REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 58 OF 2019

JOHN BORO WAIHARO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. J. W. Onchuru – PM Thika in the original Thika Chief Magistrate's Court Criminal Case No. 3763 of 2010}

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) (3) of the Sexual Offences Act and in the alternative committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

In the main charge it was alleged that on 9th September 2010 in Gatanga District within Central Province the appellant committed an act that caused penetration with one BMM a child aged 12 years.

In the alternative charge it was alleged that on the same date and place he intentionally committed an indecent act with BMM a child of the age of 12 years by touching her genital organ.

Briefly the facts of the case were that on the material day at about 9pm the complainant was in a shared toilet when she heard a knock followed by a push on the door and someone entering and because there was moonlight she recognized the person as the appellant by his face and voice. He ordered her to remove her clothes and threatened to kill her if she said anything. He then removed her biker (underwear) and using his penis did what she described as **"fucked"** her while continuing to threaten to kill her if she complained or screamed. It was her evidence that she felt his genital organ inside her genital organ and that when he released her she went home and told her mother who took her to Thika Sub-district Hospital and after that to Kirwara Police Station where she was issued with a P3 Form. The appellant was subsequently arrested and charged.

In his defence the appellant testified that on the material day he arrived home from work at 9pm and that as he went to the toilet he saw a certain lady go into the first toilet. He went into the fourth toilet only to hear the lady knocking on the door. Since she was persistent he retorted she could go in if she wanted. She insisted he comes out and so he went out. She accused him of being in the toilet with her daughter. Her screams attracted their neighbours who she told he had defiled her daughter who was in the house. The Estate Manager was called and when he arrived a villager elder was called and he, the appellant, was taken to the police station. When the girl was issued with a P3 Form he too asked for one but his request was met with a beating. The following day he was taken to Kirwara Police Station where two officers beat him and asked him to admit the charges. He was then asked to buy his freedom but he said he did not have money. The next day the officer asked for Kshs. 40,000/= to which he replied he could not afford. Then a CID officer arrived from Nairobi and directed them to take him to court and so he was arraigned the Monday following.

After evaluating the evidence from both sides the trial Magistrate J. W. Onchuru found the appellant guilty of the offence of defilement and sentenced him to imprisonment for twenty years. Being aggrieved by the conviction and the sentence the appellant preferred this appeal. The appeal which is vehemently opposed is premised on seven amended grounds filed together with written submissions through which the same was canvassed. The grounds are: -

> **"1. THAT a Cardinal Principle of law i.e. Section 200 of the Criminal Procedure Code was not adhered to at the time Honourable J. W. Onchuru, Ag. PM, took over the hearing from where Hon. B. J. Ndeda, PM had left off.**
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> **2. THAT, the Charge Sheet was defective in that it did not disclose an offence as it did not state that the alleged act was intentional and unlawful;**

3. THAT, the Hon. Trial Magistrate erred in points of law and fact by holding that the case for the Prosecution was proved against the Appellant whereas penile penetration was not adequately proved;

4. THAT, Hon. Trial Magistrate erred in law and in fact in holding that there were no contradictions in the Prosecution case thereby convicting the Appellant on the testimony of witnesses without credibility;

5. THAT the trial court failed to record the reasons for believing that the complainant was telling the truth contrary to the provisions of Section 124 of the Evidence act;

6. THAT, the learned trial Magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the Appellant had defiled BMM;

7. THAT, the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice."

In his oral submissions Mr. Kasyoka submitted that the prosecution proved the age of the victim through a baptism card, penetration through the P3 Form and identification of the perpetrator through the evidence of the victim. He contended that there were no contradictions in the evidence or any defect in the charge sheet. He also disputed that the burden of proof was shifted to the appellant. He urged this court to find that the charge was proved beyond reasonable doubt and hence uphold the judgement of the lower court.

An appeal is in the nature of a retrial and this court therefore has a duty to analyse and re-evaluate the evidence so as to arrive at its own independent conclusion while keeping in mind that it did not see or hear the witnesses give evidence and hence did not observe their demeanour **(see Okeno v Republic [1972] EA 32)**. I have also considered the submissions of the parties and perused the authorities cited at the hearing of this appeal. I am satisfied that there is evidence that the appellant committed an act which caused penetration of his genital organ with the genital organ of the complainant. The complainant vividly narrated to the court how the appellant accosted her in a public toilet. She testified that he undressed her and then "fucked" her. She stated that she felt his genital organ (penis) in her genital organ (vagina). She knew the appellant before as they were neighbours a fact which was admitted by him in his defence. I am satisfied therefore that the complainant positively recognized the appellant as the perpetrator. His own testimony that he went to the toilet at around the time it is alleged he defiled the complainant places him at the scene of the crime hence making the evidence of the complainant even more credible.

The complainant's age which is also an ingredient of the offence was proved through a certificate of dedication which indicated she was born on 14th July 1998 which means that she was 12 years old when this offence was committed. I am therefore satisfied that there was evidence to prove the offence of defilement beyond reasonable doubt. Be that as it may, I must declare a mistrial in this case as the Magistrate who convicted the appellant did so upon evidence recorded by another trial Magistrate but without complying with **Section 200 (3) of the Criminal Procedure Code**. The said **Section** states: -

(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

The Court of Appeal emphasizing the requirement of the courts to observe the aforesaid Section in **Mark Limo Chesire v Republic [2019] eKLR** held: -

"…… From the foregoing cited authorities, it is clear that Section 200 (3) of the CPC must be complied with fully and the court must demonstrate such compliance…….

It was paramount and the court record should show that the trial court took the trouble to inform the appellant of his rights enshrined in that provision of the law……

We are satisfied that there was non-compliance with the mandatory provisions of Section 200 (3) of the CPC. The consequences of such failure leads to a mistrial."

The succeeding Magistrate's handling of the case when he took over was worse than in the Chesire case in that he did not invoke **Section 200 (3) of the Criminal Procedure Code** at all and accordingly this case must suffer the same fate. I must then consider whether or not to order a retrial.

The criteria to be satisfied before a retrial is ordered are clear. In **Fatehali Manji v Republic [1968] EA 343** the Court of Appeal held: -

"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

In **Mwangi v Republic [1983] KLR 522** the same court stated: -

> ***"….. a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result."***

The conviction in this case has not been set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence but because of the defect in the proceedings occasioned by the succeeding trial Magistrate. I am also satisfied upon a proper consideration of the evidence that a conviction might result and also that the appellant who was sentenced on 17th December 2018 has served a very small proportion of the twenty years sentence and so will not be prejudiced by an order for retrial.

In the upshot **I hereby declare a mistrial, quash the conviction and set aside the sentence of imprisonment for twenty (20) years and order that the appellant shall be tried afresh by a Magistrate other than J. W. Onchuru**. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE