REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 82 OF 2019

DOMINIC KASYOKI MBUVI...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGEMENT

1. The Appellant was charged with offence of defilement of a child contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 11th day of May, 2014 at [particulars withheld] trading centre at Kitonyoni Sub-location, Muvao location in Makueni District within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of RMK, a child aged 16 years.

2. Alternative charge he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 11th day of May, 2014 at [particulars withheld] trading centre Kitonyoni Sub-location, Muvao location in Makueni District within Makueni County unlawfully committed an act by causing his penis to touch the vagina of RMK a child aged 16 years.

3. He pleaded not guilty and matter went to full trial. He was convicted and sentenced to serve 15 years.

4. Being aggrieved by the above decision he lodged instant appeal and set out the following grounds:

> **i. That the learned pundit magistrate erred in both fact and law when he convicted and sentenced him without observing that the provisions of Section 200 (3) of the CPC were not complied with, rendering the trial a nullity.**
>
> **ii. That the learned trial magistrate erred in law and fact when he convicted and sentenced him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50 (2) (j) of the Constitution.**
>
> **iii. That the pundit magistrate erred in both points of law and fact by failing to observe that one of the ingredient establishing the offence of defilement i.e. penetration was not proven by the prosecution beyond reasonable doubt as required in law.**
>
> **iv. That the trial magistrate erred in both points of law and fact when he failed to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent, and full of lies hence not capable to pass the test of credibility.**
>
> **v. That his conviction based on the evidence on record was manifestly unsafe.**

5. The parties agreed to canvass appeal by way of submissions. Only Appellant filed the same. The prosecution relied on evidence on record.

6. Appellant's submitted that the prosecution did not prove case beyond reasonable doubt.

7. The trial court violated Section 200 (3) CPC as Appellant's right of recalling witnesses was not accorded to him.

8. The new magistrate took over the matter totally ignoring said provisions. See ***Matinge vs R (2012) EKLR*****.**

9. The succeeding magistrate also delivered his judgement on 22/09/2017. However, it is not indicated on the trial documents how, when or why he had taken over the file from Hon. R. Koech.

10. The above facts strikingly resemble the decision of **Justice Dulu** in the case of ***Antony Musee Matinge vs Republic (2012) eKLR*** where **Justice Dulu** made the following persuasive remarks in his decision;

> ***"….the legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section 200 of the CPC the relevant part of which provides:-***
>
> ***200 (3) – Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the appellant person may demand that any witness be summoned and reheard and the succeeding magistrate SHALL inform the appellant person of that right."***

11. The learned judge proceeded to say as follows;

> ***"The above provisions of law are couched in MANDATORY TERMS. It is the appellant person, and not the advocate who must be informed by the court of the right to resummons witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to call witnesses. His advocate could not respond for him. The response has to be that of the appellant. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."***

12. The only distinguishing factor between the above quoted case and the present one is that in the case quoted the appellant was represented while in this one the he was not. That does not change the reasoning or the similarity of the magistrate's omission.

13. The Court of Appeal in ***Ndegwa vs Republic (1985) eKLR 534*** while discussing the importance of complying with the provisions of Section 200 CPC stated inter alia as follows:

> *i. No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated, or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration,*
>
> *ii. The statutory and time honored formula to the magistrate making judgement should himself see, hear, assess and gauge the demeanor and credibility of witnesses should always be maintained,*
>
> *iii. A magistrate who did not observe the evidence is not in a position to access the position, credibility and personal demeanor of witnesses.*

14. In Richard ***Charo Mbole vs Republic Criminal Appeal No. 135 of 2004*** the Court of Appeal held that failure to comply with Section 200 CPC would in appropriate cases render the trial a nullity. In the present case, the appellant was not informed of his rights under Section 200 CPC cited above including the right to recall witnesses.

15. This is a serious point of law which cut's deep into appellant's rights, and the administration of justice and the need for courts to adhere to the rules of procedure governing criminal trial.

16. It prejudiced appellant's right to a fair trial. He therefore submitted that these instant proceedings were fatally defective and could not be allowed to stand.

17. The appellant complains that he was denied statements of the witnesses. On 3/7/014 he requested for statements and court ordered that he be supplied at his own costs. On 7/7/014 matter proceeded without him being supplied same. Thus he submits Article 50 (2) (j) of the Constitution of Kenya was breached. See ***Sigh vs C B (2013) 55CC 741.***

18. He also submitted that penetration was not proved as required by law. He cites Section 107 (1) Evidence Act.

Issues:

19. After going through the evidence on record and tendered submissions, I find the issues are;

> ***(i) If the provisions of Art 50 (2) (j) was violated?***
>
> ***(ii) If above in positive, what is the consequences thereof?***
>
> ***(iii) Whether the provisions of section 200 (3) were violated?***
>
> ***(iv) If above in positive .what is the consequences thereof?***
>
> ***(v) Was the prosecution case proved beyond reasonable doubt?***

Analysis and Determination:

20. On violation of art 50 (2) (j) of the constitution of Kenya, the appellant submits that, on 3/7/014 he requested for witnesses statements and the court ordered that he be supplied at his own costs. On 7/7/014 matter proceeded without him being supplied with the same. However the appellant and his advocate proceeded with hearing of the matter without raising the issue of non-supply of the aforesaid statements.

21. Why didn't they indicate to the court that they were not ready to proceed without them if they were not supplied? Thy participated in the trial without any complaint whatsoever of non-availability of the same. The court the complaint to be an afterthought.

