REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 3 OF 2019

PATRICK OYALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original and conviction (Hon CHELOTI RM) dated 31st January 2019

in criminal case No.12 of 2015 Republic v Patrick Oyala)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1) (a), (b) (2) of the Sexual Offences, Act No. 3 of 2006. Particulars were that on the 20th day of February, 2015 at about 6 pm at [particulars withheld], Namanga Sub county in Kajiado County, intentionally and unlawfully caused his private organ to penetrate the private organ of FD without her consent.

2. The appellant pleaded not guilty and after a full trial in which the prosecution called 5 witnesses, and that of the appellant who called one witness, the appellant was found guilty, convicted and sentenced to 12 years imprisonment. The appellant was aggrieved with the conviction and sentence and lodged a petition of appeal dated 8th February 2019 raising the following grounds of appeal, namely:

> ***1. The learned magistrate erred in law and fact in failing to note, analyze and resolve the inconsistences in the prosecution witnesses which is material in sexual offences and in circumstances of the case before him.***
>
> ***2. The learned trial magistrate erred in law and in fact in disregarding the evidence of the accused.***
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> ***3. The learned magistrate erred in law in convicting the appellant despite the fact that the ingredients of rape were not proved.***
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> ***4. The sentence imposed was excessive and unfair.***
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> ***5. The facts on record did not disclose the alleged offence.***
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> ***6. The learned magistrate erred in law and in fact by committing the appellant to custodial sentence instead of option of the fine and community service, which is provided for laws of Kenya (sic).***
>
> ***7. The learned magistrate misdirected herself in not applying the facts as stated in the charge against the appellant's involvement (sic) in the commission of the offence.***
>
> ***8. The learned magistrate further misdirected herself in failing to consider the mitigation by the appellant and the explanation given thereof.***

3. During the hearing of this appeal, Mr. Alusiola, learned counsel for the appellant submitted in support of the appeal, that the trial magistrate failed to consider the inconsistences in the prosecution witnesses on what constitutes a sexual offence. Referring to the evidence of PW5, learned counsel argued that the witness had stated that he would not reach a conclusion that the victim had been raped; that the victim was taken to him 3 days after the alleged offence and that examination of the blood could not determine who raped the complainant. According to counsel, there was no evidence to connect the appellant with the offence.

4. Counsel argued that the appellant was not arrested at the scene; that there was no evidence of penetration and there was no struggle. He

submitted that the only thing PW5 said was that the victim was bleeding but he could not tell that it was due to rape. Learned counsel further argued that all other witnesses' evidence was hearsay and that none of the witnesses saw the appellant at the scene of crime. He relied on ***Hassan Shikuku v Republic*** [2017] eKLR (HC.CRA 172of 2015, Bungoma)**.** He prayed that the appeal be allowed, conviction quashed and sentence set aside.

5. Mr. Njeru, Learned Assistant Deputy Prosecutor, conceded the appeal on grounds of procedure but not on evidence. According to learned counsel, the record showed that the trial proceeded before three different magistrates namely, Hon. Mbicha, Hon. Chesang and Hon. Cheloti but the subsequent two courts did not comply with section 200 of the Criminal Procedure Code. According to Mr. Njeru, Hon. Mbicha took evidence of PW1, PW2 and PW3 and PW4; Hon. Chesang took evidence of PW5 and PW6 on 27th November, 2017 without complying with Section 200 of Criminal Procedure Code while Hon. Chelot took defence evidence and delivered judgment without making a ruling on whether there was a case to answer and without also complying with section 200 of the Criminal Procedure Code..

6. According to counsel the record of appeal (page 36) shows that although the prosecution sought directions under Section 200, the trial court did not give such directions, but proceeded with the defence and later judgement. He therefore conceded the appeal and prayed for a retrial. He told the court that the state would avail witnesses to prove the charge against the appellant.

7. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. The prosecution conceded this appeal. However, the law is clear that such concession does not bind the court. The court must consider the appeal on merit and make its own determination on the evidence on record. In ***Odhiambo vs. Republic*** [2008] KLR 565, the court held;

> ***"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."***

8. This being the first appellate court, it has a duty to reexamine the evidence reanalyze and consider it itself and make its own conclusion on that evidence giving reasons for it. See**. *Okeno v Republic*** [1972] EA 32,

9. PW1- FD M, the complainant, told the court that on the evening of 20th February, 2015 she was in the house sleeping. The appellant went and sat on her bed and started touching her telling her that he loved her. She told him she did not want and turned. The appellant pulled her legs apart and raped her. She felt pain cried and shouted. The appellant then left her bleeding and went away. Her young brother went to the house and found her crying. She told him what the appellant had done to her. She then called her mother who came and took her to Namanga hospital where a P3 Form was filled for her. She told the court that she knew the appellant since he used to work at a nearby construction site.

10. PW2 - HA, mother to PW1, told the court that on 20th February, 2015 at around 6 p.m. her son called and asked her to return urgently. She went back and found the son and PW1 who told her that a fundi had raped PW1 who was bleeding. She informed her husband who told her to report the matter to the police. She reported the matter to the police and they were referred to hospital. She took PW1 to Namanga Hospital where she was treated and a P3 Form filled.

11. PW3 - AD, a standard 7 Pupil and brother to PW1, testified that on 20th February, 2015, he was at their gate when the appellant went, greeted him and told him that he was going to visit his sister. He later heard noise and rushed home. He met the appellant leaving. He went to his sister's room and found her crying. She told him that the appellant had raped her. He called their mother who came and took PW1 to the police station and later to hospital.

12. PW4 - DMI father to PW1 testified that on 20th February, 2015 at 7 p.m, PW2 called and informed him that PW1 had been raped. He instructed PW2 to report the matter to the police. The police told them to inform them when they see the appellant. Since PW1 had the appellants' number, he called the appellant the following day and tricked him that someone wanted him to construct a store for him. The appellant went and the witness called the police who came and arrested him.

13. PW5 - George Thiongo, a clinical officer at Namanga Health Centre, told the court that on 24th February, 2015 he attended to PW1, a 26 years old disabled lady who was taken to hospital on a wheel chair. Her cloths had blood stains. On examination, she was bleeding from her private parts but no discharge was seen. The hymen was already broken. He was however unable to reach a conclusion that she had been raped because the bleeding was an indication of injury. The witness told the court that bleeding can come from inside private parts but he did not find the cause of the bleeding. According to the witness forced sex can cause bruises but bruised vagina wall cannot be the cause of bleeding. He filled the P3 Form which he produced as PEX 1. In cross examination, he told the court that PW1 was taken to him after 3 days and she was bleeding.

14. PW6 - NO. 64117 CPL. Francis Njenga told the court that on 14th May, 2016 he took over investigations from PC Anganya, the previous investigating officer who told him that on 20th February, 2015 PW2 made a report that her daughter, PW1, had been assaulted. She was taken to hospital treated and a P3 form filled. Charges were later preferred against the appellant.

15. The appellant gave a sworn testimony in his defence. He told the court that on the morning of 20th February, 2015, PW4 found him on the way and told him that there was some work he wanted him to do and wanted to know if he was a mason. He told PW4 that he was a casual worker. PW4 told him to wait for the person who was to give him work only for the police to come and arrest him on ground that he had raped PW1. They took him to PW1's home and asked PW1 if he (appellant) was the person who had raped her which she answered in the affirmative.

16. He told the court that on the alleged day he had done a lot of work and he could not therefore have had energy to rape PW1. He further told the court that none of the prosecution witnesses saw him rape PW1; that he was framed for the offence and that PW1's family had

demanded money from him. In cross-examination he denied that had known PW1 before.

17. The appellant called DW2 - John Njenga as a witness. John Njenga told the court that on 20th February, 2015 he was working with the appellant and that they finished the day's work at 5 p m. he testified that they went to a nearby shop to collect money for the day's work; that he had paid the 12 people he was working with after which each one went home just before7 p.m. The following day, the appellant did not join them at the construction site and again on Sunday. The witness testified that on Monday, he learnt that the appellant had been arrested. They visited him at the police station and that is when they learnt that he was alleged to have raped someone.

18. As already stated, Mr. Njeru conceded this appeal on grounds that though the case was heard by 3 different magistrates, the subsequent magistrates did not comply with section 200 of Criminal Procedure Code in the subsequent hearings. According to counsel, this was fatal to the proceedings and for that reason he did not support the conviction and sentence. He however requested for a retrial instead.

19. I have considered this appeal and perused the record of the trial court. The trial began before **Hon. E.A Mbicha, (RM)** who heard the first 4 witnesses. PW4 concluded his testimony on 16th March, 2016. The matter was then passed on to **Hon. M. Chesang, (RM)** who took the evidence of PW5 on 27th November, 2017. Despite the matter having proceeded before another magistrate, there is no indication on record that the court complied with section 200 of the Criminal Procedure Code. She also took the evidence of PW6 on 29th February, 2018 again without reference to Section 200 of the Code.

20. On 8th November, 2018, **Hon. Cheloti, (RM)**, took defence evidence and again the record is silent on directions under section 200 despite the prosecution seeking directions to that effect. The magistrate went on to deliver judgment in that trial.

21. It is therefore correct as submitted by Mr. Njeru, that subsequent trial Magistrates did not comply with section 200 of the Code. The question is, did failure to comply with section 200 render the trial invalid?

22. Section 200 of the Code provides as follows:

> ***(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 resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(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.***

23. The law is clear that where the succeeding magistrate takes over a trial in which the preceding trial magistrate had recorded evidence in that trial, the succeeding magistrate must inform the accused his right to demand that the witnesses be resummoned or the trial start denovo.

24. In ***Abdi Adan Mohamed v Republic*** [2017] eKLR (Criminal Appeal No. 1 of 2017 Msa), the Court of Appeal stated:

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

24. Section 200 requires the succeeding magistrate to explain to the accused his right under that section and give him an opportunity to elect whether to proceed with the trial from where it has reached or to commence de novo or resummon some of the witnesses who had testified.

25. The record clearly shows that Hon Chesang took over proceedings from Hon. Mbicha who had taken evidence of 4 witnesses but without complying with section 200. Similarly, Hon. Cheloti took over from Hon. Chesang who had taken evidence from two more witnesses but again failed to comply with section 200 and proceeded to take defence evidence and deliver judgment in that trial. The succeeding magistrates did not comply with a legal requirement which amounted to a violation of the right conferred on the appellant by section 200(3). They neither explained to him this right nor gave him an opportunity to make an election as required by statute.

27. As the court of Appeal observed in ***Ndegwa v Republic*** [1985] KLR 535

> ***"…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…."***

28. The magistrates' failure to comply with mandatory statutory provisions violated the appellant's right to fair trial and therefore vitiated that trial. Mr. Njeru properly conceded this appeal on that ground.

29. There is another aspect in the trial before the trial court that neither the appellant's counsel nor Mr. Njeru addressed in this appeal though apparent from the record. PW3 was recorded as a child of 14 years. He was sworn, testified and cross examined. He told the court that he was in standard 6. The record is however silent on whether the trial court conducted *voire dire* examination on this witness. It is also not clear from the record how the trial court established that this witness was 14 years given that no questions were put to him and whether he understood the meaning of an oath before he was allowed him to be sworn. This was an error which rendered the value of his evidence suspect.

30. In ***Samuel Warui Karimi v Republic*** [2016] eKLR the court emphasized on the importance of ***voire dire*** examination stating

> ***"[T]he purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic."***

31. The cumulative effect of the errors committed by the trial court rendered the trial illegal and defective.

32. Mr. Njeru has urged the court to order a retrial while counsel for the appellant urged the court not to order a retrial. Whether or not to order a retrial is at the discretion of this court. The court notes that the mistakes in the trial were not that of the appellant but of the court. When considering whether to order a retrial or not the court must bear in mind certain factors.

33. Section 200(4) of CPC provides that:

> ***"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"***

34. In ***Ahmed Sumar v R*** [1964] EA 483 the court stated:

> ***"…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"***

35. In ***Pius Olima & another v Republic*** [1993] eKLR, the Court of Appeal stated that a retrial may be ordered where the original trial, is defective, if the interest to justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

36. In ***Laban Kimondo Karanja &2 others v Republic*** [2006] eKLR, Khamoni, J. reiterated the factors to be taken into account in deciding whether to order a retrial and stated:

> ***In general a retrial will be ordered only when the original trial was illegal or defective, and from the particular facts and circumstances of the case, the appellate Court, or the court on revision, is of the opinion that on a proper and judicious consideration of the admissible or potentially admissible evidence, a conviction might result, and further that the court is satisfied, not only that the interests of justice require the order for a retrial to be made, but also that such an order when made is not likely to cause injustice to the accused person."***

37. Applying the above principles to this appeal, an order for a retrial should not be made if it will cause prejudice to the appellant or on the admissible evidence on record the retrial will return a conviction. So will the retrial if ordered in this appeal cause prejudice to the appellant?

38. I am not persuaded that such a retrial, if ordered can be conducted without causing injustice to the appellant. The appellant was arrested on 23rd February 2015 and arraigned on 23rd February 2015. He went through a full trial in which he faced 6 prosecution witnesses, tendered his own defence and called a witness. Having already given his defence in that trial, I find that a retrial will cause him prejudice given that the prosecution already knows his defence.

39. More importantly, this court must be satisfied that the retrial will result into a conviction. Before the trial court, PW1 was the only witness who testified that the appellant raped her. All other witnesses testified on the basis of what PW1 told them. Of critical concern to this court, is the veracity of the evidence of PW5, the clinical officer who attended to PW. He told the court that he was unable to reach a conclusion on whether or not PW1 had been raped.

40. I have also seen the P3 Form produced by the same witness as PEX.1 It does not have a conclusion on the issue. That is, the witness did not conclude that there was penetration and therefore rape. I have anxiously considered this evidence as well as the lapse of time since February 2015. I do doubt if the prosecution would get another witness or would still call the same witness and whether his testimony would change so as to lead to a conviction. It is always the duty of the prosecution to ensure that it has a watertight case against an accused otherwise a trial may turn into a mirage.

41. Taking the totality of the circumstances of this appeal into account, I am not persuaded that a conviction may result if a retrial was to be ordered without watertight on the vital ingredient of penetration. This court is alive to the fact that the aim of any trial is to achieve interests of justice but this must be done in a fair trial. The court must balance interests of both sides; that of the victim and the accused in ensuring that there is a fair trial.

42. For the above reasons, I am not satisfied that a retrial will not prejudice the appellant or that it will result into a conviction given the nature of evidence on record. Consequently, the appeal is allowed, conviction quashed and the sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 15th Day of November, 2019.

E C MWITA

JUDGE