



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO.16 OF 2017

J K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 15 of 2016** by **B. M. Kimtai** on 27/03/17)*

J U D G M E N T

1. **J K**, the Appellant, was charged with the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **15th day of September, 2016** within **Kitui County**, being a male person, caused his penis to penetrate the vagina of **K J**, who was to his knowledge his daughter.
 2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **15th day of September, 2016** within **Kitui County**, intentionally touched the vagina of **K J**, a child aged **12 years** with his penis.
 3. Facts of the case were that on the **15th day of September, 2016** PW1, **K J M**, the Complainant, was at home with the Appellant his father and her two siblings, **M J** and **V J**. The Appellant sent **M** to herd animals then entered the house and closed the door. He removed his clothes and those of the Complainant then proceeded to do what the Complainant referred to as "bad things" to her. On finishing she noticed a panga on the bed. He threatened her not to tell anyone. But, when her mother returned home in the evening he told her. PW2, **R M**, her mother told her to sneak out at night after the Appellant fell asleep. She complied and went to her cousin **M** home who in turn informed PW3 **J M M**. He took her to Tseikuru Police Station. She was referred to Tseikuru Sub-District Hospital where she was treated. A P3 form in that regard was later filled and adduced in evidence by PW6 **Vicky Nzomo** a Clinician. The Appellant was arrested by PW5 **No. 2015093615 APC Cheboi Amos**. PW7 **No. 81213 PC Hillary Cheboi** investigated the case and caused him to be charged.
 4. When put on his defence the Appellant stated that on the **15th September, 2016** he was at work at **Usueni**. Prior to leaving in the morning he asked his wife to go and sell 2 goats. When he reached home he asked her for **Kshs. 1,000/=** but she said that she did not have the money. He ate supper served by the Complainant and went to sleep. He woke up in the morning but did not see the Complainant who was alleged to have gone to see her aunt. He had breakfast and slaughtered a goat for visitors. Later on the police who were led by PW3 arrested him. Subsequently he was charged. It was his evidence that he had differences with his wife.
 5. The learned trial Magistrate considered evidence adduced and found the Prosecution witnesses credible. He found the Complainant having remembered each and every fact as to what transpired therefore believed her. He relied on the case of **Mpatra vs. Republic HC 110 of 2003** where **Apondi J.** Stated that:

“Evidence of the Complainant was very clear, about how the incident took place and who perpetrated the heinous act she never had any doubt about the above and the circumstances obviously were favourable for clear precise identification.”
- Hence convicted the Appellant and sentenced him to **life imprisonment**.
6. Aggrieved by the conviction and sentence the Appellant appealed on grounds that: The learned trial Magistrate erred in both law and fact by convicting him on defective charges and that no plea was taken in respect of the charge of incest.
 7. The Appeal was canvassed by way of written submissions. It was stated by the Appellant that the plea was taken in respect of the charge of **Defilement** and after it was amended to **Incest** no plea was taken. That the provisions of **Section 214(1)** of the **Criminal Procedure Code** was not complied with. As a result the conviction was invalid, bad in law and a nullity.

8. That the trial Magistrate failed to make a specific finding on the burden of proof. That the evidence adduced established that he was not the Complainant's biological father therefore he should not have been charged with the offence of **Incest**.

9. Further, that the trial Magistrate should have exercised his discretion by ordering a **DNA** test to be performed to establish the truthfulness of the matter. That evidence adduced did not establish penetration of the Complainant on the **15th September, 2016**. That she was defiled before the stated date therefore evidence adduced was at variance with the particulars of the charge.

10. In response, the State through the learned State Counsel **Mr. Mamba** opposed the Appeal. He urged that the evidence of the Complainant was corroborated by that of her mother, PW2. That the Birth Certificate adduced in evidence indicated that the Appellant was the father of the minor. On examination the minor had a foul smelling discharge and the injury sustained was one (1) day old and the sentence meted out was justified.

11. Regarding the issue of the amended charge he noted that it was not read to the Appellant but he should have raised the matter at trial.

12. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (See **Okeno vs. Republic (1973) EA 32**).

13. At the outset, on the **19th day of September, 2016** the Appellant was charged with the offence of **Defilement** contrary to **Section 3** of the **Sexual Offences Act No. 3 of 2006**. He denied the charge and a hearing date was set. On the **8th of November, 2016** an amended charge sheet found its way on the record. It is duly signed by the trial Magistrate but there is no indication if it was read to the Appellant. The Judgment written was in respect of a charge of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act**.

14. **Section 214** of the **Criminal Procedure Code** provides thus:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

15. The charge that was introduced on record and a substitution silently and unprocedurally done should have been read to the Appellant who should have been given the opportunity to plead to it. This was not done. In the circumstances the Appellant must have been prejudiced as he could not have known whether to defend himself regarding the charge of **Defilement** or **Incest**. In the case of **Joseph Kamau Gichuki vs. Republic (2013) eKLR, Mwera, J.B.M. Kariuki and M'Inoti JJA** stated that:

“.... The code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge..... In the case the charge was amended but the accused person was not called upon to plead to the amended charge the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet....”

16. This clearly shows that the trial in the instant case was substantially defective. The question to be answered is whether the Appellant should be retried?

17. In the case of **Ahmed Samar vs. Republic (1964) EA LR 483** the Court stated that:

“..... where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered..... a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible evidence or potentially admissible evidence a conviction might result. Each case must

depend on the particular facts and circumstances of that case..... an order for the retrial should only be made where the interest of justice require it..."

18. The complainant herein was the daughter of the Appellant. She was a **13 years old** child who had sufficient intelligence and understood the sanctity of the oath. There was evidence of penetration into her genitalia.

19. The Appellant on the other hand was sentenced to serve **life imprisonment**. He has been incarcerated for a period of **1½ years**. Ordering a retrial will not be prejudicial to him. He shall be produced before **Kyuso Principal Magistrate's Court** to be tried before a different Court of competent jurisdiction. Mention for directions on the **2nd October, 2018**.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of September, 2018.

L. N. MUTENDE

JUDGE