REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 104 OF 2015

J O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in original Bungoma CMCR 2543 of 2013 delivered on 16.6.2015 by I.T. Masiba Senior Resident Magistrate)

JUDGEMENT.

The Appellant J O was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.Particulars of the offence were that on the 23rd day of November 2013 at [particulars withheld] area in Teso North District within Busia County being a male person caused his penis to penetrate the vagina of P A a female child aged 13 years who was to his knowledge his daughter.

He also faced an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the alternative charge were that on the 23rd day of November 2013 at [particulars withheld] area in Teso North District intentionally did an indecent act to PA a female child aged 13 years by touching her private parts namely:- buttocks, breast, anus, vagina who to his knowledge is his daughter.

The plea was taken on 26.11.2013 before P.N. Areri Ag Principal Magistrate where upon the appellant pleaded not guilty. After several adjournments, the hearing commenced on 13.8.2014 before Hon. M. Agutu Resident Magistrate. Pw1 PA the complainant and Pw2 KN testified. The hearing was adjourned to 30.9.2014 when pw3 Jesse Sisenda Webi a clinical officer at Kocholia hospital and pw5 P.C. Juliet Ruta attached to Malaba Police station testified. The prosecution sought adjournment to call a witness Margaret Serem. Hearing was rescheduled to 20.10.18 when the prosecutor was unable to obtain the witness Margaret Asese, he closed its case. Ruling on a case to answer was reserved for 11.11.2014 when the appellant was put on his defence and opted to give unsworn evidence and call no witness.

It would appear from the proceedings that the trial magistrate Hon. Agutu was transferred and on 14.4.2015 the file was transferred to court No. 3. The proceedings of 14.4.2015 show:

> *Before Hon. I.T Maisiba PM*
>
> *Pros: Kosgei (State)*
>
> *C/A: Milly*
>
> *Accused: Present*
>
> *I am informed that the trial magistrate is away on transfer. I pray that I be given another court.*
>
> *Pros: I have no objection*

Court: Case is allocated to court 3. Mention before court 3 to fix a hearing date and to take directions under order section 200 CPC.

The Appellant's grounds of appeal in this appeal are that the trial was conducted in violation of the law, and attacked the evidence of the witnesses. The main issue is in this appeal whether the trial court complied with section 200 of the CPC when taking over the matter from M. Agutu who went on transfer. Section 200 of the Criminal Procedure Code provides:

> 200.

(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 re-summon 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 re-summoned 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.***

The need for compliance to section 200 when taking over criminal trial from another judicial officer has been severally stated by the courts. Justice Dulu in the case of ***Anthony Musee Matinge vs Republic*** **Criminal Appeal 25 of 2010 high court Machakos** stated as follows:-

"The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section 200 of the Criminal Procedure Code. The relevant part of which provides:-

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

The effect of non-compliance with section 200 of the CPC by the trial court makes the trial defective.

The court upon taking out proceedings failed to inform the accused of his rights under Section 200 to

(a) proceed with the hearing from where it had reached;

(b) the trial to start de nove or;

(c) to proceed with hearing from where it had reached but recalled witnesses be reheard. The accused then upon being explained of this right may chose the option he deems necessary. Non-compliance with this provision is a defect in the trial which is fatal to the proceedings. In this proceedings there is no records that the provisions were complied with.

"The above provisions of law are couched in mandatory terms..... In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. .....The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."

Where the appellant has established that there was a defect in the proceedings the court can order a retrial. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

"...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;....."

The Court of Appeal likewise 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"*

Applying these principles to this appeal and considering the nature of the evidence on record, the charge, the possibilities of the availability of the witnesses mostly of whom were from PW1's family and the administrative neighborhood who testified barely four years ago hence cannot be said to run the risks of faded memory and given that the appellant was convicted 3 years ago, I am of the considered finding that this is a fit case for retrial.

Consequently, the appeal is hereby allowed, the conviction quashed, and the sentence set aside. The appellant shall be released into police custody and be produced before any other Court competent to try him except Honourable Agutu and Areri. Maisiba is since deceased. Mention before Chief Magistrate Bungoma on 19th January 2019.

It is so ordered.

Dated and Delivered at Bungoma this 13th day of November, 2018

S.N. RIECHI

JUDGE