IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A., J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 127 OF 2013

F W N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from an Judgment of the High Court of Kenya at Nairobi (Achode, J.) dated 21st February, 2014

in

H.CR. A. No. 661 of 2010)

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JUDGMENT OF THE COURT

[1] The appellant, ***F W N***, was charged with the offence of defilement of a child 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 of a female contrary to ***section 144 (1)*** of the ***Penal Code***. He was eventually convicted of the offence of defilement and sentenced to life imprisonment. The particulars of that offence were that on the 14th day of December, 2005, at Ruai in Kayole Division within Nairobi area, the appellant "*intentionally and unlawfully committed an act which caused penetration with his male genital organ of* ***V W W,*** *a child aged 11 years*" to whom we will hereinafter refer to as the complainant.

[2] The appellant was dissatisfied with the conviction and sentence and he filed an appeal in the High Court. On the 21st February, 2013, ***Achode, J.,*** dismissed his appeal and hence this appeal.

[3] In his original Memorandum of Appeal filed through his advocates, ***Messrs K. A. Nyachoti & Company***, the appellant raised six (6) grounds of appeal. Those grounds were, however, abandoned by learned counsel ***Mr. Nyachoti*** in favour of the five grounds in a Supplementary Memorandum of Appeal lodged on the 27th March, 2017. At the hearing of the appeal, learned counsel abandoned ground two (2) and canvassed ground one (1) and three (3) separately and grounds four (4) and five (5) together. In our view, however, those grounds raise the following three issues:

> ***1) That the proceedings before the trial court were a nullity for failing to comply with section 200 of the Criminal Procedure Code.***

2) That the appellant was convicted of an offence created under a repealed law.

3) That the case was not proved to the required standard as reliance was placed on contradictory evidence which the High Court failed to appreciate because it failed in its duty to re-evaluate the evidence.

[4] This being a second appeal, our mandate is as stipulated in ***section 361*** of the ***Criminal Procedure Code,*** which reads as follows:

"361 (1) A party to an appeal from a subordinate court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section: -

(a) on a matter of fact, and severity of sentence is a matter of fact or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence".

[5] This Court has pronounced itself on the provision stated hereinabove in a host of cases including ***Hamisi Mbela & Another -v- Republic - [Mombasa Court of Appeal Criminal Appeal No. 319 of 2009] (UR),*** in which the Court expressed itself as follows:

"8. This being a second appeal, this Court is mandated under section 361 (1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu v Republic [1983] KLR 445, where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. (Martin -v- Glyneed Distributors Ltd. t/a MBS Fastenings)".

[6] The brief facts of this appeal are as follows: - on the 14th December, 2005, the complainant, *(PW 1),* was with her siblings at their home in Ruai when a man who had previously visited their home visited again. Their mother, ***M W Mi,*** *(PW 2), (Mary),* was away at work. The man gave the complainant Kshs. 10/= which she used to buy bananas. The man then told her he would buy her bread. They left together and the man bought her a cake. They boarded a Kangundo bound matatu and alighted at a road block along the way. The man led her to some bushes or to a quarry and removed her clothes. He also undressed, and proceeded to defile her. She felt a lot of pain and cried. The man then abandoned her. She went back to the road block and police officers took her home.

[7] In the interim, ***M***, her mother, had returned home and after waiting for the complainant in vain reported her as missing. At around 11:00 p.m. that night, the complainant was brought home by police officers. ***M*** interviewed the complainant who told her that the appellant had defiled her. The complainant was bleeding and her pantie was blood-stained. ***M*** took the complainant to Ruai Police Station and reported the defilement. She then took the complainant to Nairobi Women's Hospital where she was admitted for four days. The complainant was treated by ***Dr. Mohombe*** who observed blood-stained discharge from her private parts; the hymen was disrupted and there was a 4th degree perineal tear which was repaired. ***Dr. Mohombe's*** report was produced by ***Dr. Aden Rilwan***, (PW 7).

[8] The prosecution also called ***Dr. Zephania Kamau***, *(PW 6),* who also examined the complainant and filled a P3 Form on the injuries sustained by the complainant. He, too, found that the complainant had no hymen and that she had a perineal scar.

[9] According to ***M***, the appellant went underground after the defilement. About one year later, ***M*** saw the appellant near her house and the complainant confirmed that he was the person who had defiled her. ***M*** informed the police and the appellant was arrested by, among others, ***PC Isaac Samingo***, *(PW 3).*

[10] Notwithstanding the above identification by ***M*** and the complainant, IP ***Isa Miramba***, still mounted what we would consider to have been a non consequential identification parade at which the complainant identified the appellant.

[11] In his defence, the appellant stated that on the 14th December, 2005, he was at his home in Ruai where he remained from morning until evening. He denied knowing the complainant and M and stated that as he was suffering from T.B. and was HIV positive, he was too weak to commit the alleged offence.

[12] When the appeal came up before us for hearing on the 30th March, 2017, ***Mr. Nyachoti*** made reference to the record of the trial court and submitted that several magistrates had tried the case and that some succeeding magistrates failed to comply with the provisions of section 200 of the Criminal Procedure Code. ***Mr. Nyachoti*** further submitted that the appellant was charged and tried under a repealed law thereby rendering the trial a nullity. Learned counsel also contended that the medical evidence adduced at the trial did not connect the appellant to the offence and that there was no reason why the appellant, who was alleged to be known to ***Mary,*** was not arrested soon after the alleged commission of the offence.

[13] ***Mr. Peter Mailanyi***, the learned Senior Assistant Director for Public Prosecutions, for the respondent, conceded that ***section 200 (3)*** of the ***Criminal Procedure Code*** was not complied with and that subsequent proceedings may, therefore, very well be a nullity. He also conceded that ***section 145*** of the ***Penal Code*** could not have applied in 2007 as the ***Sexual Offences Act*** was then in force.

[14] With those flaws, ***Mr. Mailanyi*** urged that we order for a retrial. The learned Senior Assistant Director for Public Prosecutions stated that witnesses would be made available and that the retrial would commence with dispatch. In his view, there was evidence upon which a conviction could be founded.

[15] On the aspect of a retrial, ***Mr. Nyachoti*** argued that the appellant has been incarcerated for seven (7) years and that there was no guarantee that he would get a speedy retrial. It was learned counsel's further contention that witnesses are unlikely to be availed and that the evidence adduced by the prosecution would not secure a conviction.

[16] We have considered the respective submissions of both learned counsel and read the record of appeal. Having done so, the following has emerged. The trial commenced before ***Mrs. E. Mbugua,*** *(Ag. SRM)*, on the 3rd September, 2007, who heard the evidence of the first four (4) witnesses. The case was subsequently mentioned before ***Mrs. U. Kidula,*** *(CM)*, on the 13th March, 2008, who recorded that the case would proceed under ***section 200*** of the ***Criminal Procedure Code*** as the trial magistrate had been transferred. ***Ms U. Kidula*** did not hear any witness.

[17] When the case was subsequently placed before ***E. Muriithi***, *(Ag. SPM)*, on the 9th March, 2009, however, the learned magistrate took the evidence of the investigating officer, ***PC Tabitha Ondieki*** without explaining to the appellant his rights under the provisions of ***section 200 (3)*** of the ***Criminal Procedure Code***.

[18] On the 20th January, 2010, the case was placed before ***Mr. T. Murigi,*** *(PM)*, who took the evidence of ***Dr. Zephania Kamau***, *(PW 6)*. The learned magistrate did not comply with the provisions of ***section 200 (3)*** of the ***Criminal Procedure Code***. He heard the rest of the case and subsequently delivered judgment.

[19] In the premises, the appellant is right in raising the issue of non-compliance wit**h** ***section 200 (3)*** of the ***Criminal Procedure Code*** which reads:

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(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 re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right".

[20] ***Section 200 (3)*** of the ***Criminal Procedure Code*** is couched in mandatory terms. Failure to comply with the mandatory provisions meant that the subsequent proceedings were a nullity. Consequently, and pursuant to ***section 200 (4)*** of the ***Criminal Procedure Code***, we declare the appellant's trial a nullity.

[21] As we have already stated, ***Mr. Mailanyi***, has sought a re-trial which has strongly been opposed by ***Mr. Nyachoti***, learned counsel for the appellant.

[22] The law as to when a retrial should be ordered has long been settled. In the case of ***Fatehali Manji -v- Republic [1966] EA 343***, the predecessor of this Court when dealing with the same issue, gave the following useful guideline:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when theconviction is set aside because of insufficiency of evidence or for the purposes 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 prosecution 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 a retrial should only be made where the interests of justice require".

[23] The principles in ***Fatehali Manji -v- Republic*** (supra) have been reiterated in several subsequent cases in the line of ***Mwangi -v- Republic [1983] KLR 522***; ***Sosepeter Mwangi -v- Republic [Criminal Appeal No. 164 of 2005] (UR);*** and ***Muiruri -v-Republic [2003] KLR 552.*** In ***Muiruri -v- Republic***, (supra) this Court rendered itself as follows:

> ***"It, (retrial), will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedikiah Ojuondo Manyala -v- Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts".***

[24] In ***Mwangi -v- Republic [1983] KLR 522***, this Court, following ***Braganza -v- Republic [1960] EA 854,*** stated, at paragraph 538, thus:

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

[25] We have considered the entire circumstances of this case and we do find that there was evidence on record, a summary of which we have set out hereinabove, which may support the conviction of the appellant. ***Mr. Mailanyi*** has also assured us that notwithstanding the period which has elapsed since the offence was committed, witnesses will readily be availed and that the retrial will proceed with dispatch.

[26] In the result, we allow the appeal, quash the conviction and set aside the life sentence passed against the appellant. We direct that the appellant be retried by a competent court. He shall be remanded in custody pending mention of his case before the trial court.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of June, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR