REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 33 OF 2018

DANIEL MUTHAMA MUKUMBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court

Criminal Case 232 of 2015, Hon. A. G Kibiru, CM on 23rd November, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MUTHAMA MUKUMBU.....ACCUSED

JUDGEMENT

1. The appellant, **Daniel Muthama Mukumbu**, was charged before the Chief Magistrate's Court at Machakos in Criminal Case 232 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant on the 2nd day of June, 2013 , in Machakos District within Machakos County, he intentionally caused his penis to penetrate the vagina of **CMN**, a girl aged 9 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally and unlawfully touched the vagina of **CMN**, a child aged 9 years with his penis.

2. Upon being found guilty, the appellant was convicted of the main charge of defilement and was sentenced to life imprisonment. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal.

3. In support of the prosecution's case the prosecution called 5 witnesses.

4. The prosecution's case was in summary that on 2nd June, 2013, the complainant, PW3, was in the company of her brother and cousin looking after cattle when the said brother and cousin told her to go home. On her way home, she met the appellant, who had been sleeping under a tree nearby and whom she knew well as a person from the centre, who threatened that he would kill her if she screamed. The appellant then took her to the *shamba* and "did the bad thing" to her. The appellant removed her underwear and tried to penetrate her while pressing her mouth with until her lips bled. After that the complainant took her pant and left for home while the appellant away. At home the complainant informed her mother, PW2, of the incident.

5. On that day PW2, the complainant's mother had come from the church when the complainant emerged from the house crying. According to her the complainant had blood on her lips and had scratch marks. Upon inquiring from her what was wrong the complainant informed her that she had been attacked by someone and pointed at the farm where the complainant had taken the cattle to graze. It was when she was returning home at 1.00pm that she was attacked by the man, who was lying under a tree and whom she knew by the nickname "Ndere" chased her caught up with her and defiled her. PW2's attempt to trace the assailant however did not succeed and she alerted the community policing who told her to report the matter to the police which she did and also took the complainant to Machakos Level 5 Hospital after she

was given P3 form. According to her the complainant was 9 years based on the notification of birth.

6. According to PW2, the appellant who she also knew by his nickname "Ndere", disappeared for three years.

7. Upon receipt of the information from the complainant, one of the members of the Community Policing to whom PW3 relayed the information was PW3 on 2nd June, 2013. In the company of 2 other people he proceeded to the appellant's house at night to arrest him since the appellant was known to him. However, when the appellant heard them asking for him, he fled and went into hiding for two years only to re-emerge to commit another offence of stealing after which he escaped arrest once again and went to a place called Kalama where he was staying in the bush from where he was rescued from a lynch mob.

8. PW4 was the investigating officer who produced the complainant's birth notification card showing that the complainant was born on 17th August, 2004.

9. PW5 produced P3 form in which it was found upon examination which took place a day after the incident that the complainant had vaginal bleeding with a broken hymen and painful external genitalia. The witness also produced the Post Rape Care Form which also revealed similar results.

10. Upon being placed on his defence, the appellant testified that he did not commit the offence and that the allegations against him were a frame up. According to him, he did not know the complainant or her guardian. It was his evidence that due to an existing land dispute, the complainant wanted to spoil his name.

11. In his judgement the learned trial magistrate found that penetration was proved based on the medical evidence. Regarding identification of the appellant, the court found that the appellant was known by his nickname "Ndere" which he did not deny. Further, the incident occurred during broad daylight and the appellant was seen by the complainant clearly as there was no evidence that the appellant covered his face. As regards the age of the complainant, the court found that this was proved by the documentary evidence.

12. The appellant's defence, it was found was a bare denial and did not expound on the allegation that the appellant was framed.

13. In this appeal the appellant has raised the following grounds:

> **1. That the learned trial magistrate erred in law and fact by conducting the case in violation of section 200(3) of the Criminal Procedure Code.**
>
> **2. That the learned trial magistrate erred in law and fact by failing to find that there was no conclusive proof of penetration of PW1's genital organ.**
>
> **3. That the learned trial magistrate erred in law and fact by failing to find that the reasons for his arrest was due to the alleged offence but was for other reasons.**
>
> **4. the learned trial magistrate erred in law and fact by failing to find that there existed a grudge between the appellant and PW1's family due to boundary dispute.**

Determination

14. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

15. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

16. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

17. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

18. The facts of the case were that the complainant was grazing with his brother and a cousin in a farm when she was told to go home. On her way home the appellant who was apparently taking a nap under a tree followed her, threatened her, took her to a farm and defiled her. She then reported the matter to her mother who after failing to trace the appellant reported the matter to Community Policing members who tried to apprehend the appellant but the appellant escaped and for 3 years was never seen within the vicinity until later after he tried to commit another offence. In the meantime, the complainant was taken for medical check-up which confirmed that her hymen was broken and her external genitalia was painful. Apparently the appellant was well known to the complainant and her mother. In his evidence the appellant stated that he was framed up.

19. In this appeal the appellant complains that the provisions of section 200(3) and (4) of the ***Criminal Procedure Code*** were not complied with. The said provisions provide as follows:

> ***(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***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

20. The said provisions were extensively dealt with by the *Court of Appeal in* ***Abdi Adan Mohamed vs. Republic [2017] eKLR*** *where it held that:*

> ***"As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-***
>
> > ***'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.'

In other words Section 200, as was emphasised in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.

……..

Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.

Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case 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. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo. The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly. The learned Judges in Ndegwa (supra) emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:

"…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…."

……..

Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution. It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;

"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

Was Section 34 aforesaid intended to supply the evidence envisaged by Section 200 so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence if it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead? Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith. The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the

questions in issue were substantially the same in the first as in the second proceeding.

21. In the said case, the Court explained that:

> ***"We reiterate what the Court said in Ndegwa v. R. (supra) that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the appellant the magistrate erred and the appellant was thereby prejudiced. It ought to be remembered always that where an accused person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why. Throughout the issue for some time was that the availability of the prosecution. Towards the end, it was generally intimated that the investigating officer had difficulty in tracing some witnesses. What is more telling is the fact that even after the trial magistrate ordered that the trial would proceed from where the last magistrate stopped, the prosecution sought time to establish who in the list of witnesses had not testified. For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable…As we conclude we think this appeal demonstrates quite clearly how Section 200 has 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...Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.***

22. In the case before the court, the offence was committed on 2nd June, 2013. By the time section 200 of the CPC was being invoked on 30th January, 2017, a period of nearly 4 years had lapsed. While I agree that the bland statement from the prosecution that they would have challenges in recalling the witnesses who had testified did not meet the test in ***Abdi Adan Mohamed vs. Republic*** (supra), this being a first appellate court, this court is obliged to re-evaluate the evidence before the trial court. One of the reasons for declining to start the trial afresh was stated in ***Joseph Kamau Gichuki vs. R CR. Appeal No. 523 of 2010,*** *cited in* ***Nyabutu & Another vs. R, (2009) KLR 409,*** *where the Court considered that the passage of time militated against the trial being started de novo and noted that though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. While it is true that the complainant was strictly speaking not a minor of tender years at the time of her testimony or application for de novo hearing, she was certainly one at the hearing and the court did find that she was a vulnerable witness. As appreciated in* ***Joseph Kamau Gichuki v. R*** *(supra) the learned trial magistrate acted in an attempt to dispatch justice speedily and cannot be faulted because Article 53(2) of the Constitution states that* a child's best interests are of paramount importance in every matter concerning the child. *Subjecting a child to a re-hearing in a case in which she is the complainant in a sexual offence to my mind is not in the best interest of a child. I therefore cannot fault the learned trial magistrate in proceeding in the manner he did.*

23. The second ground was that there was no conclusive proof of penetration of the complainant's genital organ. It is true that the evidence of PW3 was that the appellant attempted to penetrate her sexual organ. She however added that the appellant "did the bad thing to me". Upon examination, it was found that her hymen was broken and her external genitalia was painful and the age of the injury was approximately one day. Section 2 of the ***Sexual Offences Act*** provides that:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

24. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane… It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration"**

25. In **Bassita Hussein vs. Uganda, Criminal Appeal No. 35 of 1995**, the Supreme Court of Uganda held that:

> **"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."**

26. Based on both the testimony of the complainant and the medical evidence, the learned trial magistrate was right in his finding that there was penetration as defined by the law.

27. While the appellant contends that he was arrested due to other reasons and mentioned the existence of a boundary dispute, in his defence, as rightly pointed out by the learned trial magistrate he did not expound on this issue. As was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR**:

> ***"With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: "I find that the defence of the 5th accused is not true." We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances." We agree with this confirmation."***

28. In his defence the appellant said nothing about the events of the day of the incident. Accordingly, the learned trial magistrate cannot be faulted for finding no substance in his defence.

29. Regarding the sentence, the learned trial magistrate stated that the law is clear on the minimum sentence and proceeded to sentence the appellant to life imprisonment. I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

30. In the same vein I set aside the life sentence imposed upon the appellant herein and substitute therefore a sentence of 20 years' imprisonment to run from 7th February, 2015.

31. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 12th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey