REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NUMBER 2 OF 2015

P H N ……………………........................……………………….…………………….….………Appellant

VERSUS

Respondent….. ………………….………….………………………………….…Respondent

JUDGEMENT

P H N (hereinafter referred to as the appellant) was convicted of the offence of incest contrary to Section 20 (1) of the Sexual Offences Act[1] and sentenced to serve life imprisonment in Criminal Case number 26 of 2012- Nyeri on 15.1.2015. Aggrieved by the said finding, the appellant appealed to this court on 29.1.2015 citing the six grounds in the appeal.

At the hearing of the appeal, Learned Counsel for the appellant Mr. Njuguna Kimani, strongly submitted that the proceedings in the lower court are flawed because the trial Magistrate never complied with the mandatory provisions of Section 200 of the Criminal Procedure Code.[2] The record shows that the case was before Hon. W. Juma Chief Magistrate who disqualified herself on 20.11.2012. Hearing commenced before Hon. Okato S.P.M. on 23.1.2013 and the said Magistrate heard three witnesses, but unfortunately the said Magistrate passed on.

On 30.05.2013, the file was placed before Hon. Wekesa Ag SRM and counsel for the accused sought directions since the matter was part heard before the deceased Magistrate. The record clearly shows that the magistrate recorded the following:-

Court- Provisions of section 200 are hereby complied with and the accused on being asked as to whether he would wish for his case to start afresh or proceed from where it had reached replies:

Accused-I wish that the matter to proceed from where it had reached.

Counsel- This is the Position. I had instructions to this effect.

Court- Hearing on 27.07.13

However, the record shows no directions were given by the court under Section 200 of the Criminal Procedure Code on the above date.

On 5.8.2013, the Magistrate C. Wekesa Ag SRM disqualified herself from hearing the case citing the *'complainants' attitude"* This was the second Magistrate to express discomfort in handling the matter owing to reasons attributed to conduct of the complainant. The record shows that on 20.11.2012, the Chief Magistrate Hon. W.A. Juma had disqualified herself citing a complaint letter which had been written by the complainant.

The case came up before Hon. Aringo on 23.09. 2013 and on the said date counsel for the appellant informed the court that he wished the case to start afresh and indeed the court in conformity with the provisions of Section 200 of the Criminal Procedure Code[3] directed that the case would start afresh.

Notwithstanding the above clear directive, on 27.02.2014, the case came up before the same magistrate who in total disregard of his own order made on 23.09.2013 proceeded to hear the case from where it had reached and indeed heard the evidence of PW4 on the said date and on 19.05.2014, he heard the evidence of PW5 and the prosecution closed its case and ultimately placed the appellant on his defence, heard his sworn defence and rendered the judgement now the subject of this appeal.

Counsel for the appellant submitted that on account of failure to comply with the provisions of Section 200 of the Criminal Procedure Code[4] as aforesaid or even failure by the court to comply with its own order rendered the proceedings a nullity and occasioned serious injustice. I agree with the said submissions

Further, counsel for the appellant submitted that the convicting Magistrate only heard 2 witnesses out of the 5 prosecution witnesses who were the Doctor and the investigating officer and that he never heard the key prosecution witnesses whose evidence is extremely crucial and therefore this prejudiced the appellant because the convicting magistrate could not assess the credibility of the witnesses he never saw testifying hence could not arrive at a fair decision.

Counsel for the appellant relied on the decision in the case of Stephen *Munyi Mwobe vs Republic*[5] where Makhandia J (as he then was) held that failure to comply with the provisions of Section 200 of the Criminal Procedure Code[6]was a flagrant violation of the accuses' rights under he said section and that the case was a mistrial.

Appellants counsel also referred to the decision in *Ndegwa vs Republic*[7] where Madan, Kneller and Nyarangi JJA held:-

"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. ....for these reasons we have stated, in our view the trial was unsatisfactory"

Makhandia J (as he then was) in the above cited case considered that the offence was of a sexual nature (like the present case), evaluated the nature of the offence and held that *"it was very important that the trial magistrate who saw the evidence and heard the witnesses should have been the one to write judgement as the demeanour an credibility of the witnesses was of utmost important, failing which the trial ought to have started de novo"*

Justice Dulu in the case of *Anthony Musee Matinge vs Republic*[8] 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 learned judge proceeded to say as follows:-

“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.”

Counsel for the state Miss Chebet agreed that Section 200 of the Criminal Procedure Code was not complied with but urged the court to order a retrial maintaining that the evidence was water tight. She relied on the Court of Appeal decision in the case of *Bob Ayub vs Republic*[9]where the court held as follows:-

*" We have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by this court. In the case of Muiruri vs Republic**[10]** this court held inter alia as follows:-*

Generally whether a retrial should be ordered or not must depend on the circumstances of the case....It will only be made where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not"

The position taken by the state counsel is in my view in line with the provisions of Section 200 (4) of the Criminal Procedure Code[11] which provides that:-

"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 grounds for allowing a retrial under the above section are enumerated in the above case and reiterated in numerous authorities. Khamoni J in *Laban Kimondo Karanja vs Republic*[12] discussing grounds for ordering a retrial, reviewed several court of appeal decisions on the subject and concluded as follows:-

"At the end, ...the principles an appellate court should apply in determining whether to order a retrial are as follows:-

i. A retrial may be ordered only when the original trial, was illegal or defective.

ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an injustice to an accused person.

iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result"

The Supreme Court of India in *Satyajit Banerjee & Ors. v. State of W.B. & Ors.**[13]***, it has been opined that direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. It is only when an extraordinary situation with regard to first trial is found so as to treat it as a farce or a ‘mock trial’, direction for retrial would be justified.

To appreciate the above principles it is important to understand the meaning of the expression "*where the interests of justice* require it and where it is not likely to cause *an injustice to an accused person."* For a re-trial to be ordered*, the interests of justice must require it* and secondly *it must not cause an injustice to the accused person*.

The phrase *"in the interests of justice"* potentially has a broad scope. It includes the right to fair trial, which is a fundamental right of the accused.[14] In the context of the right to a fair trial, the time the case

has lasted, the period the appellant was in prison, the weight of the evidence and the possibility of a conviction needs to be considered. In the present case, the appellant was in prison for one year. The cases commenced on 12.07. 2012 and he was convicted on 5th August 2014.

In the present context, it is also necessary to appreciate the basic concept behind a fair trial. I find useful guidance in the Supreme Court of India decision in *Manu Sharma v. State (NCT of Delhi)*,[15] where the court stated that:-

"In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

The above position is reflected in the Kenya Constitution which guarantees a fair trial to a accused person as one of the fundamental rights in the bill of Rights. In *Rattiram v. State of M.P.***[16]**, a three-Judge Bench ruled thus:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."

In this regard, I find it necessary to emphasize that fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the

society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.

There has to be a fair trial and no miscarriage of justice should be permitted and under no circumstances should prejudice be caused to the accused.

I am not persuaded that a retrial can be conducted without causing injustice to the appellant in this case. First, he was first arraigned in court in 2012, he stood trial, went through the entire process and he tendered his defence. While the law allows an accused person to be provided with witness statements and documents to be relied upon by the prosecution, there is no such requirement on the part of an accused person to provide his defence. Having already tendered his defence in the lower court, I find that a retrial will not be without prejudice because the prosecution is already aware of his defence.

Secondly, the Double Jeopardy rule will be infringed in that the appellant will be tried twice for the same offence. In *United States v. Jorn*,[17] the Supreme Court held that re-prosecuting the defendant would constitute double jeopardy.

It has been submitted that the prosecution is not to blame for the failure by the court to comply with the provisions of Section 200 of the Criminal Procedure Code.[18] This raises the question of the duty of the prosecutor to the court and indeed to the administration of justice. The prosecutor in the lower court had a duty to draw the courts attention to the requirements of Section 200 of the Criminal Procedure Code.[19] He and the defence counsel were in court and none of them pointed out to the court such an essential legal requirement. Both the defence and the prosecution are to blame.

Discussing the duty of the prosecutor in *Republic vs William Macharia Murathe***[20]** this court observed

as follows:-

"The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. ***[21]*** *It is said that the prosecutor acts in the general public interest and so it must be. That is where he prosecutor's ultimate loyalty and responsibility lie."*

I find that this is a case where both the court, the defence and the prosecution are to blame for the omission in question and a proper case for a retrial to be refused because a retrial will no doubt expose the appellant to double jeopardy and a real likelihood of prejudice and on this ground alone, this appeal succeeds.

Counsel for the state was of the view that the evidence case overwhelming, hence the need for a retrial. This necessitates a close examination of the authorities and the evidence on record. As enumerated in the earlier cited authorities a retrial may be ordered where the "*interests of justice require it and where it is not likely to cause an injustice to an injustice to an accused person." Secondly, a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result."*

I am not persuaded that a conviction may result if a retrial may be ordered. First, the record shows a highly hostile attitude exhibited by the complainants mother which makes it necessary for any reasonable tribunal to treat such evidence with caution. The complainant is a former wife of the appellant. From the record, it is clear that there was indeed a grudge between the complainants mother and the appellant and that the defence of the appellant in this regard was never considered. Indeed the court record confirms that on 25.09.2012, the complainant complained to the court that the appellant was threatening her and the court directed the prosecutor to look into the matter and on 4.10.2012 the prosecutor informed the court that he asked the DCIO to investigate the matter and the DCIO reported that there were no threats. In fact on the same day a letter dated 12.08.2012 was tabled in court from Mweiga Police Station confirming the complainant had been making false allegations against the appellant and that the police had investigated the said complaints and found no truth in the same. Thus, on the prosecution may have been propelled by other considerations such as settling scores. Such evidence cannot for the basis of a fair conviction.

For the reasons have enumerated in this judgement and having considered the facts of this case in line with the authorities I am not persuaded that there are sufficient grounds for this court to order a retrial. In fact I hold the view that retrial cannot be done in this case without causing injustice or prejudice to the appellant[22] and as held above under no circumstances should prejudice be caused to the accused. It is only when an extraordinary situation with regard to first trial is found so as to treat it as a farce or a 'mock trial', direction for retrial would be justified and even then the test is it should not be to the prejudice of the accused.

I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant.

Dated at Nyeri this 2nd day of March 2016.

John M. Mativo

Judge