



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 462 OF 2010**

**OMARI ISMAEL MAZZHA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara  
Cr. Case 3414 of 2007 delivered by Hon. T. Murigi, PM on 13<sup>th</sup> August 2010.)**

**JUDGMENT**

**Background**

Omari Ismael Mazzha, the Appellant herein, was charged with of defilement of a child contrary to Section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on diverse dates between 28<sup>th</sup> and 30<sup>th</sup> July, 2007, at Dandora phase 3 in Nairobi East District within Nairobi Province committed an act that caused penetration with his male genital organ into the female genital organ of B.O, a child aged 13 years.

In the alternative he was charged of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on diverse dates between 28<sup>th</sup> and 30<sup>th</sup> July, 2007, at Dandora phase 3 Estate in Nairobi East District within Nairobi Province, intentionally and unlawfully committed an indecent act with B O, a child aged 13 years by touching her private parts, namely vagina.

The Appellant was found guilty in the main charge and was convicted and sentenced to 20 years imprisonment. He was dissatisfied with both the conviction and sentence and preferred the present appeal. In his amended grounds of appeal dated 27<sup>th</sup> March, 2017 he was dissatisfied that the learned trial magistrate erred when he failed to observe the provisions of Section 200 of the Criminal Procedure Code, that the learned magistrate erred by failing to observe that the prosecution evidence was below the requisite standard required in a criminal trial and hence the charge was not proved beyond a reasonable doubt and lastly, that the learned magistrate erred when he failed to observe that the evidence rendered was inconsistent and not corroborated and could thus not form the basis of a conviction.

**Submissions.**

The Appellant filed written submission. With respect to non-compliance with Section 200 of the Criminal Procedure Code, he submitted that when the succeeding magistrates took over the conduct of the trial they

did not ask him to elect whether or not the matter should start afresh or proceed from where it had reached. He submitted that the failure to do so violated his right to a fair trial. He submitted that key elements of the offence of defilement were never proved. Firstly, that the age was only demonstrated by way of a P3 Form which was not sufficient. Moreover, the complainant herself testified that she was twelve years old which was a material contradiction that could not be wished away. Secondly, that the evidence of the two doctors who testified did not establish penetration. He submitted that the police doctor who filled the P3 Form indicated that the complainant's hymen was present whereas the doctor who carried out the initial examination at Nairobi Women's Hospital indicated that there was a tear in the hymen at 6 o'clock. His submission was that the trial magistrate erred when he relied on the evidence of the latter doctor over that of the former to his detriment. He urged the court to allow his appeal.

Learned State Counsel, Ms. Sigei submitted that the Appellant was sentenced to 20 years which was the penalty provided under the Sexual Offences Act. She submitted that the complainant gave sufficient evidence setting out how the offence occurred and how she spent three days with the Appellant. She submitted that the Appellant chased her away after she refused him to continue defiling her. She submitted that the complainant identified the Appellant as the person she spent those three days with.

She submitted that PW4, the doctor from Nairobi Women's Hospital corroborated PW1's evidence by giving evidence that the external genitalia was reddened and that there was a tear on the hymen at 6 o'clock. She submitted that this was sufficient proof of sexual assault. She submitted that when Dr. Kamau examined the complainant there were no visible injuries to her genitalia and produced a P3 form to that effect. She submitted that the presence of the hymen was not conclusive evidence of lack of penetration since under Section 2 of the Sexual Offences Act penetration can be partial or full. She submitted that penetration was therefore proved.

Counsel submitted that no birth certificate was produced to prove the complainant's age as no guardian testified. However, she submitted that her age was shown in the P3 form as 13 years which she corroborated during her *voire dire* examination. She was of the view that the complainant's evidence was sufficient to support a conviction.

Counsel went on to submit that the Appellant handed himself over to the authorities after he heard rumours alleging he had committed the offence leading to his arrest. Further that his defence was a mere denial and that the allegations that he was charged due to an ongoing grudge between himself and PW2, the mother to PW1 was an afterthought as he failed to cross examine witnesses on the issue.

Counsel submitted that section 200 of the Criminal Procedure Code was only applicable where a full trial is to be conducted. She submitted that in the instant case all the witnesses testified before one magistrate. This was after the charge sheet was amended. In that case, there was no need to comply with Section 200.

I have considered the respective submissions. Before I delve into the summary of evidence it is important that I first deal with the legal issue raised by the Appellant. He submitted that Section 200 of the Criminal Procedure Code was not complied with. He submitted that after two succeeding magistrates took over the trial, they did not accord him an opportunity to elect on whether the matter should start afresh or not. Instead, all the witnesses were called and they testified without the court complying with the provision. It is clear that Hon. Usui heard 5 witnesses with PW5 testifying on 14<sup>th</sup> August, 2008 after which a hearing date was set for 2<sup>nd</sup> October, 2008. On this date, the court was not sitting as it had court martial duties. Hearing was therefore set for 6<sup>th</sup> November, 2008 on which date the hearing was moved to 31<sup>st</sup> December, 2008. The trial then took a turn when Hon. Usui, on 31<sup>st</sup> December informed the parties that the matter would be taken out "**as it is to begin de novo before court No. 2**". What necessitated this is not clear from the proceedings but the matter was then placed before Hon. Murigi. It came up for hearing on 15<sup>th</sup> April, 2009. An application was made for the charge sheet to be substituted. The Appellant did not object to this substitution. He took plea and the matter heard afresh.

Section 200 of the Criminal Procedure Code is clear that in circumstances where the evidence is partly heard, the succeeding trial magistrate is under an obligation to inform the accused that he has a right to

recall witnesses. In this case, this requirement was not observed as the trial magistrates made the arbitrary decision that the matter would begin de novo. I emphasize that the prosecution have a right to amend a charge sheet before the close of their case pursuant to Section 214 of the Criminal Procedure code. But when this happens, the accused must be accorded the right to elect whether the witnesses who had testified should be recalled to give their evidence afresh or for purposes of further cross examination. This did not, unfortunately, happen and the trial magistrate on her own volition reheard the entire evidence. This ultimately infringed on the accused's right to a fair hearing. He probably may not have wished to have the witnesses re-testify for purposes of hearing the case in a timely manner. Be that as it may, both Hon. Usui and Murigi had succeeded the trial and were therefore under an obligation to comply with Section 200. Their failure do so vitiated the entire trial and rendered it a nullity. The defect would then only be corrected by ordering a retrial.

But before a retrial is ordered, the court must be satisfied that the same would most likely result in a conviction, that it would not be aiding the prosecution to fill gaps in their case, it would not be prejudicial to the accused, that it would be in the interests of justice and that circumstances of the case demand that a retrial be conducted. See **Opicho v Republic (2009) KLR,369.**

A summary of the evidence reveals marked contradictions in the medical evidence. The first doctor to testify was Dr. Kamau who examined the complainant at the police surgery and testified that there were no injuries on her genitalia and that her hymen was intact. This was in stark contrast to the evidence of PW4 who testified that the complainant's external genitalia was "visibly reddened" and that there was a tear on the hymen at the six o'clock position. It is noteworthy that the examinations of the complainant took place 6 days apart. Whereas the time period in question would explain the lack of redness that may have occurred as a result of inflammation due to the trauma, the same could not explain away the "healed" hymen. This is a monumental inconsistency and contradiction as the tear in question was a direct corroborative evidence of a crucial element, penetration.

Although Under Section 2 of the Sexual Offences Act penetration may be partial or complete, the glaring contradictory medical evidence puts into doubt whether PW1 was defiled or not. If the penetration was partial, as argued by the Respondent, then both doctors would have arrived at a similar finding; that the hymen was intact but the genitalia was marked with redness. The contrasted evidence of medical experts ultimately demonstrates that penetration was not sufficiently proved.

Further, as conceded by the prosecution, the child's age was not proven as the only source of her age was the P3 form.

This court while interrogating the evidence also found an issue arising that gave credence to the Appellant's defence. The complainant and PW3 testified that they reported the matter at the police station. The Appellant said that it is then that he heard from one Miriam that he should be in cells. He then showed up on 31<sup>st</sup> July 2007. This was corroborated by PW5 and PW6. In the circumstances, the evidence of PW6 that she did not know whether there was a first report made by the members of the public falls into place with the Appellant's defence that she informed him that there was no report at the station. This fact evokes doubts on what precipitated his arrest leading me to question his involvement in the offence.

It follows then that the prosecution's case fell far from proving the case against the Appellant beyond a reasonable doubt. A retrial would thus be an exercise in futility and would greatly prejudice the Appellant. The result of the foregoing is that the appeal succeeds. I allow that same. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED and DELIVERED this 9<sup>th</sup> day of May, 2017**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of**

1. Appellant in person.
2. M/ s Nyauncho for the Respondent.