IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 106 OF 2015

BETWEEN

ANTHONY OTIENO NDONJI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu, (H. K. Chemitei, J) dated 15th July, 2015

in

HCCRA NO. 31 OF 2015)

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JUDGMENT OF THE COURT

This appeal turns on the simple issue of compliance with the requirements of **section 200(3)** of the **Criminal Procedure Code** by the trial court and the consequences of non-compliance, if at all. That section provides, *inter alia*:-

> ***"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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

The appellant was on 23rd September, 2010 charged with the offence of defilement contrary to **section 8(1)(3**) of the **Sexual Offences Act** before the Senior Principal Magistrate's court at Winam. That court was informed thatthe appellant, **Anthony Otieno Ndonji** had on the 14th September, 2010 at around 11:00pm in Manyatta area within Kisumu County, intentionally caused his penis to penetrate the vagina of **MAH,** a child aged 13 years, hereinafter **"the complainant"**. In the alternative, the appellant was charged with the offence of an indecent act contrary to section 11 (1) of the Sexual Offences Act, particulars being that on the same day, place and time, he intentionally touched the vagina of the complainant**,** a child aged 13 years with his penis. The appellant denied the charges and soon thereafter he was tried. The prosecution assembled a total of five (5) witnesses in a bid to advance its case.

The prosecution case before the trial court in brief was that, **the complainant** was requested by her mother, **SA (PW3)** to go and stay with the appellant's children while their mother went for a prayer meeting. The complainant acceded to the request. However, at night while she was sleeping with the appellant's children in their room, the appellant came into the room, held her by force and carried her to his bedroom and defiled her, whilst threatening to kill her if she reported the incident to anyone. As he defiled the complainant, one of his children saw him in the act whilst coming out of the toilet. When the appellant's wife came back, this child told her what he had seen. The appellant's wife immediately informed the complainant's parents ASN (PW2) and (PW3) of the incident and they all reported the matter at Kondele police station. The complainant was examined at Kisumu East District Hospital by George Mwita (PW5). Upon examination PW5 concluded that sexual intercourse had occurred between the appellant and the complainant. The case was assigned to P.C. Roselyne Nanjala (PW4) who conducted the investigations and, being satisfied that the appellant had committed the offence, preferred the charges already stated above.

Put on his defence, the appellant in his unsworn testimony denied having defiled the complainant. Instead he claimed that he went to the complainant's house to demand for the status of his loan repayment account but the complainant's parents turned on him and a fight ensued. The complainant's parents then vowed to teach him a lesson as a result, hence the charges. The appellant called his wife Eunice Adhiambo Otieno (DW2) as his witness. DW2 denied any knowledge of the allegations of defilement and stated that there was a dispute over the loan account between the complainant's parents and the appellant.

The trial court having considered the evidence on both sides and the law concluded that the appellant was properly identified as the person who defiled the complainant hence the prosecution case had been proved beyond any reasonable doubt. Consequently, the appellant was convicted and sentenced to 20 years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court on several grounds but at the hearing, he confined himself to the ground dealing with the non-compliance with the mandatory provisions of section 200(3) of Section 200 of the Criminal Procedure Code, *"CPC"*. The appellant argued that Section 200 of the CPC though explained to him, he had in response requested that the trial commence afresh. His demand was however rejected and he was forced to proceed with the case from where it had reached before the initial trial magistrate exited the stage. In the premise he considered the proceedings a nullity and prayed for a retrial. In response the State submitted that section 200(3) of the CPC was explained to the appellant and though he requested for the case to commence *de novo,* the trial magistrate was entitled and was indeed justified in turning down the request. The state denied that the proceedings were in the circumstances a nullity and or that the appellant suffered any prejudice.

The learned judge in dismissing the appeal held that the trial court had complied with the requirements of section 200(3) of the CPC and that the provisions did not necessarily intend that the case starts *de novo*. He finally held that the appellant was not personally prejudiced as he had previously actively participated in cross-examination of prosecution witnesses and even presented his defence and called witnesses. It is instructive to note that the state had conceded the appeal on that score. Despite the concession, the appeal was nonetheless dismissed.

