REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 102 OF 2018

BETWEEN

JOHN NDUVA MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 82 of 2013, Hon. A. Lorot, SPM)

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NDUVA MUTUA.....ACCUSED

JUDGEMENT

1. The appellant herein, **John Nduva Mutua**, was charged in Machakos Chief Magistrate's Court Criminal Case No. 82 of 2013 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on the 1st day of October in Mwala District within Machakos County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **DPM**, a girl aged 13 years. In the alternative, he was charged with the offence of an Indecent Act contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on the said date and the same place at the same time, he unlawfully and indecently touched the private parts (anus) of **DPM**, a girl aged 13 years using his penis.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the offence of defilement, convicted him accordingly and sentenced him to 25 years' imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. That the case for the prosecution was not proved beyond reasonable doubt as the law demands and the learned trial magistrate erred in both law and facts by failing to make up a specific finding in this regard.**
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> **2. That the Learned Trial Magistrate erred in law and in fact by failing to conduct a voir dire examination upon PW1 yet she was a minor aged 13bbyuears, hence her evidence was admitted contrary to Article 50(4) of the Constitution**
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> **3. That the Learned Trial Magistrate erred in law and in fact and misdirected himself by convicting the appellant on the purported identification evidence by PW1 without ruling out altogether the possibility of mistaken identification more so in view of the prevailing circumstances as the alleged scene of crime.**
>
> **4. That his conviction was manifestly unsafe.**

4. The hearing of this case had a rather chequered history. The hearing started on 5th June, 2013 before **Hon. E K Too Ag. SRM** who took the evidence of PW1, PW2, PW3 and PW4. However, the matter was taken over by another magistrate and on 18th February, 2014, pursuant to section 200 of the **Criminal Procedure Code**, an order was made that the mater proceed from where it had reached. Prior to that on 4th

December, 2013, the accused had appeared before another magistrate **(Hon. A. Ireri, PM)** and applied that the mater started *de novo* though no order was made in that regard. For some unexplained reason the matter was unable to proceed before the said magistrate and on 18th February, 2014, the matter was placed before **Hon**. **L Simiyu, Ag. SRM** who directed, after hearing the appellant, that the matter proceeds from where it had stopped. However, on 1st April, 2014 the matter was placed before the same magistrate he realised that there was confusion in the court file considering the fact that on 4th February, 2013, the accused had elected to start *de novo* and that before the matter could commence **Hon. Ireri** also left the station. The learned magistrate therefore once again explained the provisions of section 200 of the ***Criminal Procedure Code*** to the appellant who applied that the trial starts *de novo* and since the prosecution did not object to the application, it was so ordered. Here I must say that there was no need to give further directions the appellant having opted on 18th February, 2014, to proceed from where the matter had reached. That must be so because although the appellant had applied on 4th December, 2013 that the mater starts *de novo*, no decision was made thereon.

5. At the *de novo* hearing, only three witnesses were called.

6. Testifying in the fresh hearing as PW1, the complainant stated at the time of the incident she was a student in class 6. On Friday 1st October, 2010 at about 8.00pm, she, in the company of her fellow pupils were returning home from school when they were joined by the accused whom she identified as her neighbour. Along the way some of her fellow pupils branched to their homes leaving them with one of her fellow pupils known as **M**, a standard 8 pupil who used to escort her home and the appellant. Upon approaching the complainant's uncle's gate, the appellant asked the said **M** to go back offering to escort the complainant. A few metres from the gate, the appellant grabbed her, covered her mouth and pushed her down while holding her throat. He then dragged the complainant to a garden where he put sand into her mouth and hit her on the forehead when the complainant struggled. He then pulled off her underpants, pushed down his trouser and inserted his penis into her anus while holding on to her neck. After that he warned the complainant not to report the incident. After the appellant left, the complainant met one **Ngui** and **Wambua** to whom she narrated the incident and the pursued the appellant while she went home and reported the incident to her grandmother with whom she was staying. They then left for the appellant's home where they reported the incident to the appellant's mother. They also reported to her uncle and at Makutano Police Post the same night where she was referred to Machakos General Hospital that same night where she was treated. She returned to the hospital the following day and she was issued with a P3 form which she identified. Later she was called to Masii Police Station where she left a blouse and tunic dress which were muddy and blood stained. According to her the tunic got torn during the struggle and she was injured on the head, neck and ankles.

7. It was her evidence that she had known the appellant since 2006 as their neighbour. According to the complainant she not only recognised the appellant's voice having heard him speak on several occasions, but they also walked together for a long time before the other pupils branched off. She also knew the appellant's mother whom they reported the incident to. It was her evidence that she used to see the appellant daily as the appellant used to follow them as they walked back from school. On the day of the incident the appellant was at the market and followed them when they passed by. She however denied that the appellant had made love advances towards her.

8. After hearing PW1, it would seem that **Hon**. **L Simiyu, Ag. SRM** was once again transferred and the matter was taken over by **Hon. A Lorot, SPM**. On 7th September, 2016 the appellant informed the court that the matter could proceed with the evidence adduced before **Hon. Too** and **Hon. Simiyu**. There is no evidence that section 200 was strictly complied with as there is no indication that before he made that option section 200 was explained to him. The learned trial magistrate then ordered that the matter to proceed on and that there wold be no need to recall the other witnesses that had testified much earlier.

9. Next to testify was PW5, **Dr Josephine Letiku** who produced the P3 Form. According to her on examining the complainant who was 13 years, she found that she had a swollen red left eye and though her genitalia was normal, she had blood discharge peri-anally and there was blood around her anal orifice. She concluded that there was evidence of trauma peri-anally which correlates with the history of anal penetration.

10. PW6, **PC Cornelius Busienei**, was the investigating officer. After recording the statements of the witnesses, the appellant was arrested and charged according to her evidence.

11. Upon being placed on his defence, the appellant stated that on the day of his arrest, he had been called by his mother to discuss a family dispute and after retiring to bed, at 9pm he heard people talking outside and upon opening the door he was ordered to sit down. He was then informed that he was suspected of having been one of the persons who defiled a child of a neighbour. He was then arrested and taken to the police station after which he was arraigned in court. According to him, he had no knowledge about the defilement.

12. In his judgement, the learned trial magistrate considered all the evidence that was adduced prior to and after the *de novo* hearing and found that the case was one of recognition and knowledge. According to him, the appellant knew what he had done and that is why he disappeared and only resurfaced discreetly. According to the learned trial magistrate though the appellant made two attempts to escape the justice in this case he had no escape. The court further found that the appellant's conduct after the attack of disappearing and his two attempts to escape could only point to the fact that he believed his goose was coked and he was running away from eventual justice. It was the finding of the court that the evidence was watertight that the appellant defiled the complainant and proceeded to convict the accused as charged on the main count and sentenced him to 25 years in prison.

Determination

13. I have considered the proceedings before the trial court and the submissions made by the appellant and on behalf of the Respondent by **Ms Mogoi**, the learned prosecution counsel in this appeal.

14. As stated hereinabove on 1st April, 2014, the court directed that the matter starts *de novo*. It is important to deal with the effect of the evidence adduced in the earlier proceedings before an order is made that the hearing starts *de novo*. **Mativo, J** in **Kenya Anti-Corruption Commission vs. Michael K. Gituto [2015] eKLR** while dealing with *de novo* hearing cited the case of **Kajubo vs. The State** and expressed himself as hereunder:

"Starting the case *de-novo* entails re-calling all the witnesses. "The Latin Maxim "*De novo*" connotes a *'New', Fresh", a 'beginning', a 'start' etc.* In the words of the authors of *Black's Law Dictionary, De novo* trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered...new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was originally heard and a review of previous hearing. On hearing *'de novo'* court hears matter as court of original and not appellate jurisdiction. That a trial *de novo* could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate. The consequence of a retrial order or a *de novo* (a *Venire De novo*), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance."

15. Similarly, in **Catherine Wanjiku Kagua vs. Chinga Tea Factory & Another [2016] eKLR** the same Judge expressed himself as hereunder:

"Trial *De novo* refers to a new trial on the entire case conducted as if there had been no trial in the first instance. *De novo* is a Latin expression meaning *"anew," "from the beginning," "afresh." De novo* is a Latin phrase for *"anew"* which means starting over. *The Black Law Dictionary* defines a *de novo* trial thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the instance."

The dictum of Ibrahim Tanko Muhammed, J.S.C in the Nigerian case of *Babatunde v Pan Atlantic Shipping and Transport Service* is also apposite and is quoted verbatim thus:-

"The Latin maxim "*De novo*" connotes a "New" "fresh" a "beginning" a "start" etc. In the words of the authors of Black Law dictionary, *De novo* trial or hearing means trying a matter anew, the same as if it had not been heard before and as if no decision had been previously rendered … new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing "*de novo*" court hears matter as court of original and not appellate jurisdiction… that a trial *de novo* could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate."

From the above definition, for a matter to be tried *de novo* would mean considering the matter *anew,* as if it had never been heard. The foregoing makes it clear that a *de novo* trial should examine the evidence before it afresh. Obviously since a retrial has been ordered and the case is to be heard *de novo*, the plaintiff must reprove his case as if there has been no earlier trial. It is crystal clear from the above authorities that the plaintiff must prove his/her case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. There is nothing one can add to the above explanation. The fact is very clear that a *de novo* trial must be started from the beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression *"new trial" trial de novo, 'retrial', 'fresh hearing', 'trial a second time* all have the same meaning. Thus, it is my considered opinion that the appellant cannot rely on the earlier evidence but he must adduce fresh evidence and since the issue of liability was resolved I the test case, the only issue the appellant will have to adduce evidence is on the issue of assessment of quantum of damages."

16. **Lesiit, J** on her part in **Julius M'mario M'mauta vs. Republic [2011] eKLR** found that:

"It is clear from the record of proceedings that after the order to have the case heard *de novo*, no prosecution witness was called. The term *de novo* means that the case was to begin afresh from the beginning. *Black's Law Dictionary, Eight Edition* defines trial *de novo* thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."

After the learned trial magistrate declared that the case was to be heard *de novo,* it meant that the prosecution was to begin its case from the beginning. Since no evidence was called by the prosecution after the order for hearing *de novo* was made, the prosecution could not have established a *prima face* case on whose basis the appellant was called to answer the charge. The learned trial magistrate misdirected himself for finding a *prima facie* case was established without calling of any evidence. The learned trial magistrate also misdirected himself when he entered a conviction as the only evidence before him was that by the appellant. The appellant could not have adduced evidence against him. Infact, his defence was that he deemed the charge in the circumstances the entire trial was botched. The conviction entered against the appellant was unsafe and cannot be allowed to stand."

17. The effect of an order for hearing *de novo* was explained by the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992** where that Court expressed itself as hereunder:

"Where the Court of Appeal has set aside a Judgement and ordered a fresh hearing *de novo* by a different Judge, the Judge has to apply his own mind to the matter and decide for himself what would be a fair and reasonable compensation but should not just reproduce the Judgement which had been set aside and increase it by a small sum to take account of inflation as to do so is impermissible and the Judgement not being his, is a nullity."

18. From the foregoing decisions it is clear that once an order for hearing *de novo* is made the hearing must start afresh. Whereas pursuant to the decision of the Court of Appeal in **David Mutune Nzongo vs. Republic [2014] eKLR** the failure to plead afresh is not fatal to such proceedings, it is clear that the evidence adduced in the earlier trial has no place in the judgement arising from the proceedings undertaken pursuant to an order for *de novo* hearing. Where therefore an accused person requests that a *de novo* trial starts pursuant to section 200 of the ***Criminal Procedure Code*** and that request is granted, the accused takes the risk that the prosecution will have another bite at the cherry and may reframe its case and restructure it as it may deem it appropriate. Where therefore the evidence adduced at the hearing *de novo* is inconsistent with the evidence adduced in the nullified proceedings, no party can fall back on the same with a view to impeaching the credibility of the witnesses.

