REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 78 OF 2012

ALLAN KIPROTICH BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Principal Magistrate at Kericho court (Hon. J.Ndururi) in Kericho Chief Magistrate's court Criminal (S.O) Case No.17 of 2011 on 8/11/2012)

JUDGMENT

ALLAN KIPROTICH BETT, the Appellant, was tried on a charge of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act no.3 of 2006**. He also faced an alternative count of indecent assault contrary to **Section 11(1)** of the **Sexual Offences Act**. After undergoing a full trial, the appellant was convicted in the main count and was sentenced to serve life imprisonment. The Appellant being dissatisfied filed this appeal.

On appeal, the appellant put forward the following grounds in his Petition:

1. **THAT the learned trial Magistrates erred in law and in fact is not appreciating the fact that the charge sheet was defective.**

2. **THAT the learned trial Magistrates erred in law and in fact is not warning herself on relying on evidence of a single evidence.**

3. **THAT the learned trial Magistrates erred in law and in fact is not appreciating the fact that the evidence tendered by the prosecution witnesses were full of contradiction.**

4. **THAT the learned trial Magistrate erred in law and in fact is not warning hereself and appreciating the fact that P3 was not identified by PW2 but was only introduced by the investigation officer.**

5. **THAT the proceedings in the entirely are defective per-se in that judgement and conviction were delivered by two different magistrates.**

6. **THAT the learned trial Magistrates erred in law by relying on uncorroborated evidence.**

7. **THAT in the judgment the learned trial Magistrates sorts to introduce new evidence which was never tendered by the prosecution witnesses.**

8. **THAT the sentence is unlawful, harsh and excessive in the entire circumstances as it offence the provisions of the children act.**

9. **THAT the learned trial Magistrates erred in law and in fact by violating the constitutional rights of the Appellant.**

When the appeal came up for hearing, Miss. Muthee, learned Prosecuting State Counsel, conceded the appeal on the ground that the Magistrate who took over the case from another colleague did not comply with **Section 200** of the **Criminal Procedure Code**. Miss. Muthee urged this court to order for a retrial. Mr. Kirui learned advocate for the appellant strongly opposed the request for a retrial claiming the same will be prejudicial to the appellant. Mr. Kirui also argued that if this court orders for a retrial the conclusion of the case will procrastinate further. Miss. Muthee countered this argument by stating that the witnesses are readily available and that the evidence are strong enough to sustain a conviction.

Before determining the substance of the appeal, let me set out in brief the case that was before the trial court. The particulars of the charge are that on 14th November 2010, at about 6.00pm [particulars withheld] in Kericho District within Rift Valley Province, the appellant intentionally and unlawfully caused his penis to come in contact with the Vagina of **E C** a girl aged 2 ½ years. A total of eight witnesses testified in support of the prosecution's case. It is the evidence of **M C** (PW3) that on the material date she was on her way back home from a Posho Mill when she found the appellant laying on top of the complainant (E C) in the compound of[particulars withheld] Primary School. The child was crying prompting PW3 to scream for help. **V C** (PW4) told the trial court that she was playing with the complainant together with another girl by the name N when the appellant came and sent them to buy some omo while remaining behind with the complainant. When she came back, PW4 said, she found the complainant crying as blood was dripping from her private parts and soaking her clothes. **N C** (PW5) gave evidence similar to that of PW4. **D K** (PW6) stated that she went to where the complainant was when she heard screams of children. She was told by the complainant's colleagues that the appellant had defiled the complainant. PW6 took the child to **R C M** (PW2) and informed her of what had transpired. PW2 took the complainant to the nearby dispensary and from there she was referred to Kericho District Hospital where she spent the night and reported to police the next day. The appellant was finally arrested on 25th March, 2011 after escaping police dragnet and taken to court on 28th March, 2011. In the P3 form filled by Joseph Koros and produced by **Robert Langat** (PW8), it was opined that there was evidence of defilement. When placed on his defence the appellant gave unsworn testimony denying the offence.

Having set out in brief the case that was before the trial court, let me now turn my attention to the substance of the appeal. It is not in dispute that Honourable N. Wairimu, learned Senior Resident Magistrate heard the entire Prosecution's case and Hon. Kaberia, learned Senior Resident Magistrate took over the case and proceeded to hear the defence case. It is noted that the Provisions of **Section 200 (3)** were explained to the accused person and that he stated that he will proceed from where the previous Magistrate left. Hon. Kaberia convicted the appellant on 2nd November 2012. When called upon to mitigate, the appellant informed the court that he was aged 17 years. This revelation prompted the trial court to send the appellant for age assessment. On 8th November 2012, the age assessment report was filed indicating that the appellant was over 18 years. The file was placed before Hon. Ndururi, learned Principal Magistrate who proceeded to mete out a sentence of life imprisonment. It is clear from the recorded evidence that Hon. Kaberia attempted to comply with **Section 200** of the **Criminal Procedure Code** before taking over the case from where Hon. N. Wairimu left. However, it is not clear whether the Honourable Magistrate fully explained to the appellant the details of his rights to recall witnesses who had testified before the previous magistrate to be reheard or in the alternative the hearing of the case starts de novo. It is not enough to just state that the accused elects to proceed from where the previous magistrate left. That may be so, but the question is, was the accused person informed that he had a right to recall the witnesses who had already testified? If so what was his answer to that specific direction? In my humble view, I think Hon. Kaberia did not fully comply with **Section 200** of the Criminal Procedure Code before taking over the case. The other interesting scenario in this appeal is the role Hon. Ndururi played. The Honourable Principal Magistrate took over the file from Hon. Kaberia and proceeded to pronounce the sentence without any reference to **Section 200** of the **Criminal Procedure Code**. It is

important to note that during that time that both Hon. Kaberia and Hon. Ndururi were based in Kericho. Section 200 of the Criminal Procedure Code clearly states that 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 the judgment. There is no evidence that Hon. Kaberia had ceased to exercise his jurisdiction as a magistrate by the time Hon. Ndururi took over the file to pass sentence. Again, Hon. Ndururi failed to comply with Section 200 of the Criminal Procedure Code before taking over the file from Hon. Kaberia. With respect, I must commend Miss. Muthee for conceding the appeal on this ground. Perhaps the most contentious issue to determine here is whether or not I should order for a retrial. Miss. Muthee has informed this court that the witnesses are available and that the evidence is strong enough to sustain a conviction. Mr. Kirui has argued that an order for retrial should not be made because it will be prejudicial to the appellant in that the case will delay further. There are several factors which must be considered before making an order for retrial. In **Fatehali Manji =Vs= R (1966) EA 343**, the East African Court of Appeal held inter alia as follows"

"(i) 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 insufficiency of evidence or for the purpose 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 prosectuion is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

In this appeal, Mr. Kirui has argued that if the order for retrial is made, the case may delay thus prejudicing the appellant. Miss. Muthee has argued that her witnesses are readily available hence the case will not delay. The records shows that the offence was allegedly committed on 14th November, 2010 and the appellant was convicted and sentenced in the year 2012. With respect, I agree with the submissions of Miss. Muthee that the witnesses are readily available and the passage of time has not taken toll on the witnesses' memory. In any case this court has the discretion to order for the retrial to be conducted on priority basis. In **Mwangi =Vs= R (1983) KLR 522** the Court of Appeal held inter-alia as follows:

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

A critical look at the evidence recorded will reveal that the admissible evidence is capable of sustaining a conviction. The Court of Appeal further restated in **Fundi Reuben Ngala =Vs= R CR.A.no. 268 of 2005** *(unreported)* in part as follows:

"Whether or not a retrial shall be ordered is within the discretion of the court and will be dictated by circumstances in each case. Ordinarily a retrial would be be appropriate order to make where there are fundamental irregularities which would result in a miscarriage of justice which is not curable under Section 382 of the Criminal Procedure Code."

In the final analysis, this appeal is allowed. The conviction is quashed and the sentence set aside. The case is remitted back to the subordinate court to retrial. The appellant to be held in custody pending his retrial. I direct that the case be reheard afresh before another magistrate of competent jurisdiction other than Hon. Ndururi and Hon. Kaberia. The retrial be conducted on a day to day basis until its conclusion. The case be mentioned before the Chief Magistrate's Court Kericho on 10th March 2014 for further orders and directions on retrial.

Dated, signed and delivered in open court this 7th day of March, 2014.

J.K.SERGON

JUDGE

In the presence of:

Miss. Kivali for Director of Public Prosecution

Miss. Maritim holding brief for Mr. Kirui for Appellant