Dissatisfied with the High Court's dismissal of his appeal, the appellant filed the present appeal. Three grounds were raised to wit that the learned Judge erred in law by; dismissing the appeal entirely notwithstanding the fact that the trial court failed to comply with Section 200(3) of CPC the Criminal Procedure Code; convicting the appellant using prosecution evidence which had not established the guilt of the appellant beyond reasonable doubt; and putting reliance on the evidence of the prosecution which was largely contradictory and inconsistent.

At the hearing of the appeal, the appellant was represented by **Ms. Nabifo,** learned counsel holding brief for **Mr. Omondi,** learned counsel while the state was represented by **Mr. Muia,** prosecution counsel. Counsel relied on their written submissions and opted not to highlight.

Mr. Omondi in his submissions dwelt at length and indeed confined his submissions to the question of

application of section 200(3) CPC. He submitted that departure from a clear statutory provision without providing a proper and cogent reason signaled an assault on the legislative authority of Parliament as was illustrated in the manner in which the two courts below interpreted Section 200(3) of CPC. He faulted both courts below for refusing to accede to the appellan'ts request on the ground that the case involved a minor. He relied on the cases of **Ndegwa v Republic (1985)eKLR** and **Abdi Adan Mohamed v Republic (2017)eKLR** to lay emphasis on the need for full compliance with of Section 200 of CPC.

Opposing the appeal, Mr. Muia submitted relying on the case of **ODPP v Peter Onyango Odongo & 2 Others (2015)eKLR** that there was full compliance with section 200(3) since the appellant was informed of this right.

We have considered the appeal, the submissions made by counsel and the law. The central issue which we shall address and which will determine the fate of this appeal as already set out at the beginning of this judgment is the alleged failure by the trial court to comply with the provisions of Section 200(3) of the CPC.

The record shows that plea and evidence of the complainant, PW2, PW3 and PW4 was taken by Hon. C.N. Sindani, RM. She thereafter left the station in circumstances which are not clear from the record. The case was thereafter taken over by Hon. B. Kasavuli, SRM who took the evidence of PW5 and the defence, then crafted and delivered the judgment.

The record shows that on 1st July, 2014 when the matter came up for hearing before Hon. B. Kasavuli, SRM, for the first time and after the provisions of section 200(3) CPC had presumably been explained to the appellant, he informed the court of his desire to have the case start afresh on the grounds that the trial court and the prosecutor were all new. He also cited personal problems for his request. The prosecution opposed the request on grounds that the case was old, involved a minor, the only remaining witnesses was present in court and that the appellant only wanted to delay the case by the request. The learned trial magistrate in his brief ruling declining the appellant's request stated:

> ***"I have considered the applications (sic)of the accused and the response by the prosecution and I must agree with the prosecution that this is a very old matter and the reasons given by the accused are not sufficient to allow this Court to issue the riders (sic) sought for. I have also taken into consideration that this case involves a minor and ordering the same to start afresh will be unfair. The accused's response also shows that he is not sure of what he wants. The application is declined, case to proceed from where it had reached."***

It is always desirable that one judicial officer hears a case from the beginning to its conclusion and thereafter render judgment satisfied that he was able to weigh the evidence taken and was also able to make his observations of the conduct or demenour of the witnesses. In the case of Ndegwa **v. Republic, (supra),** the court observed:

> ***"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."***

However, there may be instances when the trial court may not be able to see the case through to conclusion due to the transfer, death, resignation of the judicial officer and for other legitimate reasons. In such case, the provisions of section 200 CPC and in particular subsection 3 thereof kicks in.

In the present appeal, four witnesses had testified when the second magistrate took over the case. He did not have the opportunity to observe and assess the demeanor and credibility of those witnesses save for

PW5. It would have been in the interest of justice if arrangements would have been made for the 1st magistrate if she had been transferred to return to the station so as to complete the trial as almost all the witnesses had already testified before her. (See: **Abdi Adan Mohamed v Republic**, **(supra)**). Further, the case had taken four (4) years to be concluded and as was stated in **Abdi Adan Mohamed v Republic**, **(supra)**, no effort had been made to recall the magistrate to conclude the case. The court stated:

> ***"…we think this appeal demonstrates quite clearly howSection 200has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates. We do not understand why Hon. T. Nzioki who had heard virtually all the witnesses, except one could not return to complete the trial."***

The essence of Section 200(3) of the CPC is however to secure the rights of an accused person in a trial. It is part of fair trial provisions of the law meant to ensure that the accused person is not prejudiced in criminal proceedings and it is absolutely necessary that the said provisions be fully complied with and the record demonstrate such compliance. This Court stated further in **Ndegwa v. Republic, (supra)** that:

> ***"…No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."***

As it is the duty of the trial court to inform an accused person of his right to demand that any witnesses be re-summoned and re-heard, it would appear therefore that failure to inform the accused of that right would result in a mistrial as it would amount to an infringement of the right to fair trial under article 50 (1) of the Constitution. In the instant appeal, it would appear the appellant was informed of the provisions of Section 200(3) of the CPC. What is not clear is how those provisions were communicated to the appellant. The record of the trial court on that day is in those terms:

> *"**11/7/2014***
>
> *Before B. Kasavuli, SRM*
>
> *Court Prosecutor – C.I.P. Okinda*
>
> *Court Clerk – Onyuka*
>
> *Accused – present*
>
> *Section 200 CPC complied with.*
>
> *Accused: I want case to start afresh because the prosecutor and the trial court are not here. That is all."*

This record is unsatisfactory. It does not show that the appellant was informed that he had a right to demand that any witness be re-summoned and re-heard. That notwithstanding upon exercising his right to have the case start afresh, the same was curtailed by the decision of the magistrate who instead ordered the case proceed from where it had reached This Court in the case of **Paul Kithinji v Republic (2009)eKLR** stated that:

> ***"…Sub-section (3), above, is worded in mandatory terms. The failure by the succeeding Judge to comply with it rendered all the proceedings before him a nullity."***

This position was further affirmed in the case of **Richard Charo Mole v Republic (2010)eKLR** when this Court held that:

Section 200(3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity.

This position was again reinforced in the recent case of **Henry Kailutha Nkarichia & another v. Republic [2015] eKLR** where this Court stated:

"The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial."

It is evident from the foregoing that Section 200(3) of CPC must be fully complied with and the court record reflect such compliance. This was not the case here. If there is want of compliance with the provision on the part of the judicial officer, the proceedings are automatically vitiated. The appellant requested for the proceedings to start de novo but his request was denied. It was not sufficient that the learned magistrate found that the case was an old one and that it involved a minor to deny the appellant his request. From the record, it is quite apparent that the delay in concluding the case had nothing to do with the appellant. The delay was all along occasioned by the prosecution who sought adjournment after adjournment on various grounds and in particular with regard to the evidence of PW5. It took between 1st September, 2011 and 1st July, 2014 to have him testify. This delay could not therefore have been attributed to the appellant and form the basis of the magistrate's refusal to grant the appellant's request. In any event the age of the case, without more, cannot be used to infringe on the appellant's protected rights to a fair trial. There is nothing on record to suggest that the complainant could not have availed herself for trial nor that she had been contacted and refused to co-operate and testify again. The complainant may well have been a minor but that alone again is not sufficient reason for the trial court to trample upon the appellant's rights to a fair trial statutorily protected. Further the appellant gave reasons, though he need not have to, why he thought that the case should start *de novo*. It was because both the magistrate and the prosecution were new. We think that the reason was valid and sufficed for the case to commence *de novo.*

Turning to the High Court and with tremendous respect, we think that it misapprehended the essence and purport of section 200(3) of the CPC. It does not repose in the accused's demanding the recalling of a witness first before the judicial officer informs him of the right. It is the duty of the judicial officer first to inform him of that right and leave it to the accused to weigh his options. The learned judge also held that the provision did not necessarily intend that the matter be heard de novo and that the section only dealt with recalling of witnesses. That may be true. However, if the accused was to exercise his options and demanded that all the witnesses who had previously testified be re-summoned and be re-heard, will that not be tantamount to the case starting *de novo*?

A careful reading of section 200(3) of CPC gives an accused person three options; to have the case commence *de novo* he decides to have all the previous witnesses re-summoned and reheard, have some witnesses re-summoned and reheard or proceed from where the previous judicial officer had reached with the case. Therefore, we do not think that the judge was right in holding that section 200(3) of CPC did not envisage a *de novo* hearing. The appellant's demand for a *de novo* hearing did not go outside the purview of section 200(3) CPC as the judge indirectly held. One of the reasons, advanced by the appellant in wanting the case start *de novo* was because of a personal problem. The trial court, however did not interrogate that aspect further. Instead, the trial court used it against the appellant which was not proper. The High Court on its part merely glossed over the issue. Had the two courts done so, it may well have provided further and persuasive reason why he wanted the matter to start afresh.

The High Court also held that the appellant was not materially prejudiced, when the trial court refused his request. The basis of that conclusion is that the appellant had participated in the trial by cross-examining the witness previously assembled by the prosecution and calling his own witnesses. However, participating in the proceedings and advancing a defence by an accused is no absolution from the compliance with the requirements of section 200(3) of CPC. Compliance with section 200(3) of CPC is

meant to give the succeeding magistrate a feel of the case, and the opportunity to observe the credibility and demeanour of witnesses.

Finally we note that the prosecution conceded the appeal in the High Court on the ground that since section 200(3) of the CPC had not been fully complied with by the trial court, the proceedings were thereby vitiated. The state then sought a retrial. However, the High Court did not buy the concession. We hasten to add that the learned judge was not bound to take the position of the state in conceding to the appeal. The learned judge was perfectly entitled to reject the concession. However in the circumstances of his case, we think that the learned judge for reasons we have already expressed ought to have gone along with the position taken by the state in the appeal and found that the proceedings were a nullity for want of compliance with the mandatory provisions of section 200(3) of CPC.

What happens now? Where proceedings are vitiated, two options are available to the appellate court; to order a retrial or free the appellant. The applicable principles for an order of retrial were summarized in the case of ***Jason Akhaya Makokha –vs- Republic [2014] eKLR*** as follows:

> ***"The question we have to ask ourselves now is whether this is a proper case for a retrial. In the case of Mbae Morison and Another v Republic (Nyeri Cr. Appeal No. 306 & 305 of2006 it was held inter alia that a retrial should only be ordered where interests of justice require it. In Kanyeki v Republic [2004] 2 KLR 164 there is the proposition that a retrial will be ordered where witnesses could be easily traced. In Sinaraha & Another v Republic [2004] 2 KLR 328, the proposition is that a retrial will be ordered only when the original trial was illegal or defective but not for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In the case of Ekimat v Republic [2005] 1 KLR 182 there is the proposition that a retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result and should not be ordered where it is likely to cause an injustice to an accused person. In M'Obici & Another v Republic [2006] 2 KLR 166, the Court ruled that a retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See also the case of Kedisia vs Republic [2009] KLR 604for the proposition that regarding an order for a retrial, the Court of Appeal is entitled to look at all the circumstances surrounding the case, taking into account the admissible or potentially admissible evidence available for determination as to whether a conviction was likely to be obtained or not; save that each case must depend on its own peculiar circumstances."***

We are inclined to order a retrial in the interest of justice. The offence committed was serious. No doubt it will have a lifetime impact on the complainant. It has not been suggested that the prosecution will have any difficulties in availing witnesses, should the re-trial be ordered. We are also satisfied that the evidence presented during trial if availed again at the retrial a conviction is likely to result. There is no suggestion that there are gaps in the prosecution case that the prosecution may seek to fill in the event of a retrial. The appellant has only been in custody for 5 years which is not such a long time as to cause prejudice to him. Finally, we note that the prosecution was amenable to retrial when the case was on appeal in the High Court. We are therefore persuaded that the prosecution will have no difficulties in mounting a retrial.

The upshot is that the appeal is allowed. The appellant's trial in the 1st count is deemed a mistrial for want of compliance with section 200(3) of CPC. We however direct that the appellant undergoes a retrial in the Senior Principal Magistrate's Court at Winam before any other magistrate other that Hon. C. N. Sindani and Hon. B. Kasavuli both Senior Resident Magistrates who previously handled the case. Because of the period this case has been in court, we direct that it be handled expeditiously. Towards this end, the appellant should be presented before the Winam Court within the next twenty one (21) days from the date of this judgment for his retrial to commence. Pending such appearance, the appellant shall remain in prison custody.

Dated and delivered at Kisumu this 31st day of October, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.