19. However, the decision that a trial starts *de novo* ought to be made very sparingly and only in situations where meaningful trial may still be undertaken. Every effort must therefore be made and every arrangement taken to ensure that the trial proceeds before the initial judicial officer up to the end.

20. Section 200(3) and (4) of the ***Criminal Procedure Code*** provides as follows:

> ***(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***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

21. The said provisions were extensively dealt with by the *Court of Appeal in* ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** *where it held that:*

> ***"As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-***
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> ***'It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. .....for these reasons we have stated, in our view the trial was unsatisfactory.'***
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> ***In other words Section 200, as was emphasised in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.***
>
> **……..**
>
> ***Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.***
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> ***Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly. The learned Judges in Ndegwa (supra) emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:***
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> ***"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."***

……..

> ***Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the***

Constitution. It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;

"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

Was Section 34 aforesaid intended to supply the evidence envisaged by Section 200 so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence if it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead? Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith. The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.

22. In the said case, the Court explained that:

"We reiterate what the Court said in Ndegwa v. R. (supra) that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the appellant the magistrate erred and the appellant was thereby prejudiced. It ought to be remembered always that where an accused person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why. Throughout the issue for some time was that the availability of the prosecution. Towards the end, it was generally intimated that the investigating officer had difficulty in tracing some witnesses. What is more telling is the fact that even after the trial magistrate ordered that the trial would proceed from where the last magistrate stopped, the prosecution sought time to establish who in the list of witnesses had not testified. For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable…As we conclude we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates...Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.

23. In this case, on 7th September, 2016 when the court ordered that the matter to proceed on and that there would be no need to recall the other witnesses that had testified much earlier, there was an order on record that the matter start *de novo* and pursuant to that order the complainant had been recalled and had in fact testified. There is no evidence that section 200 of the ***Criminal Procedure Code*** was strictly complied with as there is no indication that before the appellant made his option the said provision was explained to him. One may argue that since this was not the first time the matter was being taken over by another magistrate, there was no need to go through the motions. However, the law does not create any such distinction. In my view section 200 of the ***Criminal Procedure Code*** is meant to advance, promote and give effect to the provisions of Article 50 of the Constitution.

24. In this case, the learned trial magistrate in his judgement relied on the evidence adduced in the proceedings before the order for *de novo* trial was made. In other words, he relied on proceedings which to all intents and purposes had been set aside. The learned prosecution counsel, **Miss Mogoi**, seems to have appreciated this since in her submissions, she contended that even discounting that earlier evidence

there was sufficient evidence on record to prove the case. That may be so. However, that is not the way the learned trial magistrate saw it.

25. Apart from the foregoing, on 3rd October, 2016 when the appellant was placed on his defence, there is no evidence that prior to that the provisions of section 211(1) of the ***Criminal Procedure Code*** were complied with. The said section provides that:

> ***At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

26. It is clear that before making a determination that a case is made out against the accused person sufficiently to require the accused to make a defence, the trial court is required to hear such summing up, submission or argument as may be put forward by both the accused and the prosecution. This provision was clearly not complied with. In addition, section 213 of the ***Criminal Procedure Code*** provides that:

> ***The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court.***

27. Once again, there is no indication on the record that this provision was complied with.

28. In my view, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

> **"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"**

29. Apart from these fundamental errors in the matter, the trial court seemed to have concentrated more on the conduct of the appellant after the commission of the offence rather than on the proof of the ingredients of the offence. Whereas the conduct of a suspect in disappearing after the offence in suspicious circumstances without any explanation may be taken into account as a corroborating factor, it is my view that the commission of an offence such as the escape from lawful custody ought not necessarily to be basis for finding that the accused committed the offence charged particularly, as was the case in the instant case, where the accused had been punished for the same. The sentiments of the trial magistrate with due respect were clearly uncalled for.

30. In sentencing the appellant, the learned trial magistrate stated that by seeking a non-custodial sentence, the appellant was audacious, imagining that the court may consider non-custodial sentence. As a result of the fact that the appellant admitted having paid his way to escape from custody, the court found that the appellant was of corrupt morals through and through. With due respect the learned trial magistrate seemed to have taken it against the appellant for seeking a non-custodial sentence in his mitigation. Mitigation is a right provided to the accused under the law and the court ought not to take it against an accused person that because he has mitigated and sought a lenient sentence he is not worthy of being considered for the same. This was the position of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** where it expressed itself as hereunder:

> **"It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness…."**

31. The same court opined that:

> **"It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not. See *Commentary on the Criminal Procedure Act at 28-6D*."**

32. The Court of Appeal in **Kingsley Chukwu vs. Republic [2010] eKLR** while dealing with derogatory remarks by the court expressed itself as hereunder:

> **"With regard to the complaint that the trial court had not acted impartially and independently, and had made certain racial and derogatory statements, we would deplore the trial court's remarks that "…** ***the people responsible for the bad name and image (of Kenya) are foreigners, especially Nigerians*****". That statement, although** ***obiter dictum*****, has no place in a judgment, and should not have been made. It is unfortunate and unnecessary. However, we would observe, as did the learned Judge of the superior court, that the offending statement was made after conviction, and before sentence, and could be associated more with sentence, rather than conviction."**

33. Similar position was adopted by **Lesiit, J** in **Ayala Abdi Ayala vs. Attorney General Through State Counsel [2013] eKLR** where she stated that:

> **"I must comment on the manner in which the learned trial magistrate proceeded after entering a plea of guilty. The learned trial magistrate proceeded to take submissions from the prosecution titled "Accused antecedents" such remarks as Appellant siding with his mother and not father; and such chauvinistic derogatory remarks as suggesting Appellant forgot his mother alone could not bear him were dangerous remarks. They were inadmissible at that stage. The evidence Act. Section 57 makes it clear where Appellants antecedents are admissible. Further all the prosecutor should have done is to disclose if the Appellant had any previous record, how many convictions he had and whether they were similar and or relevant to the present charge. Any other statement besides that was inadmissible, prejudicial to the Appellant and resulted in depriving the Appellant a fair trial."**

34. All in all, the manner in which the proceedings were conducted before the trial court was contrary to law. It rendered the whole trial a mistrial.

35. The question then is whether the court should order for a retrial. The Court of Appeal had the following to say in the case of **Samuel Wahini Ngugi v. R (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'**
>
> **That decision was echoed in the case of Lolimo Ekimat vs. R, 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.'"**

36. In **Muiruri –vs- Republic (2003), KLR, 552,** the Court held that:-

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

37. The offence with which the appellant was charged was an offence against the person. It is alleged that the said offence was committed 9 years ago. A retrial was ordered and the complainant subjected to testify more than once. An order for a retrial in such circumstances where neither the appellant nor the complainant can be blamed would amount to subjecting them to an agony for no making of their own. A trial in matters of defilement invariably subjects the complainant to re-live the ordeal afresh. In this case the complainant has been subjected to that agony more than once. Subjecting her to the ordeal once again would amount to an unfairly treating the complainant. In my view regrettable as it is, it is in the interest of the complainant and the accused that the matter be brought to a closure. In other words, it is my view that it would be unjust to direct the trial to start afresh.

38. In the premises, this appeal succeeds, the appellant's conviction is hereby set aside, the sentence imposed on him is hereby quashed and he is to be set at liberty forthwith unless otherwise lawfully held.

39. It is so ordered.

40. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 14th day of November, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey