REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 34 OF 2018

RICHARD ONYANDO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. E.Kigen, RM,

deliveredon the 25th May 2018 in Eldoret Chief Magistrate's Criminal Case No.144 of 2012)

JUDGMENT

[1] The Appellant, **Richard Onyando**, was charged before the lower court 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 thereof were that on the night of 27th and 28th August 2011 at [particulars withheld] in Eldoret West District within the Rift Valley Province, he unlawfully and intentionally caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of SN. a girl aged 15 years.

[2] In the alternative, the Appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on the night of 27th and 28th August 2011 at [particulars withheld] in Eldoret West District within the Rift Valley Province, he unlawfully and intentionally allowed his genital organ, namely penis, to penetrate the genital organ, (vagina) of SN a girl aged 15 years.

[3] The Appellant denied the charges; and upon hearing the evidence tendered by both sides, the lower court was satisfied as to the guilt of the Appellant and convicted him of the Main Charge of defilement. He was thus sentenced to 20 years' imprisonment on **25 May 2018**. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal, **29 May 2018** on the following main grounds:

> **[a]** That the trial magistrate erred in law and fact in convicting the Appellant when there was no evidence in support of the Prosecution case;
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> **[b]** That the trial magistrate erred in law and fact in convicting the Appellant in the absence of DNA tests to confirm that the pregnancy the complainant had was as a consequence of a sexual offence perpetrated by the Appellant;
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> **[c]** That the trial court erred in law and fact in denying the Appellant a chance to cross-examine the Complainant, thereby occasioning a miscarriage of justice;
>
> **[d]** That the trial was a mistrial;
>
> **[e]** That the trial magistrate erred in law and fact in relying on the evidence of the Complainant to convict the Appellant whereas the preceding magistrate had found that she did not have an appreciation of the need to tell the truth;
>
> **[f]** That the trial magistrate erred in law and fact in holding that the Complainant's evidence was credible whereas she never heard or saw her when she testified;
>
> **[g]** That the trial magistrate erred in law and fact in failing to comply with **Section 200** of the **Criminal Procedure Code.**

[4] Hence, the Appellant prayed that his appeal be allowed, the conviction quashed, and the sentence set aside.

[5] The appeal was urged on behalf of the Appellant by **Mr. Momanyi**, Advocate. He relied on his written submissions filed herein on **4**

February 2019; which he highlighted on **26 September 2019**, and complained about the manner in which the prosecution of the Appellant was conducted before the lower court. For instance, he pointed out that though an age assessment of the Complainant was requested for by the Prosecution and an order made to that effect, no age assessment report was ever produced. He urged the Court to presume that the report was otherwise adverse to the Prosecution case.

[6] Counsel further decried the fact that the Defence was denied an opportunity to cross-examine the Complainant, yet at the time of her testimony she was about 16 years old; and therefore, not a child of tender years for purposes of **Section 2** of the **Children Act, No. 8 of 2001** and the **Oaths and Statutory Declarations Act**, **Chapter 15** of the **Laws of Kenya**. He submitted that the purpose of *voir dire* is simply to determine whether a minor's evidence should be taken on oath or otherwise; and that it has no bearing on whether or not the witness ought to be subjected to cross-examination. Counsel relied on the following authorities to support his submissions on the point:

[a] Ayieyo vs. Republic [2008] 1 KLR 684 ;

[b] Njuguna vs. Republic and Mutunga vs. Republic [1988] KLR 707;

[c] Mutunga vs. Republic [2005] 1 KLR 679;

[d] Mwangi vs. Republic [2006] 2 KLR 94;

[e] Opicho vs. Republic [2005] KLR 369;

[f] Karobia vs. Republic [2007] 1 EA 128;

[g] Kemoni vs. Republic [1991] KLR 489;

[h] Johnson Murirui vs. Republic [1983] 445.

[7] On the merits of the appeal, **Mr. Momanyi**, took issue with the fact that no DNA profiling was carried out to determine the paternity of the child that was allegedly conceived by the Complainant from the nefarious act; and the credibility of the Complainant as a witness, granted the conclusion by the magistrate who conducted *voir dire* examination that she did not appreciate the importance of telling the truth. Counsel also made mention of the contradictions in the evidence of the Complainant as to the date of the incident and the date she was delivered of the baby that was allegedly conceived as a result of the incident of defilement on the one hand; and the date that was presented in the particulars of the charge on the other hand.

[8] On behalf of the State, **Ms. Mokua,** opposed the appeal. She submitted that the minor testified about the occurrence, and that it was not necessary for that a DNA test be carried out to prove the offence of defilement. She relied on **Section 36** of the **Sexual Offences Act** and stressed the operative word "may" therein, and added that the issue was raised before the lower court and was satisfactorily dealt with by the trial magistrate. In respect of Grounds 3 and 4 of the Appeal, Counsel for the State conceded that the trial court erred in denying the Defence an opportunity to cross-examine the Complainant; she however submitted that the error cannot render the trial and conviction a nullity; as the lower court evaluated the evidence in its totality and found sufficient proof of the offence of defilement.

[9] Counsel for the State accordingly urged the Court to consider the independent evidence adduced by the doctor as well as **PW5** and find that the conviction was based on sound evidence, notwithstanding the fact that the Complainant was not subjected to cross-examination. Counsel further submitted that, should the court find the omission fatal, then a retrial would meet the ends of justice in the circumstances, and therefore ought to be ordered; and that the mistakes made by the trial magistrate should not be visited on the victim. She also urged the Court to note that the Prosecutor before the lower court made an attempt to have the minor recalled for purposes of cross-examination but was overruled.

[10] As for compliance with **Section 200** of the **Criminal Procedure Code**, it was the submission of **Ms. Mokua** that it is sufficient that at pages 22, 23 and 27 of the Record of Appeal, there is an indication that **Section 200** of the **Criminal Procedure Code** was complied with. She posited that it is not mandatory for the trial court to specifically make mention of **Section 200(3)** of the **Criminal Procedure Code** as the provision was explained in its entirety. Likewise, Counsel for the State urged the Court to dismiss the argument that failure by the initial Investigating Officer to testify was fatal to the Prosecution case. She submitted that the Investigating Officer who testified did so on behalf of the initial Investigating Officer and relied on the statements and documents prepared by the initial Investigating Officer. She therefore urged the Court to find that the Prosecution called a sufficient number of witnesses to prove its case to the requisite standard. She prayed for the dismissal of the appeal.

[11] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by both the Appellant's Counsel and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; while bearing in mind that it did not have the opportunity to either see or hear the witnesses. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[12] Before the lower court, the Prosecution called a total of 4 witnesses, in a trial that commenced before **Hon. Wattimah, RM,** on the **22 April 2013.** The first witness was the Complainant and the Record of Appeal shows, at page 12 thereof, that she was first taken through a *voir dire* examination before her unsworn statement was recorded by the trial magistrate. In the view of the trial magistrate, the minor **"…did not know the effect of stating lies…" PW1** then proceeded to tell the lower court that she was 16 years old and that on the night of **27th and 28th August 2012**, she was at the Appellant's house. She testified that the Appellant was her boyfriend and that he used to call her to his place every week; and that on the night in question, they made love with the Appellant and left for home in the morning. She further stated that thereafter she realized she had started growing fat and that her neighbours then told her that she was pregnant. She added that she had never had sex with any other person; and that she gave birth on **26 April 2012.**

[13] The minor's mother testified as **PW2**; and her evidence was that the minor used to go to school but got pregnant and gave birth while in Class 6. She availed the Birth Certificate for **PW1** and it was produced before the lower court as the **Prosecution's Exhibit 1. PW2** testified that when she realized that the Complainant was pregnant, she inquired from her and she told her that she had been impregnated by **Richard** when she visited her sister in Eldoret. **PW2** accordingly reported the matter to **Baharini Police Station** and was issued with a P3 Form in respect of the minor with which she took her to hospital. She added that she did not know the said **Richard** before; and only saw him after his arrest.

[14] Dr. Eunice Temet (PW3) of Moi Teaching & Referral Hospital testified on **14 November 2016** on behalf of **Dr. Kibet** who was then away for further studies. She produced the P3 Form that was filled by **Dr. Kibet** in respect of the minor herein, and confirmed that she was presented to their facility on allegations of having been defiled by a person known to her. The minor was found with a pregnancy of 20 weeks' gestation and healed hymenal tears. Accordingly, the examining doctor came to the conclusion that the minor had been defiled. **PW3** produced the P3 Form and it was marked the **Prosecution's Exhibit 2** before the lower court.

[15] The last Prosecution Witness was **Cpl. David Otieno (PW4)** of Baharini Police Station. His testimony was that he received the police file for this matter in **December 2015** from **P.C. Kimathi** and proceeded to familiarize himself with the statements and documents on the file. He produced the minor's Birth Certificate as an exhibit before the lower court and it was marked the **Prosecution's Exhibit No. 1.**

[16] On his part, the Appellant told the lower court that he was at work on **27th and 28th August 2011** when the Police arrested him. He denied that he met the Complainant or that he had sexual intercourse with her and impregnated her. He complained that he was not examined or tested to confirm by way of DNA that he was the father of the minor's child. He posited that he was only arrested because the minor's sister wanted money from him.

[17] The foregoing being the summary of the evidence, the question to pose is whether the offence of Defilement with which the Appellant was charged and convicted, was proved beyond reasonable doubt. It is therefore pertinent to have **Section 8** of the **Sexual Offences Act** reproduced here below for its full tenor and effect. It provides as follows:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[18] Accordingly, the Prosecution needed to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child for purposes of **Section 8(3)** of **the Sexual Offences Act**;
>
> **[b]** That there was penetration of the Complainant's vagina;
>
> **[c]** That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[19] For purposes of **Section 8** of **the Sexual Offences Act,** the age of a Complainant is an essential ingredient that must be proved beyond reasonable doubt. Hence in **<u>High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic</u>** by **Hon. Makhandia, J.** (as he then was) thus:

> **"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly it is important that the age of the victim to be proved by credible evidence..."**

[20] Similarly, in **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal stressed this point thus:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which***

must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

[21] Thus, **Rule 4** of the **Sexual Offences Rules of Court Rules** recognizes that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

[22] Although the Complainant told the lower court that she did not know her date of birth, she did say that she had a Birth Certificate, the **Prosecution's Exhibit 1**, which she duly identified before the lower court along with her mother, **PW2**. The document gives the Complainant's date of birth as **17 April 1996**. Hence, the minor was 16 years old as at **27 August 2012** when the offence is said to have happened; and was therefore a child for purposes of **Sections 2 and 8(1)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**. **[b]** **<u>On whether Penetration of the Complainant Occurred:</u>**

[23] The Complainant testified before the lower court that she spent the night **27th and 28th August 2012** in the house of the Appellant; that they made love; and that afterwards she realized she was pregnant after she started gaining weight. She further told the lower court that she gave birth on **26 April 2012**, a date that the Appellant's Counsel took issue with. Thus, by the time her mother had the matter reported to the Police, the several months had passed. Indeed, the evidence of **PW3** was that the girl had a pregnancy of 20 weeks' gestation; and that she also had healed hymenal tears. There being no dispute that **PW1** was defiled or that she conceived as a consequence thereof, the lower court cannot be faulted for finding as a fact that penetration was proved beyond reasonable doubt.

