**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL 11 OF 2012**

**J M K ……APPELLANT**

**VERSUS**

**REPUBLIC…….....……RESPONDENT**

**(An appeal arising out of the judgment and sentence of S. Gacheru SRM in Sexual Offences Case No. 6 of 2010 delivered on 13th September 2011 at the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

J M K, (hereinafter "the Appellant"), was convicted of the offence of the offence of incest contrary to Section 20(1) of the Sexual Offences Act, and sentenced to life imprisonment. The particulars of the offence were that on the 14th day of February 2010 at ***[particulars withheld]*** village, Katanga sub-location in Machakos District, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M K G, a girl aged 17 years, who was to his knowledge his sister.

The Appellant was also charged with an alternative offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that on the 14th day of February 2010 at ***[particulars withheld]*** village, Katanga sub-location in Machakos District, the Appellant intentionally touched the vagina of M K G, a girl aged 17 years, with his penis.

The Appellant was arraigned in court on 19th October 2012 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced on 13th September 2011. The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal on the grounds that the magistrate relied on biased visual identification by PW1; the evidence of PW3 was not credible; the medical examination did not link him to the penetration allegation; the sentence was too harsh; and that his defence was not considered.

The Appellant availed submissions on his appeal dated 10th February 2016. He submitted therein that his fundamental right to a fair trial was infringed in that he was not supplied with witnesses' statements since the time he was charged on 16th February 2010 upto 10th November 2010, thus making the trial null and void. In addition, that the learned magistrate ordered that he could only be supplied with the statements at his own cost despite being a pauper. The Appellant cited various provisions of the Constitution in support of his argument including Article 50 (2) (b) and (j).

The Appellant further argued that the prosecutor had not indicated that he had been gazetted to prosecute after the change of the Constitution and shift in the powers of the Attorney General, and pursuant to section 85 of the Criminal Procedure Code. He also argued that the offence had not been proved to the required standard since the witness called Munyao had not testified; that there were not spermatozoa

found on the victim's panties; there was no medical evidence adduced from Machakos hospital and there was no DNA analysis conducted on the victim.

Ms Rita Rono, the learned Prosecution counsel, filed submission dated 7th March 2013 in opposition to the appeal. It was submitted therein that the Prosecutor PC Muyei was gazetted as having the delegated powers to prosecute. It was argued that the presence of spermatozoa was not all the evidence required to prove defilement, and that PW7 had confirmed that the victim's hymen was not intact and that her vagina was reddish confirming the defilement. It was further urged that the age of the victim was properly assessed by a doctor, and the court was rightly guided on the same.

It was also admitted by the prosecution that the Appellant had requested for written statements after two witnesses had testified. However, that the court did not indicate whether the statements were supplied and the matter proceeded in the next hearing. It was stated that the decision of court was well reasoned, however it is in the interest of justice that a re-trial be held.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses during the trial of which PW1 was the complainant, G M K, who testified as to the events of 14th February 2010 when the offence is alleged to have been committed by the Appellant.

M K K (PW2) who was the complainant's mother; Zipporah Kitheka (PW3), the chief of Kola sub-location; and Cpl Beatrice Koskey (PW5), the investigating officer in the case, all testified as to the reports they received from the complainant of the alleged offence committed against her, and on the arrest of the Appellant. The last witness was Dr. Judith Kimuyu (PW4), who produced the P3 form and testified as to the injuries noted on the complainant upon her medical examination.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave unsworn testimony and did not call any witnesses. He stated that he had been framed and that on 14th February 2010 he woke up and went on with his chores in the farm. He said that he had only met PW1 outside the house at 6.00 am as he was going about his business. He stated that he was arrested at 11.00 am on that day by two people and taken to Machakos Police station.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise two issues. These are firstly, whether the Appellant's right to a fair trial was violated; and secondly, whether the Appellant's conviction for the offence of incest was based on consistent and sufficient evidence.

On the first issue, the Appellant claimed that his right to a fair trial as enshrined in the Constitution were violated as he was not availed the witness statements until 10th November 2010. I have perused the record of the trial court, and note that the Appellant requested for the witness statements on 10th November 2010 after two prosecution witnesses (PW1 and PW2) had already testified and been cross-examined. The trial Magistrate then ordered that the Appellant be supplied with the witness statements at his cost. When the matter came for the remaining hearings the Appellant did not raise the issue of provision of witness statements.

Article 50(2)(j) of the Constitution provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This right was explained in ***Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission,*** **Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

> ***"The words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair***

***trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c)guarantees the accused the right, "to have adequate facilities to prepare a defence.***

***This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence ….. The obligation to disclose was a continuing one and was to be updated when additional information was received."***

In the present appeal, it is evident that the Appellant requested for witness statements after the trial had already started, and it is not shown on the trial record if the same were availed to him. The failure to ensure that the Appellant received witness statement before proceeding with the trial contravened and/or violated the Appellant's constitutional rights as enshrined in the Article 50(2)(j) Constitution. The appeal therefore succeeds on the ground that the Appellant was not provided with witness statements to help him prepare for his defence.

I am of the view that the ground of failure to afford the Appellant the witness statements on time is sufficient to dispose of the appeal. In addition, it will not be prudent for this Court to proceed with a determination of the outstanding issue, as the same will entail and evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered, as requested by the Prosecution.

The only outstanding issue then is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

> **"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 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 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 injustice to the accused person."**

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal held that:

> "**We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. In addition, it is my view that taking into account the time that has lapsed since the Appellant's conviction and sentencing on 13th September 2011, and given that all the witnesses were either family members or public officers, the witnesses will not be difficult to secure, and a retrial will therefore not be difficult.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried by any other magistrate other than Hon. S. Gacheru at the Machakos Chief Magistrate's Courts, and for that purpose he shall remain in custody and shall be taken before a Senior Resident Magistrate at Machakos Chief Magistrate's Courts on **17th June 2016** to plead to fresh charges.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 13TH DAY OF JUNE 2016.**

**P. NYAMWEYA**

**JUDGE**