REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 93 OF 2010

D M …….…… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. T.M. Mwangi (SRM) delivered on 30/04/2010 in Kitui Principal Magistrate's Court Criminal Case No. 448 of 2007)

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(Before Hon. B. Thuranira Jaden J)

R U L I N G

1. The Applicant, **D M**, was charged and convicted for the offence of attempted incest contrary to **section 20 (2)** of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that on the 11th day of May 2007, at around 8.00 p.m, in **Kitui District** of the **Eastern Province**, attempted to have sexual intercourse with **M M** aged 12 years who to his knowledge was his daughter.

2. During the hearing of the appeal, the Applicant orally applied to this court for the taking of additional evidence under **section 358** of the **Criminal Procedure Code**.According to the Applicant, the complainant gave involuntary evidence.The Applicant's counsel had prior to the making of the application written to the court, indicating that the complainant had been influenced by her mother to give evidence that implicated the Applicant. A letter from the chief and from the complainant were attached to the said letter.
3. **Section 358** of the **Criminal Procedure Code** provides as follows:-

   "358. (1) In dealing with an appeal from the subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

   (2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

   (3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court."

4. The principles upon which an appellate court can exercise its discretion in a criminal case to allow the taking of additional evidence were set out by the **Court of Appeal Elgood –vs- Regina (1968) E.A 274** and restated by the Court of Appeal in **Simon Mwangi Wambui –vs- Republic 2014 e KLR** as follows:-

i. **"The evidence that is sought to be called must be evidence which was not available at the trial;**
ii. **It must be relevant.**
iii. **It must be credible.**
iv. **The court will consider the evidence together with the evidence on record to determine whether it would create reasonable doubt.**
v. **It is only in very exceptional cases that the evidence will be permitted."**

5. In the case at hand, the then 12 (twelve) year old complainant testified and was exhaustively cross-examined by the defence counsel. The complainant's evidence was available at the time of the trial. It is not new evidence. The letter by the chief and by the complainant is not made under oath. Affidavits ought to have been sworn. Be as it may, taking the proposed new evidence into consideration together with the rest of the evidence on record, the same appears to be an afterthought. The complainant is a minor. It is doubtful that the complainant is capable of independently visiting the chief's office to come up with such a complaint. Taking into account the circumstances of this case, the complainant is a vulnerable witness who required to be taken into protection before the making of any such statement. It is not clear under what circumstances the statement in question was recorded from a minor after five years since the date of her evidence in court.
6. With the foregoing, I find no exceptional circumstances to warrant the reception of additional evidence. Consequently, I dismiss the application. The Applicant is at liberty to proceed with his appeal without calling of additional evidence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of February 2015.

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B. THURANIRA JADEN

JUDGE