REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 87 OF 2017

VINCENT MAYENGA MASARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 666 of 2011 at Ogembo Law Courts before Hon. L.M. Nafula (SRM) delivered on the 20th day of November, 2017)

JUDGMENT

1. The appellant, **VINCENT MAYENGA MASARE**, was charged with the offence of defilement contrary to Section 8 (1) and (2) of the Sexual Offences Act. The particulars of the offence were that on the 1st day of July, 2011 at 1:30 p.m. within Kisii County he intentionally caused his penis to penetrate the vagina of HM a child aged 3 ½ years. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

2. The trial court found that the main charge had been proved beyond reasonable doubt. He convicted and sentenced him to life imprisonment. Being aggrieved by that decision, the appellant filed this appeal. He raised 9 grounds of appeal which his counsel Ms. Mogusu summarized as follows;

3. That there were no treatment notes to support the P3 form. The clinical officer that filled the form had not treated the minor and the clinical officer who then testified had neither filled in the P3 form nor treated the minor and could not answer vital questions when they were put to him. The evidence on record was that the minor had been treated at 3 different hospitals; however no treatment notes were tendered and it could be inferred that the medical report was simply based on PW1's (the complainant's mother) allegations against the appellant.

4. Counsel also pointed out that the medical report had been filled in 3 days after the incident. Her contention was that this further diminished the veracity of the medical report. She also faulted the trial court for failing to consider the possibility that a conflict may have existed between the complainant's family and the appellant. The appellant is a step brother to the complainant's father and there was a chance that a grudge had caused the allegations levelled against him.

5. Lastly, she submitted that the minor was not produced in court as required in such cases. She pointed out that by the time the evidence was given, the minor was 8 years old. At such an age it was possible for the trial court to get it from her what happened. The complainant's mother had stated that she tried to talk to the minor immediately the alleged offence occurred but she did not respond yet she was 4 years old. That raised suspicion on whether the offence was actually committed.

6. She concluded that it was not safe to make a finding that the appellant was guilty as charged and commit him to life imprisonment. That though the offence is heinous and deserves such a sentence, justice can only be done if the offence is proved beyond reasonable doubt as people can make allegations. She submitted that the alternative offence had similarly not been proven as there was no proof of penetration. She urged the court to reverse the sentence meted out on the appellant.

7. Mr. Otieno, counsel for the respondent, conceded the appeal for non-compliance with Section 200 of the Criminal Procedure Code. He drew the court's attention to page 9 of the proceedings and page 23 and stated that when the succeeding magistrate took over the matter, the appellant elected to recall the witnesses. Instead, the court directed that the matter proceed from where it had reached without giving any reasons or an indication that it was impossible to recall or find the witness.

8. The relevant section of the Criminal Procedure Code 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."*

9. The proceedings show that this matter was first heard by Hon. Elizabeth Tauni S.R.M. She took PW1's testimony before she was transferred and succeeded by Hon. N. Wairimu S.R.M. The proceedings immediately after Hon. N. Wairimu S.R.M. took over the matter read as follows;

> *5.11.012*
>
> *Before N. Wairimu S.R.M.*
>
> *CIP: Akumu*
>
> *CC: Moseti*
>
> *Accused: Present*
>
> *Prosecution: the complainant is in court and 1 witness however I will not be in a position to proceed as I would (sic) the matter handled consistently by 1 prosecution I ask for adjournment*
>
> *Section 200 CPC directions*
>
> *Accused I would like the matter heard again since the magistrate was not there when the complainant testified I would also like to be examined as ordered by court.*
>
> *Court: matter to proceed from where it had reached.*
>
> *Further hearing :19,12,12*
>
> *(hearing adjourned to 11th February 2013)*

10. On 11th February, 2013 when the matter came up for hearing, Mr. Miencha, counsel for the appellant asked that the complainant undergo a second independent medical examination and also asked for the recall of PW1. The matter was subsequently heard by Hon. L.M Nafula S.R.M. The proceedings immediately after the second succeeding magistrate took over the matter read as follows;

> *13.20.2017*
>
> *Coram: Before L.M. Nafula S.R.M.*
>
> *P/C: Waruguru*
>
> *CC: Gladys/James*
>
> *Accused present*
>
> *Prosecution : I have 3 witnesses ready to proceed.*
>
> *L.M. Nafula S.R.M- 13.10.17*
>
> *Accused: I am ready to proceed. I want the matter to proceed from where it had reached.*

11. The salient question is whether the accused was materially prejudiced by the trial court's failure to re-summon and rehear PW1.The Court of Appeal in the case of ***Ndegwa v Republic [1985] eKLR Criminal Appeal No. 125 of 1984*** insisted on the importance of adherence to this provision of the law stating;

"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."

12. The court in the above matter also stated that the provisions of Section 200 of the law are to be used very sparingly. In ***Abdi Adan Mohamed v Republic [2017] eKLR Criminal Appeal No. 1 of 2017*** the Court of Appeal revisited this issue and gave the purpose of this provision as follows;

> *"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*."

13. The record shows that the appellant was informed of his rights in accordance with Section 200 by Hon N. Wairimu S.R.M. The court's

mandatory duty was done up to that point. Though the appellant sought to have PW1 re-summoned, it was then within the court's discretion to disallow this request.

14. When Hon. L.M. Nafula S.R.M took over the matter, she did not expressly state to the accused his rights under Section 200 of the Criminal Procedure Code. The court of appeal in ***David Kimani Njuguna v Republic [2015] eKLR*** found that Section 200 of the Criminal Procedure Code had not been complied with when the court indicated as follows;

> *"COURT: By consent of Counsel for the accused and state counsel, this matter to proceed from where Lady Justice Mugo left."*

15. The Court of appeal in ***David Kimani Njuguna v Republic (Supra)*** proceeded to quash the conviction and order a retrial. Guided by the above authorities, I find that the trial court did not fully comply with Section 200 of the Criminal Procedure Code. Having so found, I will not address myself to the issues raised by the appellant's counsel.

16. Consequently, the appellant's conviction is quashed and the sentenced imposed on him is set aside. The next issue is to consider whether to an acquittal or 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** held that :

> ***'...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;.....'***

17. Having considered the evidence adduced in the interest of justice and noting that the offence the appellant was charged with is a serious one which carries a life imprisonment, I order a re-trial. The appellant shall remain in custody and appear before Ogembo court on the 17 th of December 2018 for plea and subsequent retrial.

Dated and delivered at **Kisii** on this **11th**day of **December 2018.**

R.E.OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Otieno Senior Prosecution Counsel

Mr. Okemwa h/b for Ms. Mogusu For the Appellant

Ms. Rael Court clerk