REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 86 OF 2017.

BETWEEN

STEPHEN ANGANDA CHEVAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 6269 of 2012 delivered by Hon. M. A. Opondo, SRM on 21st July, 2017).

JUDGMENT.

Background

1. The Appellant was charged in the main count with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act of 2006. The particulars of the offences were that on 2nd December, 2012 at [particulars withheld] Estate within Nairobi Area, unlawfully and intentionally caused his penis to penetrate the anus of E.A, a child aged $2^1/_2$ years. He was charged in the alternative with an indecent assault contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he unlawfully and intentionally committed an indecent act with E.A., a child aged $2^1/_2$ years, by touching her private parts.

2. The Appellant was found guilty of the main count and was sentenced to imprisonment for life. He has lodged the present appeal against both the conviction and sentence. He set out his grounds of appeal in an addendum to his written submissions filed 18th July, 2018. In summary they were that penetration was not proved, that Section 200(3) of the Criminal Procedure Code was not complied with, that the case was not proved beyond a reasonable doubt and that his defence was rejected without a plausible reason.

Submissions

3. The Appellant who was in person relied on written submissions filed on 18th July, 2018. He took issue with the fact that penetration was not established. He poked holes into the medical evidence which he pointed out was scanty, contradictory and inconsistent. He specifically stated that the evidence of the police doctor did not point to penetration. He submitted that this evidence contrasted that of the clinical officer who testified that there were tears around the anus that pointed to penetration. He submitted that the difference between the time of the examinations which was only two days apart could not account for the differing results.

4. He submitted that the identification of the Appellant was not apparent from the evidence of PW1 as she was not clear when she identified him.

5. The Appellant took issue with non-compliance with of Section 200(3) of the Criminal Procedure Code after Hon. Wakumile, SPM took over the conduct of the trial which he submitted vitiated the trial.

6. The Appellant also submitted that his defence was not considered. He summed up by urging the court to find that the case was not proved beyond a reasonable doubt and pleaded that the conviction be quashed and sentence set aside.

7. Ms. Sigei for the Respondent made oral submissions. She submitted that the prosecution proved its case to the required standard. She submitted that all the ingredients of the offence of defilement were established. She emphasized that identification of the Appellant was by way of recognition as the complainant knew the Appellant before that date of the incident. She denied that Section 200(3) of the Criminal Procedure Code was not complied with. She referred to the instance when Hon. Opondo, SRM took over the conduct of the trial and ably

explained to the Appellant the requirements of the provision. She concluded by stating that the conviction was safe and urged the court to uphold both the conviction and the sentence.

Determination

8. I have considered the evidence on record and the respective rival submissions. I have concluded that the issues arising for determination are;

i. Whether the provisions of Section 200(3) of the Criminal Procedure Code were complied with.

ii. Whether the offence was proved beyond a reasonable doubt.

9. On the first issue, the record of proceedings shows that the matter was handled by several magistrates. Those required to comply with Section 200(3) were those who would substantively record evidence. The matter was initially before Hon. R.A. Otieno, SPM, who heard the evidence of PW1. She was succeeded by Hon. V. Wakumile, SPM who took the evidence of the rest of the prosecution witnesses. The succeeding magistrate, Hon. Olwande took over the matter on 19th July, 2013 and while the record indicates that Section 200 was complied with and the matter was to proceed with the evidence on record, it fails to indicate whether the Appellant was informed of his right thereunder and what choice he made. A simple indicator that the provision was complied is not evident as the same cannot be impressed by the fact of recording that the section was complied with. It must be recorded how an accused elected to proceed with the trial, either by having the trial start *de novo* or have the witnesses recalled to testify afresh or for further cross examination or to proceed with the evidence already on record. The onus of informing the accused his right to elect how the trial should proceed squarely falls with the succeeding magistrate.

10. All the same, Hon. Wakhumile concluded the prosecution evidence and made a ruling that a *prima facie* case had been established warranting the Appellant to tender a defence. On 21st August, 2015 the matter was placed before Hon. E. S. Olwande, PM who explained the requirements of Section 200(3) to the Appellant who chose to have the matter begin afresh and on 9th September, 2015 the court ruled that matter should begin afresh. Hon. Olwande, PM was succeeded by Hon. A. Opondo, SRM. But before she could record any evidence, she once again called into compliance with Section 200(3). The Appellant chose to have the witnesses recalled. The prosecution objected to the restarting of the case and the trial magistrate made a ruling that the matter would proceed with the evidence on record.

11. It is at this juncture that everything went wrong. Hon. Opondo was only required to inform the parties that an order had been made by Hon. Olwande that the matter was starting afresh. She would then call upon the prosecution to call their witnesses. She did recognize that the Hon. Olwande had already ordered that the matter be heard afresh but in an apparent ouster of that order had the parties submit before ruling that the case would proceed from where it had reached. Her action definitely amounted to overturning an order of a court of concurrent jurisdiction which powers she did not have. She was in error in undertaking the obligation under Section 200(3) yet the matter was due for fresh hearing. Her action no doubt vitiated the trial thus violating the Appellant's right to a fair trial. The court has no alternative but to order that a retrial be conducted. See **Vashanjee Liladhan *v.* Rex[1946] 13 EACA 150**.

12. But a retrial is ousted if certain conditions are not met, including but not limited to a consideration of whether if a retrial is ordered, it will result in a conviction. A retrial must not be aimed at enabling the prosecution to fill up gaps in their case. It must not prejudice an Appellant. All the same, each case depends on its circumstances but the broad principle is that it must serve the interests of justice. **See Opicho v Republic [2009] KLR, 369, Ekimait v Republic (2005)1 KLR, 182.**In the latter case, the Court of Appeal held that;

> ***"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."***

13. Most paramount amongst the factors the court should consider before ordering a retrial is whether the retrial will result in a conviction. Before I briefly make an analysis of this, it is important to state in brief the prosecution case. The complainant was then aged three years. Her unsworn statement was very brief in that she just stated that the Appellant who was their neighbor did bad thing to her. It was in cross examination that she identified her vagina as the area the Appellant touched her. It is her mother, PW1 who discovered that the minor had been defiled. On the material day she did not find PW1 at home and after severally calling out her name in the plot the Appellant came out of their house and told her (PW2) that PW1was sleeping in his house. She went to his house whereupon she bumped into her at the door. She took the minor to the house where she noticed that she was restless. She then realized that she was bleeding from the anus. She informed her neighbor who called an emergency number and were advised to take the victim to hospital. This was done on the same evening. The minor was treated at MSF Clinic in Mathare and later examined by a doctor. The Appellant denied committing the offence stating that he was arrested from his house and informed about the incident. He added that he was asked to give Ksh. 100,000/ so that the matter could be terminated.

14. My reevaluation of the evidence drives me to deduce that the issue of identification was settled by the fact that PW1 and PW2 were neighbors to the Appellant. What the court must critically reevaluate is the medical evidence called to establish the element of penetration. The Appellant submitted that there was a material contradiction in the medical evidence. He submitted that while PW4, a Clinical Officer at MSF Clinic testified that there were fresh tears on the complainant's anus, the same was contradicted by the evidence of PW3, doctor Maundu attached to the police surgery who testified that he did not observe any tears of the anal entry. This submission is attested by the record as PW4 examined the minor on 2nd December, 2012 the date of the incident. Dr. Maundu did the examination on 5th December, 2012 only there days thereafter. It is illogical that an examination of three days apart could yield such varied results. The tears as described by PW4 could not have healed within such a short time. This calls into question the credibility of the medical evidence which I conclude was insufficient to establish the element of penetration. The contradiction in the evidence of the two doctors was so material that it could not be wished away.

15. The court is nonetheless alive to the proviso to Section 124 of the Evidence Act which confers on a court the power to convict an accused person charged with defilement based on uncorroborated evidence of a minor if it believes that the minor was telling the truth. However, penetration which is a key ingredient of the offence of defilement must be established by medical evidence. In the present case, the prosecution called contradictory medical evidence which was fatal to its case.

16. In a nutshell, even if the court were to order a retrial, it is my honest opinion that the same would not result in a conviction; and even if a conviction would be secured it would the result of according the prosecution an opportunity to fill up gaps in their case. In this case, the latter can be glimpsed by a likelihood of adducing only the piece of medical evidence that favors their case. This would heavily prejudice that Appellant and so not serve the interests of justice.

17. In the result, this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 16th day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Miss Atina for the Respondent