**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 244 of 2007**

**GEORGE WASIKE WANYONYI.....…...…….....APPELLANT**

**-AND-**

**REPUBLIC……..……..……..…...….RESPONDENT**

***(An appeal from the Judgement of Senior Resident Magistrate***

***Mrs. Usui dated 25th January, 2007 in Criminal Case No. 11119 of 2001***

***at Makadara Law Courts)***

**JUDGEMENT**

The appellant was charged with defilement of girl contrary to s.145(1) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on an unknown date during the month of November, 2000 at M Estate in Nairobi, had carnal knowledge of *FAO*, a girl under the age of fourteen years.

The appellant faced the alternative charge of indecent assault on a female contrary s.144(1) of the Penal Code; the particulars being that on an unknown date during the month of November, 2000 at M Estate aforesaid, he unlawfully and indecently assaulted *FAO* by touching her private parts.

The complainant had testified that she was aged 15 years, and was a primary school pupil in Standard 8. She said she knew the appellant herein as a neighbour at M Estate. One day in November, 2000 the complainant while on her way to M Market met the appellant who then invited her to his house, for the reason that he had a message to be delivered to the appellant's sister. But once she entered the appellant's house, the appellant stripped off her clothes, subjected her to sex, and thrust his finger into her vagina. The appellant then issued a warning to the complainant not to report this incident to anyone, on the pain of being killed by him. Several months later it was found out that the complainant was pregnant, and she delivered a baby in September, 2001. The details regarding the sex assault came to light after the pregnancy test; and it is then that the appellant was arrested.

The trial Court thus set out its finding:

"I found the complainant's evidence to be consistent. She appeared to remember what happened very well. She described in detail how the accused led her to believe that he wished to send her to his sister's place, but instead locked her up in his house and had sex with her. She knew the accused person very well as they lived in the same neighbourhood. It appeared that the accused was someone he trusted. I found her evidence not shaken even on cross-examination."

It was Principal Magistrate *Mrs. Juma* who first heard the case, on 11th February, 2003 and thereafter heard the testimonies of PW1, PW2 and PW3. On 9th April, 2003 the same Magistrate directed that the matter be mentioned on the same day, for the purpose of re-allocation to another judicial officer; and the matter came up before Senior Resident Magistrate *Mrs. Nyakundi*, who directed that hearing would take place on 9th June, 2003. On 29th October, 2003 the matter came up for hearing before Resident Magistrate *Mrs. Nyaloti*, and she heard the fourth prosecution witness.

From the record it is clear that the transfer of the conduct of proceedings from Principal Magistrate *Mrs. Juma* to Resident Magistrate *Mrs. Nyaloti* was not the subject of *any directions* by the Court, in the nature of information to the appellant herein.

On *8th January, 2004* this matter came up before Principal Magistrate *Mrs. Kimingi*, and counsel for the appellant then applied for the

recall of PW1, PW2 and PW3 for further cross-examination. The Court did not decide the question, stating as follows:

"The case is part-heard before *Mrs. Nyaloti* who is better placed to deal with the application...."

On 5th August, 2004 this matter came up for hearing not before *Mrs. Nyaloti*, but before *Mrs. Usui* and she proceeded to hear the fifth prosecution witness. The earlier application for a re-call of witnesses was not considered; and no information relating to the change from one judicial officer to another, was conveyed to the appellant herein. This remained the position until 18th July, 2005 when Senior Resident Magistrate *Mrs. Usui* ruled that the appellant herein had a case to answer. The appellant made his unsworn defence on 16th August, 2005 and 6th September, 2005. Thereafter he was convicted and sentenced to an eight-year term of imprisonment, with effect from 25th January, 2007.

Learned respondent's counsel, *Mrs. Gakobo* conceded to this appeal on a technicality: neither of the two judicial officers who succeeded *Mrs. Juma*, who first heard the case, complied with the terms of s.200(3) of the Criminal Procedure Code (Cap.75, Laws of Kenya) at the time they proceeded with the trial. Section 200(3) of the Criminal Procedure Code, which bears the marginal note "Conviction on evidence partly recorded by one Magistrate and partly by another", thus provides:

"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 resummoned and reheard and the succeeding magistrate *shall* inform the accused person of that right."

*Mrs. Gakobo*, quite rightly, with respect, submitted that the terms of s.200(3) of the Criminal Procedure Code are mandatory; and the fact that neither of the "succeeding magistrates" informed the appellant of his trial rights, meant that these Magistrates could have acted on incomplete evidence.

Learned counsel, however, urged that a retrial be ordered: the charges were very serious; there was overwhelming evidence in support of the prosecution case; all the prosecution witnesses are likely to be available; it is in the interests of justice that a retrial be conducted.

Counsel submitted that there was firm evidence showing that the appellant herein had defiled the complainant; the complainant delivered a baby following the incident of defilement; the Government Analyst gave evidence showing that the appellant was the biological father of the child conceived and born following the incident of defilement. Counsel urged: "If this evidence is tendered in a retrial, it is likely to result in conviction."

Counsel urged that a retrial would not cause injustice to the appellant; for, although the trial had taken long, from 2001 to 2007, the appellant had been free on bond; and since the sentence imposed by the trial Court was eight years' imprisonment, he would not have served a substantial portion of it by the time retrial is concluded.

The appellant, for his part, objected to retrial, on the ground that he had, for as much as six years, been attending Court from time to time and this involved travelling long distances from Western Province to Nairobi; in his words: "Retrial will subject me to difficulty."

The facts of this case, as they appear on the trial Court record, are clear. A charge against an adult man, such as the appellant herein, of defiling a young girl, is a serious one in Kenyan society – this Court must take judicial notice. Set against such a legitimate public claim is the inconvenience to the appellant, of undertaking several-hundred kilometres of travel to come to Court in Nairobi, if a retrial is ordered. The relevant considerations, just as learned counsel urged, should be taken in the context of the Court's exercise of discretion.

Judicial discretion is invariably to be founded on *benchmarks of law;* and the relevant law in this regard is laid out in judicial precedent.

In *Bernard Miako Kang'ethe v. Republic*, Nairobi H.Ct. Crim. Appeal No. 48 of 2007 counsel asked this Court to refuse a plea for retrial, and to lay a premium on the goal of justice to the appellant. The following is a passage in the judgement given on that occasion, and it will remain a reference-point for this case as well:

"Although [counsel] urged this Court to take into account certain circumstances in this case and refuse retrial, there are recognised principles that guide the Court, in determining whether there should be a retrial. These principles are stated in *Ahmedali Ali Dharamsi Sumar v. Republic* [1964] E.A. 481; in *Braganza v. Regina* [1957] E.A. 152; and also considered in the scholarly work, *Procedures in Criminal Law in Kenya* (Nairobi: E.A.P.H., 1994) by *Mr. M. Bwonuong'a*, who writes (p.251):

"There are instances in the course of an appeal hearing when it comes to light that the trial of the appellant was either illegal or unsatisfactory for one reason or [another]. In cases of [this] nature the appellate court, depending on the nature of the defect, may either acquit or order a retrial. In general, a retrial should only be ordered when the original trial was illegal or defective.

"...However, a retrial will not be ordered unless it can be shown from the record that, on a proper consideration of the potentially admissible evidence, a conviction might result.'

"From the 11 counts of the charge, which turns on fraud and wrongful obtaining of money from complainants, the record shows the makings of a complex case which closely touches on property rights, and on the protections of the law for the citizen. From the large number of

witnesses (seventeen) called by the prosecution, I have noted that there is, indeed, evidence which seeks to establish a case against the appellant herein. [Respondent's counsel] urged that the ends of justice call for a proper hearing, and a determination of the criminal case, and that the prosecution is ready with the evidence and would recommence trial if the Court allows.

'[Counsel for the appellant] was more concerned with the best interests of the appellant herein; he urged that the trial in question had taken long, and this has compromised the appellant's happiness in his life.

"It is clear to me that this Court is in the first place to be guided by *ends of justice*; and by a commitment to the satisfactory functioning of the legal process; and only in a secondary place, is the personal convenience of parties to be ranked."

I do not consider the foregoing principles to be time-bound, or to have become inapplicable as at now; and relying upon them, I hold that what is before the Court is a fit and proper case for retrial. I will make orders as follows:

1. The proceedings and judgement of the trial Court are hereby vacated.

2. A retrial of the case shall be conducted before a Magistrate other than any of the ones before whom a hearing of the case has in the past taken place.

3. This matter shall be listed for mention, for the purpose of giving retrial directions, before the Chief Magistrate at Makadara Law Courts on Wednesday, 15th October, 2008.

4. The appellant shall continue to be held in prison custody, but may make an application for bail/bond pending retrial before the Court conducting the retrial.

**DATED and DELIVERED at Nairobi this 1st day of October, 2008.**

**J.B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellant in person