resummons witnesses.

7. I therefore hold that the trial magistrate erred by failing to or at any rate misapprehending the provisions of **section 200** of the ***Criminal Procedure Code***. The appellant was therefore prejudiced and his conviction cannot stand. I allow the appeal on this ground.

8. As to whether a retrial is appropriate in this case, I am guided by the decision in ***Muiruri v Republic*** **[2003] KLR 552** where the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Amongst the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

9. The incident subject of this case took place last year and I do not think that it would be difficult to get witnesses to mount a retrial. I am also satisfied that there was overwhelming evidence against the appellant hence I shall order a retrial.

10. I allow the appeal, set aside the conviction and sentence. The appellant shall be taken for re-trial at Ogembo Magistrates Court on **8th July 2019** the case shall be heard by any other magistrate other than Hon. G. Barasah.

11. I direct that the appellant shall remain in custody until the testimony of the complaint and her mother is taken.

DATED and DELIVERED at KISII on this 4th day of JULY 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.