22. On none-compliance of section 200(3) CPC, the appellant submits that, the succeeding magistrate did not explain his rights as therein stipulated. He relied in ***Richard Charo Mbole vs Republic Criminal Appeal No. 135 of 2004*** the Court of Appeal which held that failure to comply with Section 200 CPC would in appropriate cases render the trial a nullity. In the present case, the appellant was not informed of his rights under Section 200 CPC cited above including the right to recall witnesses.

23. This is a serious point of law which cut's deep into appellant's rights, and the administration of justice and the need for courts to adhere to the rules of procedure governing criminal trial.

24. It prejudiced appellant's right to a fair trial. He therefore submitted that these instant proceedings were fatally defective and could not be allowed to stand.

25. Section 200 of the CPC provides:-

> ***"(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 re-summon the witnesses and recommence the trial.***
>
> ***(2) ...***
>
> ***(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 accused person of that right."***

26. On the importance of compliance with the said procedural requirement, my brother **Makau, J**. in the case of ***Office of Director of Public Prosecutions vs Peter Onyango Odongo & 2 Others*** High Court at ***Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR*** rightly so expressed himself while considering whether Section 200 (3) of the Criminal Procedure Code was unconstitutional. The learned **Judge** delivered himself thus: -

> ***"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.***
>
> ***It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. Tis 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.***
>
> ***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.***
>
> **…………**
>
> ***In the case of R V. Wellington Lusiri [2014] e KLR the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.***
>
> ***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 state every accused person has the right to a fair trial, which includes other rights as set out thereunder. The court in determining an application under Section 200 (3) of CPC should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under Article 47 (1) of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 53 (d) of the constitution states every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and***

Article 53 (2) provides a child's best interest are of paramount importance in every matter concerning the child."

27. The learned Judge further rightly concluded that, ***"…section 200 (3) of the Criminal Procedure Code was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010…"***

28. 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.

29. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of ***Ahmed Sumar vs. R (1964) EALR 483*** offered the following guidance:

> ***"..in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;......"***

30. The Court of Appeal likewise had the following to say in the case of ***Samuel Wahini Ngugi vs Republic (2012) eKLR:*** -

> **"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:**

> ***"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".***

31. That decision was echoed in the case of ***Lolimo Ekimat vs Repubic Criminal Appeal No. 151 of 2004 (unreported)*** when this Court stated as follows:

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

32. Before determining whether to order retrial or not, the court has to look at what was tendered as prosecution evidence. On the prove of the case by the prosecution, it was the evidence of Pw1 that on 11/5/2014 about 6.00pm, the appellant led her into his house and had sex with her for a short period. PW1 testified that the appellant forced her to have sex. She further testified that she is in class eight (8) at [particulars withheld] Primary School.

33. PW1 testified that the appellant was her friend and that the appellant removed her panty and they had sex once. That all these happened when her mother had sent her to Kilala market to fetch water from a water tank but the appellant called her and led her to his house and closed the door and they had sex.

34. The evidence of PW1 was not challenged by the appellant nor shaken by the appellant at all. From the testimony of PW1, PW1 appeared consistent even during cross-examination by the appellant that indeed the appellant had sex with her.

35. It's the evidence and testimony of PW2 that he examined the complainant (PW1) after two (2) days and that he saw nothing abnormal but further testified that the complainant took a bath and urinated after the incident.

36. PW2 produced the P3 form as exhibit 1, the Post Rape Care form as exhibit 2 and the treatment card in respect of the complainant as exhibit 3. In cross-examination, the witness (PW2) replied that the injuries on the complainant were three (3) days old and the complainant had been penetrated but he could not tell when.

37. PW3, PW4 and PW5 confirms from their testimony in court that the complainant had gone to fetch water from water tank at Kilala. PW2, PW3, PW4 and PW6 confirms that on 11/5/2014 they found the appellant and the complainant inside a house at Kilala market and that the door to the house was locked from inside.

38. PW8 confirmed arresting the appellant and the complainant and taking them to the hospital at Makueni County Referral Hospital. PW7 relying on the statements of the complainant, PW4, appellant and other witnesses charged the appellant with the charges before this court.

39. This too is confirmed by the appellant in his defence. PW7 produced the Birth Certificate, exhibit 4 and immunization card, exhibit 5 of the complainant which confirmed that the complainant was sixteen (16) years as at 11/5/2014 when the offence was committed.

40. These documents were not challenged by the appellant. It was the evidence of PW3 that PW1 informed her that the appellant forced her (PW1) to have sex with him (appellant) and that they had sex. Equally this evidence was not challenged by the appellant.

41. In view of the aforesaid evidence, the trial court made a finding that there was prove that the appellant penetrated the vagina of the complainant (PW1) RMK a child of 16 years on the 11th day of May, 2014 at Kilala market which is a trading center.

42. The trial court was not convinced by the defence given by the appellant that it was the complainant who entered the house of one Fredrick Mutinda where the appellant had gone to look for a change for his customer and that the mother of the complainant found them therein. However in view of none-compliance with section 200 (3) CPC, the court finds that the conviction and sentence cannot be upheld.

43. Applying the principles set out as stated on ordering retrial to this appeal and considering the nature of the evidence on record the court is aware that the alleged offence took place in 2014 and trial was concluded in 2017.The accused has only served about 2 years of the sentence awarded.

44. Thus the court in all circumstances of the case makes the following orders;

(i) The conviction is quashed and sentence set aside.

(ii) The matter is remitted back to the magistrate court Makueni

Law courts for retrial.

DATED, SIGNED AND DELIVERED AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE