Case Number:	HCRA 74 of 2013
Date Delivered:	09 Dec 2014
Case Class:	Criminal
Court:	High Court at Busia
Case Action:	Judgment
Judge:	Francis Tuiyott
Citation:	P N O v Republic [2014] eKLR
Advocates:	Owiti for State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	I.T Maisiba
County:	Busia
Docket Number:	-
History Docket Number:	CMC.CR.C.1280 OF 2011
Case Outcome:	Appeal allowed.
History County:	Busia
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCRA NO. 74 OF 2013

P N O ……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(An Appeal arising out of the judgment of I.T Maisiba SRM in BUSIA CMC.CR.C.1280 OF 2011 delivered on 10th December 2012).

J U D G M E N T

1. In the course of the trial of P N O (**the Appellant**) there was a change of Magistrates after two (2) of the six (6) Prosecution witnesses had testified. The conviction and sentence that resulted from that trial faces challenge due to the non-compliance of the provisions of section 200(3) of the Criminal Procedure Code by the second trial Magistrate. That conviction was in respect to the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act (Act No.3 of 2006). The sentence imposed was imprisonment for a term of 15 years.

2. From the record, Hon. M. W. Njagi heard the evidence of S A (PW 1) and G A L (PW2) who were the first prosecution witnesses. For reasons which are not explained on the record the Magistrate did not complete the hearing of the case and as from 2nd April 2012, a different Magistrate, Hon. I.T. Maisiba heard the remaining four (4) witnesses and the Appellant in his defence. This Court has looked at both the typed and handwritten proceedings of the Lower Court record and finds no indication that Hon. I.T. Masiba complied with the provisions of section 200(3) of the Criminal Procedure Code which are;

"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".

3. Mr. Owiti appearing for the State concedes that indeed there was no compliance with the provisions of section 200(3) of the Criminal Procedure Code. He however argued that the non-compliance should not affect the resultant conviction unless that non-compliance has caused prejudice to the Accused. He then argued that the Appellant has failed to show any prejudice he suffered as a result of the lapse by the succeeding Magistrate.

4. A Trial Magistrate who sees and hears witnesses testify first hand is best placed to hear, gauge and assess the demeanour and credibility of witnesses. Where some witnesses have testified and for some reason there is a change of Magistrates, section 200(3) gives the Accused person a right to demand that any witness be re-summoned and reheard by the succeeding Magistrate. Those provisions are intended to ensure that the Trial continues in a manner that does not prejudice the Accused person and is for the

protection of the Accused person. Where the provisions of section 200(3) are not complied with then the resultant conviction is as vitiated as the Trial itself. In this regard this Court is in agreement with the view of Mbogholi Msagha J in **Rebecca Mwikali Nabutola v. Republic [2012] eKLR** who after considering various Court of Appeal decisions, rendered himself;

"Having gone through the record and especially the issue raised relating to Section 200 (3) of the Criminal Procedure Code I subscribe to the following position. The requirement to comply with the provision thereof is mandatory. The record of the trial court must of necessity contain the fact that the trial court, in this case the succeeding magistrate, has informed the accused person of the right to recall or rehear any witnesses. The reply by the accused person must also be placed on the record and the order relating thereto should be signed by the succeeding magistrate. It is not enough for counsel to state that they have taken instructions because, as the Court of Appeal has said, the duty of the court is to the accused person and not the advocate. Short of that the trial is vitiated. With profound respect, the record before me falls short of that." (my emphasis)

For the reason that the Trial was vitiated, the conviction and sentence of the Lower Court are hereby set aside.

5. The State Counsel urged that in the event of the Court setting aside the conviction then it should order a re-trial. Is this a suitable matter for re-trial" The Principles upon which a retrial can be ordered were restated in **Fatehali Manji –vs- Republic** [1966] EA 343 as follows:-

"**They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".**

The conviction herein has been vitiated by a mistake of the Trial Court for which the Prosecution takes no blame. This Court now looks to see whether a retrial is in the interests of justice and the impact of such an order on the rights of the accused.

6. In the course of hearing, the first Trial Magistrate ordered for the age assessment of the Accused person after noticing that he may be a minor. On 27/2/2012 ,the Magistrate observed;-

"**Age assessment report showing suspect age was assessed on 25/10/09 shows he is underage"**

This Court has looked at the age assessment report which though not on the record of Appeal is in the original file. The date of the report (25/20/2009) is obviously erroneous as it was prepared in compliance with the order of the Court of 24/2/2012 and therefore cannot predate the order. But what is decisive is the content of that report which reads;-

"This is to confirm I have today the 24th day of February 2012 examined P N O and found him to be below the age of Eighteen (18) years" (my emphasis)

As of 24th February 2012, the Appellant was a minor. That seems to find support in a P3 form prepared after the examination of the suspect on 18th October 2011. The examining Doctor put the age of the suspect at Seventeen (17) years.

7) It would be apparent that as at time of the alleged commission of the offence, being 18th October 2011, the Appellant was a minor. As earlier stated the Trial Court, after convicting the Appellant, sentenced him to a prison term of 15 years. This sentence may very well be unlawful. In considering the sentence to impose on a child offender who has turned the age of majority at the time of conviction what is critical is the age of the offender at the time of the offence and not on the date of conviction. Section 8(7) of The Sexual Offences Act provides:-

"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 Act."

Commenting on the effect of those provisions vis-à-vis imprisonment of minors, The Court of Appeal in **Dennis Abuya –vs- Republic** [2010] e KLR held,

"Neither the trial Magistrate, nor the learned Judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was alleged to have been committed. Section 8(7) of the Sexual Offences Act specifically provides that:- 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 Act.

The question of imprisoning a minor does not, therefore, arise under the provision of the Sexual Offences Act."(my emphasis)

Section 190 (1) of The Childrens Act is explicit

"190 (1) No child shall be ordered to imprisonment or to be placed in a detention camp."

8) No doubt the Appellant is alleged to have committed a serious crime. It would seem that he may have suffered an unlawful jail term from 10th December 2012 (24 months now). This may be sufficient atonement for any wrong he may have done. It would be an unjust to put him through a re-trial. For those reasons I hereby set the Appellant free unless detained for some other lawful cause.

F. TUIYOTT

J UD G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 9TH DAY OF DECEMBER 2014

IN THE PRESENCE OF:

KADENYI ……..COURT CLERK

OWITI…….....FOR STATE

APPELLANT PRESENT IN PERSON