IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 63 OF 2019

BETWEEN

PATRICK ALIKULA OMOLO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kiambu,

(Hon. L. N. Mutende, J) dated 10th October, 2017

in

HC. CR.A. NO. 176 OF 2016)

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JUDGMENT OF THE COURT

MWM, hereinafter **"the victim"** was a child with mental retardation having suffered from Autistic Spectrum disorder. At the material time she was staying with her mother, (PW1) and her other siblings on a plot owned by Mama **Peter Kariuki, (PW3).** On 11th of August, 2011, PW1 received a message from PW3 that there was a pastor at her house who could pray for the victim. She immediately left for the house with the victim in tow.

Upon arrival in the house of PW3, they met the pastor who turned out to be the appellant. The appellant conducted some prayers for those who had come besides **MWM** and PW1; after which, he informed PW1 that there were evil spirits in her house that were making the victim sick which he needed to exorcise. The trio proceeded to PW1's house and on arrival, the pastor sent away all the children who were in the house claiming that they might be possessed with the same evil spirits when he was exorcising them. The appellant then instructed PW1 not to open the windows and asked for some water in a basin which he was given. He also sought for tea leaves and some salt which he mixed in a basin of water and started sprinkling the mixture around the house. He thereafter asked PW2 for anointing oil which she did not have. The appellant then requested PW1 to go to the shops and buy the same.

PW1 took about 30 minutes to come back and when she did she found the door which she had left ajar, partly closed. She met the appellant at the door steps and he gave her a basin containing water mixed with blood which he instructed her to pour into the toilet. The appellant also instructed her to recite the Lord's Prayer 12 times as she did so. PW1 did as instructed and when she came back, she was given another basin containing blood mixed with water and the victim's underpants which she was also told to pour in the toilet and continue praying as previously instructed. She did so and when she went back she was again given yet another basin containing mucus like substance with similar instructions. Thereafter PW1 was allowed into her house by the appellant. She was shocked to find the victim half-naked and seated on the bed with her legs wide open. The bed sheets were soaked in blood and when she sought to know from the appellant what had happened; the appellant told her that the evil spirits had had sexual intercourse with the victim and instructed her to dress her up. As PW1 was doing so, the appellant attempted to rape her in full view of victim. He unsuccessfully tried to insert his penis into PW1's genitalia. Instead, he inserted his fingers into PW1 private's parts and in the ensuing struggle the appellant consoled PW1 saying that he was not serious about raping her. After PW1 was done with dressing the victim she escorted the appellant back to PW3's house and later to the bus stage where he boarded a motor vehicle and left.

Two weeks after the incident, on 25th August, 2011, PW1 noticed when washing the victim that there was a discharge from her private parts which had a foul smell. She sought medical attention at Nyathuna Sub District Hospital where primary examination indicated that she had been defiled. The victim was referred to Gikuna Administration Police Post where she reported the incident. She was then referred to Nairobi Women Hospital where **Dr. Kungu,** (PW8) examined her and filed her P3 form. He formed the opinion that the victim had been defiled. Later on 6th January, 2012, **Dr. Josephine Otieno,** (PW7) a child adolescence psychiatrist from Kenyatta National Hospital examined her and confirmed that the victim suffered from autistic mental disorder and did not have capacity to have the conversation or understand court proceedings. **CPL Philip Kirui**, (PW10) the investing officer produced the victim birth's certificate which indicated that the victim was 11 years of age at the time of defilement.

The appellant was then arrested and charged with defilement contrary to **section 8(1)(2)** of the Sexual Offences Act. Particulars being that on 11th August 2011 at Gakiri Trading Centre within Kiambu County he intentionally caused his penis to penetrate the vagina of the victim a child with mental disabilities aged 10 years. The appellant faced 2nd count of committing an indecent assault contrary to section 11(1) of Sexual Offences Act. Particulars were that on the same date and place he intentionally touched the vagina of the victim a child with mental disabilities with his penis. In the third count, the appellant was charged with the Sexual assault contrary to **section 5(1)(a)** of Sexual Offences Act. It was claimed that on the same day and place he unlawfully used his fingers to penetrate the vagina of the victim, a child with mental disabilities. The final count that faced the appellant was again that of Sexual assault contrary to **section 5(1)(a)** of the Sexual Offences Act. The particulars noted were that on the same day and place, he unlawfully used his fingers to penetrate the vagina of **PW1**.

In his defence, the appellant denied knowing the victim nor ever meeting her as contended by the prosecution. He however conceded the fact that he was a pastor and that sometimes in August, 2011 he went to house of PW3 at Kibiku for prayers. He was accompanied by Pastor Lumumba. They met with more than 20 people, amongst them some 4 children although he could not confirm whether the victim was one of them. He stated that he conducted prayers between 11.00 a.m. and 5 p.m. He categorically denied that he conducted any prayers in the house of PW1. Nonetheless he admitted that he was escorted to the bus stage by the people he had prayed for, among them, PW1. He laid blame on pastor Lumumba for the predicament that befell him following the said visit, as the same pastor had warned him against interfering with gifts from his followers at Kibiku.

Upon hearing both the prosecution and defence cases, the Trial Magistrate was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt in respect of counts 1, 2 and 3. She however acquitted him of the 4th count. Upon conviction she sentenced the appellant as follows; 1st count - life imprisonment, 2nd count - 10 years imprisonment and 3rd count - 10 years. Both sentences were ordered to run concurrently.

Being aggrieved with the decision by the Trial Court the appellant appealed to the High Court of Kenya at Kiambu on the grounds that he was not positively identified as the person who had defiled the victim, there was no prove of penile penetration of the victim's genitalia by his penis; alternatively he argued that it was possible that penetration would have been caused by other objects or substances and finally that the prosecution failed to call essential witnesses who could have exonerated him.

After hearing the appeal, the learned Judge (Mutende,J) found that both 2nd and 3rd counts had not been proved. She allowed the appeal in respect of those counts. She however sustained the conviction and sentence in respect of the 1st count which has provoked this second and perhaps last appeal, in which he contends that the learned Judge erred in law by;-upholding the conviction despite the fact that the Trial Court had not complied with section 200 (3) of the Criminal Procedure Code, upholding the conviction and yet the case was not properly investigated and; failing to evaluate the evidence as required by the law and come to her own conclusions.

At the hearing of the appeal, the appellant appeared in person and relied entirely on his written submissions. He however emphasized the fact that medical evidence tendered by the prosecution during the trial was not properly evaluated by the two courts below.

Mr. O'mirera, learned counsel for the respondent opposed the appeal. He maintained that the case against the appellant was proved beyond reasonable doubt; that PW1, 2 and 3 were found to be credible witnesses by both courts below; Counsel further submitted that the identification of the appellant was not in doubt. That there was strong circumstantial evidence linking the appellant to the crime as the evidence by the prosecution placed him at the scene of crime and that the age of the victim was proved when the victim's birth certificate was tendered in evidence. With regard to compliance with **Section 200 (3)** of the Criminal Procedure Code, counsel submitted that there was full compliance by the trial magistrate.

This is a second appeal and therefore our jurisdiction is limited to consideration of matters of law only. In the case of **Karani V Republic (2010) 1KLR 734.** This Court observed thus on the issue

> ***"… 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 …"***

Upon careful consideration of the appellant's and respondent's contestations we are of the view that the issues of law for our determination are;-

i) Whether the case against the appellant was proved beyond reasonable doubt.

ii) Whether the High Court re-evaluated the evidence tendered in the trial court as required.

iii) Whether there was non-compliance with 200(3) of the Criminal Procedure Code.

Grounds (i) and (ii) above can be dealt with together. In convicting the appellant, the learned trial Magistrate relied on the testimonies of PW1, PW2, PW3, PW8 and PW9 and in the main considered PW1's circumstantial evidence as to how she came to know the appellant through PW3. That she left the appellant in her house alone with the victim to go and purchase anointing oil from the shops as requested by the appellant. On coming back she found that the appellant had partly closed the door and could not allow her in. Instead she proceeded to give her a basin containing blood, water, mucus like substance and the victim's underpants and told her to go and pour them into the toilet after which the appellant allowed her to the house and found the victim on the bed with her legs wide open. When she confronted the appellant wanting to know what happened, the appellant simply said that it's the demons who had had sexual intercourse with the victim. The court also considered the fact that two weeks later, PW1 noticed unusual discharge from the victim's private parts and she took her for medical treatment following which it was confirmed that the victim had been defiled.

After evaluating the evidence as given by PW1, PW2, PW3 and PW8, the learned trial Magistrate rightly drew an inference that the circumstantial evidence on record irresistibly and unerringly pointed to a conclusion inconsistent with the innocence of the appellant and that the said evidence was incapable of no other explanation other than the guilty of the appellant.

Before the High Court, the learned Judge properly directed her mind to the issues in contest and proceeded to re-evaluate and re-appraise the entire evidence tendered before the trial court. She reverted to the celebrated case of **Okeno V Republic (1972) EA 32** regarding the jurisdiction of the first appellate court on a first appeal. She considered at length the evidence of PW1, PW2, PW3, PW8 and PW9 and came to the conclusion just like the trial court that the evidence was sufficient to sustain to uphold the conviction of the appellant. The court was satisfied that there was no reason whatsoever to doubt the credibility of the said prosecution witnesses' testimonies. She was satisfied that the circumstantial evidence on record unerringly and irresistibly pointed to a conclusion that the appellant was the only person who could have defiled the victim on the material day. The appellant was properly identified notwithstanding the fact that there was no eye witness account of the actual act.

It is evident from the forgoing analysis that both courts below made concurrent findings on issues of fact touching on essential ingredients of the offence, that is the age of the victim, the identity of the perpetrator and penetration of the victim. We are satisfied just like the two courts below that the prosecution led sufficient evidence in prove of the offence charged contrary to the appellant's submission. We discern no misdirection or misapprehension whatsoever of the law to warrant our intervention.

Section 200(3) provides inter alia:-

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

In **Joseph Kamau Gichuki vs Republic, Criminal appeal No. 523 of 2010,** this Court in Pronounced itself thus on the application of **section 200 of the Criminal Procedure Code**;

> ***"This Court had previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of Justice will be defeated if a succeeding Magistrate does not continue a trial commenced by his predecessor. Some of the consideration to be borne in mind before invoking section 200 include whether it is convenient to commence the trial De novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."***

Similarly in the case of **Joseph Kamara Maro V Republic (2014) eKLR** this Court further held that:-

> ***"Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."***

Our own consideration of the record of the trial court however clearly shows that there was strict compliance with the requirements of **section 200(3)** of the Criminal Procedure Code. The record shows that the appellant was represented by **Miss Kinyanjui**, learned counsel. On the day that **Hon. D. N. Musyoka**, PM, took over the hearing of the case from **A. W. Mwangi**, PM, **Miss Kinyanjui** is recorded as saying;

> ***"The matter was being handled by your sister who was transferred and proceeds (sic) from where it had reached …"*** *The court then ordered* ***"matter to proceed from where it had reached as requested by counsel for the accused…"***

Clearly this ground of appeal has no merit whatsoever. It is even an afterthought, since it was not even raised in the first appellate court.

There is absolutely no merit in the complaint by the appellant that his defence was not given due consideration by the two courts below. The trial court reverted to the defence and found it wanting. On the whole therefore, the appeal lacks merit and is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 23rd day of October, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR