



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL 215 OF 2013**

**S W K.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of L. Simiyu Ag. SRM in Criminal Case No. 449 of 2010 delivered on 13<sup>th</sup> September 2013 at the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

S W, (hereinafter “the Appellant”), was convicted of the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act, and sentenced to life imprisonment. The particulars of the offence were that on 28<sup>th</sup> April 2013 in Machakos District within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of E W N, who was to his knowledge his daughter.

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 28<sup>th</sup> April 2013 in Machakos District within Machakos County, he intentionally and unlawfully caused his penis to touch the vagina of E W N a child aged twelve (12) years.

The Appellant was arraigned in court on 30<sup>th</sup> July 2009 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced on 13<sup>th</sup> September 2013. The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal in Petition of Appeal dated 20<sup>th</sup> September 2013 and filed in Court on the same date. The grounds of appeal as set out in the said Petition are as follows:

1. The learned trial magistrate erred in both law and fact by convicting and sentencing the Appellant in a charge which was defective.
2. The learned trial magistrate erred in both and law and fact by convicting the Appellant on a charge which was at variance with the evidence adduced in court.
3. The learned trial magistrate erred in both law and fact by failing to appreciate that the constitutional right of the Appellant had been violated in that he was not arraigned in court within twenty four (24) hours as by the law stipulated and failing also to find that no explanation at all was offered by the prosecution for the said delay and therefore the entire lower court proceedings were a nullity ab initio.
4. The learned trial magistrate erred in both law and fact and misdirected herself by failing, after

convicting the appellant on the main count, to make a finding regarding the alternative charge.

5. The learned trial magistrate erred in both law and fact when she failed to consider and appreciate that the documentary medical evidence availed was of no probative evidential value, in that there was time lapse between the date and time of the alleged commission of the offence and the time and date of medical examination.

6. The learned trial magistrate erred in both law and fact by failing to appreciate that the medical evidence tendered by the prosecution was not conclusive and the same had no nexus to the offence with which the appellant was charged and convicted.

7. The learned trial magistrate erred both in law and fact by failing to appreciate and find that PW5 (the alleged victim) was threatened and coerced by her mother (PW4) into telling lies but not the truth.

8. The learned trial magistrate erred in both law and fact by failing to appreciate and find that the age of the alleged victim was nowhere stated in the charge sheet thereby occasioning prejudice, embarrassment and miscarriage of justice to the appellant.

9. The learned trial magistrate erred in law and fact relying on the evidence of a single witness (a minor) which evidence also needed corroboration and therefore the conviction of the Appellant was unsafe .

10. The learned trial magistrate erred in law and fact by allowing and admitting the evidence of PW6 whilst such admissibility had not passed the test of the provisions of section 33(1)(b) of the Evidence Act (Cap 80 of the Laws of Kenya).

11. The learned trial magistrate erred in both law and fact by failing to accord the Appellant's defence the attention and consideration required.

12. The learned trial magistrate erred in both law and fact by relying on prosecution evidence which was contradictory .

13. The learned trial magistrate erred in both law and fact by shifting the onus of proof from the prosecution to the defence.

14. The learned trial magistrate erred in law and fact by failing to appreciate that M N K (PW3) was not a defence witness and therefore her testimony ought to have gone all the way to discredit the prosecution case.

15. The learned trial magistrate erred in both law and fact by meting out a sentence against the accused person which was manifestly harsh and excessive.

These grounds can be collapsed into three main grounds namely that the charge was defective, that the evidence tendered by the prosecution did not prove their case beyond reasonable doubt, and that the Appellant's defence was not given the attention and consideration required.

The Appellant's Advocate J.N. Kimeu & Co Advocates, availed two sets of written submissions on the appeal dated 14<sup>th</sup> March 2016 and 26<sup>th</sup> July 2016 during the hearing of his appeal. On the issue of the defective charge, it was submitted that the phrase "incest by male" in the charge rendered the charge vague and defective, as the offence is described as incest by male person. Further, that there is no such offence as incest by male in law, and the Appellant was charged with an offence that is non-existent and unknown in law contrary to Article 50(2)(n)(i) and(ii) of the Constitution. Reliance was in this regard placed on the decisions in **Mohamed Abadala vs Republic, Criminal Appeal No. 372 of 2012** and **Hilda Atieno vs Republic, (2016) e KLR**. It was also submitted that this is a defect that cannot be cured by section 382 of the Criminal Procedure Code

The Appellant further submitted that he was convicted on the uncorroborated evidence of the complainant, and that the trial Court did not exercise caution required by section 124 of the Evidence Act in relying on the evidence of the complainant who was a child of tender years. It was also urged that the evidence of PW3, who was the mother of the Appellant, contradicted that of the other prosecution witnesses, and that the treatment notes produced as exhibits by the prosecution were of no probative value as there was a time lapse between the alleged time of commission of the offence, and the time and date of medical examination.

Lastly, it was submitted for the Appellant that a retrial would not meet the ends of justice in this case, and that without prejudice to the foregoing the Court do reduce the jail term which was manifestly harsh and excessive.

Ms. Rita Rono, the learned Prosecution counsel, filed submission dated 17<sup>th</sup> July 2016 in opposition to the appeal. It was submitted therein that the charge sheet was properly drafted, as section 20(1) of the Sexual Offences Act prescribes the offence and penalty of incest by males hence there was no ambiguity. The prosecution however conceded that after PW5 gave her testimony, the Appellant was not given the chance to cross-examine her, and that it would therefore be in the interests of justice that a retrial is ordered as the right to cross-examine is one of the rights of a fair trial under Article 50(2)(k) of the Constitution. Reliance was placed in this regard on the decision in **Nicholas Mutiso vs Republic, Criminal Appeal No. 154A of 2014.**

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 M M (PW1), N M M (PW2), M N K (PW3) and N M (PW4), who were the complainant's maternal uncle, maternal grandmother, paternal grandmother, and mother respectively all testified as to information they received about the defilement of the complainant, and their conversations with the complainant in this regard.

The complainant, E W N, was PW5, and she testified after a *voire dire* examination as to the events of 28<sup>th</sup> April 2013 when she was allegedly defiled by the Appellant who was her father, while at his house. PW6 Dr. Emmanuel Leoposha gave evidence as to the results of the complainant's medical examination after the alleged defilement. P.C Ann Napunyu was the last witness (PW7), and testified as to the report made of the complainant's defilement at the Machakos Police Station.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave sworn testimony and did not call any witnesses. He denied defiling the complainant, and claimed that the complainant who was his daughter, had the habit of escaping from his home to her mother's home, and that on the material day he did not look for her for this reason, and assumed that she was with his mother.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise four issues. These are firstly, whether the charge pursuant to which the Appellant was convicted was defective; secondly, whether the Appellant's was denied the right to cross-examine the complainant; thirdly, whether the Appellant's conviction for the offence of incest was based on consistent and sufficient evidence; and lastly whether the Appellant's defence was considered.

On the first issue, the Appellant claimed that the charge sheet was defective as it did not state that the incest was by a male person as indicated in section 20(1) of the Sexual Offences Act, but stated that the offence was "incest by a male" which is a non-existent offence. I have in this regard perused the charge sheet, and the charge therein was stated as follows: "incest by male contrary to Section 20(1) of the Sexual Offences Act, No. 3 of 2006", and the charge sheet proceeded to give the particulars of the offence.

Section 20(1) of the Sexual Offences Act provides for the offence of incest as follows:

**“20. Incest by male persons**

**(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:**

**Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”**

The question therefore is whether the omission of the word “person” after the word “male” in the charge makes the charge sheet defective. In Peter Ngure Mwangi v Republic, [2014] eKLR the Court of Appeal sitting at Nairobi held that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

In addition it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

***“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”***

I have perused the charge sheet and find that other than the missing word of “person“, the particulars of the offence of incest by male person were clearly spelt out, which included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

Turning to the second limb as to whether the noted omission in the charge sheet is curable, section 382 of the Criminal Procedure Code provides as follows in this regard:

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”**

In the instant appeal, I find that the missing word of “person“ in addition to the word “male” in the charge sheet did not prejudice the Appellant in any way, as the word male can also be, and is ordinarily construed to mean a person of the male sex. In addition, the section cited in the charge which was

section 20(1) of the Sexual Offences Act clearly indicates the offence which is one that exists in the law. This error is therefore one that is curable under section 382 of the Civil Procedure Code.

Turning to the issue raised by the Prosecution about the failure to accord the Appellant the opportunity to cross-examine the complainant who was PW5 and a minor, the right to cross-examine a witness in a criminal trial is found in Article 50 (2)(k) of the Constitution which provides as follows;

**“Every accused person has the right to a fair trial, which includes the right to:-**

**....k) to adduce and challenge evidence”**

*In addition section 208 of the Criminal Procedure Code provides for the procedure to be followed by a trial Court upon entering a plea of not guilty as follows:*

**“(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).**

**(2) The accused person or his advocate may put questions to each witness produced against him.**

**(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.”**

I have perused the record of the trial court, and note that on 2<sup>nd</sup> July 2013 at page 12 of the typed record of the trial court, PW5 who was a minor gave her unsworn evidence-in-chief after a *voire dire* examination, and immediately thereafter the prosecutor stated that he was ready with the doctor. The Appellant stated he was ready and PW6 was then called to give his evidence-in-chief. There is no indication on the record if the Appellant declined to ask PW5 any questions in cross-examination or if he was called upon by the trial Court to cross-examine PW5.

It was incumbent upon the trial court to have informed the Appellant of the right of cross-examination, especially where he was not represented by a legal counsel, and if the Appellant did not have any question to put to the witness, it should have recorded that fact. Thus, the failure by the trial court to do so was an error. It is also my finding that this error that prejudiced the Appellant as the evidence of PW5 who was also the complainant was central in the Appellant’s conviction.

In addition, the issue of cross-examination of children of tender years who give unsworn testimony was settled by the Court of Appeal in **Nicholas Mutula Wambua v Republic**, MSA CRA No. 373 of 2006 where it quoted with approval the decision of the Supreme Court of Uganda in **Sula v Uganda** [2001] 2 EA 556 that:

***“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined”.***

I am of the view that the ground of failure to afford the Appellant an opportunity to cross-examine PW5 is on its own sufficient to dispose of the appeal. In addition, it will not be prudent for this Court to proceed with a determination of the outstanding issues, as the same will entail an evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered.

The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of **Muiruri vs. Republic** (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:

**“Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”**

In the criminal justice system, the law requires that the right of the Appellant must be weighed against the victim’s right. In this appeal the victim was a minor then aged 12 years, and a daughter of the Appellant. The Appellant has been in confinement for three (3) years, and the offence took place slightly over three ago, and it would therefore not be difficult to secure the witnesses. Balancing all the interests, I am of the view that justice demands that the case be re-heard in the trial court.

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 on the same charge before a Magistrate of competent jurisdiction other than Hon. L. Simiyu 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 **3<sup>rd</sup> November 2016** to plead to fresh charges.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF OCTOBER 2016.**

**P. NYAMWEYA**

**JUDGE**