[c] **<u>On whether the penetration of the Complainant was perpetrated by the Appellant</u>**:

[24] As to the pertinent question whether the penetration of the Complainant was perpetrated by the Appellant, the Complainant's evidence was that she knew the Appellant well before the night of **27th and 28th August 2011**, and referred to him in her evidence as her boyfriend. She further stated that she would visit the Appellant in his house every week. In particular, **PW1** told the lower court that she spent the night of **27th and 28th August 2012** with the Appellant in his house; and that they made love. It was the testimony of **PW1** that she had not had sex with any other person; and therefore pointed at the Appellant as the person responsible for her defilement.

[25] The evidence of **PW1**, who was the only identifying witness, was however attacked by the Appellant's Counsel from various fronts; the first of which was that it was contradictory, particularly as regards the date of the offence and the date of birth of the minor's baby; thereby raising the question as to credibility of **PW1** as a witness. It is true that, whereas in the Charge Sheet filed before the lower court, the date of the offence was furnished as the night of **28th August 2011**, the typed Record of Appeal shows that the date given by **PW1** in her evidence was the night of **27th and 28th August 2012**. Although this anomaly was explained away by Counsel for the State as a typographical error, a look at the original handwritten record of the lower court confirms the date given in the minor's evidence as the night of **27th and 28th August 2012**. In the circumstances, the question to pose is whether there is independent witness to inculpate the Appellant with the crime. That being the case, an issue would and does arise as to whether the Appellant is indeed the culprit and the father of the child whose date of birth was given by **PW1** as **26 April 2012**.

[26] The only other evidence that would have connected the Appellant with the act of defilement alleged would have been proof, by way of DNA of paternity of the Complainant's baby; which was not done. Whereas a DNA test is not mandatory, given the clear provisions of **Section 36** of the **Sexual Offences Act**, where the peculiar facts and circumstances of a particular case lend themselves to such testing with a view of satisfying the standard of proof, there is no reason why such a course should not find favour with the Prosecution. In ***<u>Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010</u>,*** the Court of Appeal held that:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person…"***

[27] There appears to be no other evidence of identification linking the Appellant with the Complainant's defilement. Other than the discrepancies on the dates, a fundamental flaw that was pointed out by the Appellant was that he was denied the opportunity to cross-examine the Complainant on the basis that, after conducting *voir dire*, she was of the view that the minor did not know **"…the effect of stating lies…"** She accordingly ruled that she would give an unsworn statement. As has often been stated, the purpose of the *voir dire* examination is for the court to ascertain whether a child of tender years is possessed of sufficient intelligence to understand the meaning of the oath and the importance of being truthful. Thus, in **<u>Maripett Loonkomok vs. Republic [2015] eKLR</u>**, the Court of Appeal restated that:

> **"***Voir dire***, a latin phrase (***verum dicere***) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "***<u>*Voir Dire*</u>** **definition" Duhaime's Legal Dictionary<u></u>.".**

[28] *Voir dire* also serves another purpose, namely, to enable the court ascertain the age of the minor with a view of determining whether a minor is a child of tender years for purposes of **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya**; granted that it is now trite that a child of tender years is one under the age of 14 years. In **<u>the Maripett Case</u>** (supra) it was held that:

> **Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand**

the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* **examination..."**

[29] Had the learned trial magistrate properly directed herself as to the purpose of *voir dire*, she would have come to the conclusion that the minor in this case was not a child of tender years, and would have received her evidence on oath as is usually the case. But even assuming that she was indeed a child of tender years for purposes of **Section 19** of the **Oaths and Statutory Declarations Act,** there was absolutely no justification for the lower court to deny the Appellant the opportunity to cross-examine her; for **Section 208 of the Criminal Procedure Code is explicit** that:

(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witness and other witnesses (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

[30] Clearly, the procedure adopted by the lower court was flawed given the clear guidance provided in **Section 208** aforestated; and there is a long line of authorities to confirm the Appellant's posturing that he had the right to cross-examine **PW1**, notwithstanding that she gave an unsworn statement. For instance, in **Sula V. Uganda (2001) 2 E.A**, the **Supreme Court of Uganda** expressed itself thus on the issue:

"Although an accused person is not liable to cross- examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

[31] *The same position was taken in by the Court of Appeal in* the case of **Nicholas Mutula Wambua vs. Republic, Mombasa Criminal Appeal No. 373 of 2006 wherein it** was held thus:

"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined…It would appear that misconception arises from a view that because accused persons are not cross- examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."

[32] *Having so found, the question to pose is whether that omission is fatal to the proceedings of the lower court. Having given the matter careful thought, I would subscribe to the view that whereas the omission is not fatal as an appellate court is still required to give consideration to the entire body of evidence adduced before the lower court and, if it is sufficient to sustain a conviction then the trial ought not to be vitiated by the omission. However, in this instance, there appears to be no other evidence particularly inculpating the Appellant with the crime.*

[33] The last point taken by the Appellant was that **Section 200** of the **Criminal Procedure Code** was not strictly complied with. That provision states that:

(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 resummons 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.

[34] It was, therefore, the submission of Counsel for the Appellants that there is no evidence that **Section 200(3)** of the **Criminal Procedure Code** was explained to the accused persons by the court; and that the court record only records compliance. According to Counsel, this omission was fatal to the Prosecution case.

[35] A consideration of the lower court record does confirm the Appellants' contention that their trial was handled by three different magistrates. The trial commenced before **Hon. Wattimah, RM**, who took the evidence of **PW1** and **PW2**. It was taken over by **Hon. Olando, RM**, on **16 December 2014** but apparently no witness testified before him. Thereafter **Hon. Kigen, RM**, took over the conduct of the trial on **29 August, 2016** and heard the case to conclusion. In both instances, the Record of Appeal shows, at pages 19 and 24, that the provisions of **Section 200** of the **Criminal Procedure Code** were explained and complied with. However, in **Richard Charo Mole vs. Republic [2010] eKLR**, the Court of Appeal took the firm position that:

"Section 200 (3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."

[36] The aforementioned decision was followed by the Court of Appeal in **John Bell Kinengeni vs. Republic [2015] eKLR**, in which it was held that:

"…the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate … shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In *Cyrus Muriithi Kamau and another versus Republic* Nyeri Criminal Appeal No. 87 & 88 of 2006 the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms…In the light of the above principles the learned succeeding judge's failure to inform the appellant of his rights under section 200 (3) of the Criminal Procedure Code as was mandatorily required of him vitiated the appellant's trial as well."

[37] The rationale for the strict stance was well explained in **Ndegwa vs. Republic [1985] KLR 534** thus:

"1. The provisions of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2. The provisions of section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.

3. No rule of natural justice, statutory protection, evidence or 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.

4. The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.

5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."

[38] In this case, the Appellant's conviction was premised on the evidence of **PW1**, a witness that the convicting magistrate did not see or hear from. This anomaly, as well as the fact that the Appellant was unfairly denied the opportunity of cross-examining **PW1,** leads me to the conclusion that the conviction of the Appellant is untenable. Accordingly, I would allow this appeal, quash the Appellant's conviction, and set aside the death sentence imposed on him the by the lower court. Having done so, the the question to pose, then, is whether it would be in the interest of justice to order a retrial herein pursuant to **Section 200(4)** of the **Criminal Procedure Code**.

[39] In **Rwaru Mwangi vs. Republic, Criminal Appea No. 18 of 2006**, the Court of Appeal was of the view that:

> **"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not…It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial…"**

[40] In this matter, the Appellant was arrested on **9 January 2011**. Given the peculiar facts of this case, I would take the view that the Appellant would be prejudiced by a retrial. Thus, it is hereby ordered that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER, 2019

OLGA SEWE

JUDGE