REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 21 OF 2015

R K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal fro the Conviction and Sentence in Criminal Case NO.47 of 2013 SPM's Court Kericho – Hon. Soita SPM)

JUDGMENT

Robert Kibet Kitur hereinafter referred to as the appellant was convicted and sentenced to life imprisonment for the offence of incest contrary to Section 20(1) of the Sexual Offences Act, No.3 of 2006.

The particulars are that on the night of 24th August, 2013 at ***[particulars withheld]*** Village, Chepkoinick Location in Kericho County, he intentionally did an act that caused penetration to A C aged three (3) years with his penis who was to his knowledge his daughter.

The prosecution in this case called six (6) witnesses in support of their case with the defence calling one (the appellant).

This is the first appellate court and it beholves it to evaluate and re-consider the evidence on record, bearing in mind that it did not have the opportunity of hearing and seeing the witnesses testify so as to be able to observe their demeanor **Okeno V. Republic 1972 EALR**.

In the instant case it is not in dispute that the complainant was a girl aged three (3) years. It is also not in dispute that she was the daughter of the appellant. The main issue is whether there was penetration.

After the trial Magistrate conducted a *voire dire* examination he came to the conclusion that the complainant was sufficiently intelligent and she appreciated the heed to tell the truth and he proceeded to direct that she tender unsworn evidence. In her evidence this is what she told the court at page 8 line 16;

> *"I do not know my dad's name. He is here, he is that one. He did bad manners to me. We were in Brooke. My mum was also in Brooke. My dad only held my leg. I do not know what he did. I felt pain on the leg. It is here (shows the ankle). He did not remove his clothes. I was taken to hospital because of the leg. He did not remove his clothes."*

With respect to the learned trial Magistrate, his summation of the *voire dire* examination of the complainant was not entirely correct. The complainant was not sufficiently intelligent to know the name of her father, leave alone to understand what happened (if at all something untoward did happen) that

day. She testified that her father held her by the leg and she felt pain on the ankle. That narration of events is not remotely close to a scene of incest.

After giving her unsworn testimony, there is no indication that the accused was given the opportunity of cross-examining her.

In the case of **H.O.W V. Republic (2014) eKLR** the Court of Appeal cited with approval the decision in the case of **Nicholas Mutua Wambua V. Republic Criminal Appeal No. 373 MSA** where it was held;

"The second point we wish to discuss is whether or not a child witness, who gives evidence 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 misconceptions 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 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.

That thinking is expressed in Section 208 of the Criminal Procedure Code which governs hearing of criminal proceedings in the magistrates courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all prosecution witnesses are liable to be cross-examined in order to cast their credibility and the vivacity of their evidence. The trial courts should always observe that requirement of the law in all criminal trials, to obviate an otherwise stable case from being lost on that omission."

I need not add more, that restatement of the law is quite apt. In the present case, the learned trial Magistrate did not allow the accused to cross-examine the complainant even if her evidence did not amount to anything substantive.

The complainant's mother testified as PW2. She told the court that on 28th August, 2013. She arrived home at around 6.30pm to 7.00pm when her sister informed her that the complainant was crying and saying that she was feeling pain on her private parts, upon examination she observed that her genitalia was bruised and upon interrogation the complainant said that it was her dad who did it.

Her sister M C PW3 testified that she was left in custody of the children by PW2 on 21st August, 2013. On 22nd August, 2013 the accused insisted that he was to sleep with the complainant. He did so. He also went to bed with her on 23rd and 24th nights of August, 2013. In the evening the complainant was crying. Her mother arrived and found her still crying. When the mother was not within earshot the complainant told her that it was her father who had done bad manners to her.

From the above its not clear when the complainant's mother returned home from her sojourn. Whether it was on 28th August, 2013 as she alleges or whether it was on 24th August, 2013 as her sister suggested.

The complainant's mother did concede that she did inform her husband that the child was suffering from malaria. That she later reported the matter to police and the accused was arrested. He was later released because she was agreeing and refuting. When the complainant was examined by a clinical officer on 28th August, 2013 it was observed that her hymen was intact but she had bruises on the labias.

This appeal is conceded by the prosecution on the basis of inconsistency on the evidence of the complainant and the contradictions inherent in the evidence tendered by the prosecution witnesses. It is also contended that the trial Magistrate in his judgment appeared to have shifted the burden of proof to the accused for the sole reason that there had been attempts at withdrawing the case. Finally, that the learned trial Magistrate did not allow the cross-examination of the complainant.

I find both arguments by the prosecution and the defence to be meritorious. The conviction of the appellant for the offence of incest was not safe and the sentence was not lawful.

The appeal is allowed. The conviction is quashed and sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2016.

...….....

M. MUYA

JUDGE

In the presence of;

1. Learned Counsel for the Prosecution - Miss Mwangi

2. Learned Counsel for the defence- M/s Motanya - absent

3. Gladys - court assistant