IN THE COURT OF APPEAL

AT NAKURU

CORAM: OUKO (P), W. KARANJA & J. MOHAMMED, JJ. A

CRIMINAL APPEAL NO. 200 OF 2013

BETWEEN

P S …….....…….....APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(*Appeal against the judgment of the High Court of Kenya at Nakuru, (**Emukule, J.**) dated 8th November 2013*

in

CRIMINAL CASE NO. 150 OF 2012)

****

JUDGMENT OF THE COURT

1. **PS**, (the appellant) has filed a second appeal challenging his conviction and sentence for the offence of defilement of a two-year-old girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

2. The appellant was charged, tried and convicted by the Senior Principal Magistrate's Court at Narok. The particulars of the offence were that on 2nd July 2011 at [Particulars Withheld] area in Narok North District of the then Rift Valley Province, he intentionally and unlawfully committed an act which caused penetration with his penis into the anus of **SES** (name withheld) a girl aged two years.

3. The prosecution called six (6) witnesses in support of its case. It was the complainant's testimony that she went to one **Nasieku's** home where the appellant took her to the sheep shed, removed her pants, clothes and shoes and defiled her. It was her further testimony that the appellant injured her; that she felt pain as she bled and screamed; that she ran to her mother while the appellant remained in the sheep shed. The complainant identified the appellant by name in Court and pointed him out in the dock. It was the complainant's further testimony that her mother took her to the hospital for treatment and later to the police station.

4. **N ole S (S),** the complainant's father testified that the complainant was 2½ years; that the appellant is known to him as they are in laws; that on the material day at about 9 am, the complainant was tending to their sheep in the company of other children; that upon checking on the children, he saw that the complainant's face and head were swollen; that there was blood on her legs; that upon checking her further, he found blood oozing from her anus; that her anus was torn; and that he called the complainant's mother and other women to rush the complainant to the hospital while he and other men initiated the appellant's arrest. It was **S's** further evidence that there was no grudge between his family and the appellant or his family; and that upon arrest, the appellant lifted his hands and asked for forgiveness.

5. **OS (S)**, **S's** older brother, and the complainant's uncle, testified that on the material day, **S** called him and informed him that the appellant had sodomized the complainant; and that he accompanied **S** in arresting the appellant.

6. **Maibuko ole Shura (ole Shura)** was the Assistant Chief at Naikara Sub-location. He testified that on the material day, **S** called him to inform him that the appellant had sodomized the complainant. It was his testimony that he informed the police who arrested the appellant.

7. **Jesse Kimojino (Kimojino)** was the Clinical Officer at Narok District Hospital. He testified that on 3rd July 2011, he examined the complainant who could not walk or sit properly. It was Kimojino's testimony that he observed that the complainant was 2 years old; that she had lacerations with a tear on anal opening; that blood was oozing out from her anal opening and that penetration was confirmed. Kimojino confirmed that the complainant had been sodomized and signed the P3 form and treatment notes.

8. **PC Mary Kimondo** who was attached to Narok Police Station at the material time was the investigating officer. It was her testimony that after investigating the matter, she charged the appellant with the offence of defilement.

9. The appellant gave an unsworn defence that on the material day, he was herding **S's** herd of cattle when **S**, the complainant's father, arrived with other men and arrested him for allegedly selling a calf. He denied sodomizing the complainant and stated that he quarreled with **S** in August 2008, and **S** therefore framed him as he had a grudge against him.

10. The trial court held that the prosecution had successfully proved its case against the appellant beyond reasonable doubt, found the appellant guilty and convicted him as charged. The trial court considered the appellant's mitigation that he was the sole bread winner of his family and begged to be pardoned. The trial court stated as follows:-

> ***"I have considered the mitigation however, the law does not provide for an alternative sentence as far (sic) this offence is concerned. Besides the offence committed is serious and its prevalence in this region cannot be downplayed. This week alone this court has convicted 5 offenders with similar charges. Accused deserver (sic) deterrent sentence to deter the likeminded fellows. Accused is therefore sentenced to life imprisonment as provided for by the Sexual Offences Act."***

11. Aggrieved by that decision, the appellant appealed to the High Court on the grounds that the trial court erred in law in failing to find that the charge sheet was not in accord with **Section 137** of the **Criminal Procedure Code**, that a Police Constable conducted the prosecution contrary to **Section 88(1)** of the **Criminal Procedure Code;** that the prosecution did not furnish the defence with the investigating officer's notes contrary to **Section 169** of the **Evidence Act**; that the Clinical Officer who testified was not a registered medical practitioner; and that the appellant was not subjected to medical examination.

12. After the hearing, the High Court was satisfied that the charge sheet contained the essential elements of a statement of the offence and the particulars thereof; that the offence disclosed was not that of defilement under Section 8(1) as read with 8(2) of the Sexual Offences Act, but the offence of sexual assault contrary to **Section 5(1)(b)** of the **Sexual Offences Act.** The trial court found the appellant guilty of the offence of sexual assault contrary to **Section 5(1)(b)** of the **Sexual Offences Act**, and sentenced him to life imprisonment.

13. Undeterred, the appellant has filed this second appeal to this Court on the grounds that the learned Judge erred in law in: failing to find that the appellant was denied disclosure of evidence by the prosecution contrary to Article 50 of the Constitution; failing to find that **Section 198(1)** of the **Criminal Procedure Code** was not complied with; and in upholding that the medical evidence was cogent while the expert evidence adduced to prove penetration was not credible.

Submissions

14. At the hearing of the appeal, the appellant was in person while **Mr. Kelvin Gitonga,** Prosecuting Counsel II represented the State. The appellant filed Amended Grounds of Appeal and written submissions on the date of hearing of this appeal and sought to rely on his written submissions. The appellant urged the Court to quash his conviction; set aside the sentence imposed and set him free.

15. **Mr. Gitonga,** learned counsel for the State opposed the appeal and submitted that the High Court re-evaluated the evidence of this case; that the two courts below evaluated the evidence of the prosecution witnesses including the complainant and **S** and considered it before arriving at their decisions.

16. **Mr. Gitonga** submitted that the issue of a grudge between the appellant's and complainant's families was not raised in the trial court.

Counsel urged us to dismiss the appeal.

Determination

17. This is a second appeal. Our role as the second appellate court was succinctly set out in **Karani vs. R [2010] 1 KLR 73** wherein this Court expressed itself as follows: -

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

18. From the record, one of the grounds of appeal to the High Court was that the prosecutor was conducted by an unqualified prosecutor, contrary to **Section 88(1)** of the Criminal Procedure Code. The appellant expounded on this issue in his written submissions in the High Court and urged the first appellate court to allow the appeal on this ground. It is notable that the first appellate court did not consider this issue or make any determination on the issue. With respect, we find that the High Court erred in failing to consider and make a determination whether the prosecution of the case by **PC Ihaji** rendered the entire case a nullity.

19. We have perused the record of the proceedings and confirm that the prosecution was conducted from the beginning to the end b **Police Constable Ihaji. Section 88(1)** of the Criminal Procedure Code provides as follows:-

> "***(1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public***

prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission."

20. **Section 85(2)** of the Criminal Procedure Code provides as follows:-

"(2) The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case."

21. Accordingly, we find that pursuant to **Section 85(2)** as read with Section 88 of the Criminal Procedure Code, **PC Ihaji** was unqualified to conduct the prosecution. The purported prosecution of the case by **PC Ihaji** therefore rendered the entire case a nullity and a mistrial. Accordingly, we have no choice but to declare the proceedings before the trial court a nullity and to quash the conviction and set aside the sentence meted out by the trial court and confirmed by the first appellate court.

22. In the circumstances of this case, should we order a retrial? The provision of the law is that when there is a mistrial, an appellate court may order a retrial or set an appellant free depending on the circumstances of the case. In **Dennis Leskar Loishiye v Republic [2015] eKLR** this court considered the circumstances under which a court should order retrial as set out in **Muiruri v R [2000] KLR 552**:

"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not….."

23. We are guided by the case of **Joseph Muriuki Wachira & another V Republic [2005] eKLR** where this Court in ordering a retrial stated as follows:

"Right from the very beginning of their trial which started before a Senior Resident Magistrate at Nyeri on 17th July, 2000, their prosecution was conducted before the Magistrate by a Senior Sergeant Kigera and on that basis alone, we must allow their appeals against conviction on all the counts upon which each of them was convicted. We accordingly quash the convictions recorded against each appellant and set aside the various sentences imposed on each one of them."

24. Further, in **Roy Richard Elirema & Another V Republic [2003] eKLR** this Court stated:-

"Going by the provisions of the code which we have already fully set out, it is clear that the Attorney General has no power to appoint a police officer below the rank of an assistant inspector to be a public prosecutor."

25. In the instant case, the ordeal that the complainant suffered must have been harrowing. The charge against the appellant was very serious. The minor complainant was established to be only two (2) years old.

26. We bear in mind that the appellant has been in custody since 2nd July 2011, a period of about 8 years. The appellant and the complainant are related and key witnesses in this case are most likely to be available for a retrial. We have also considered the fact that the complainant was 2 years in 2011, when the offence against her was committed and is today 11 years.

27. In the circumstances, we hereby order that the appellant be tried *de novo* before a different Magistrate. We order that the appellant remain in prison custody pending his production before the Magistrate in-charge, Narok Law Courts within 14 days from the date of this judgment for retrial.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR