REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 13 OF 2014

DAVID CHERUIYOT KIPLANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. V. Karanja, Senior Resident Magistrate, Bomet dated 25th February 2014)

JUDGMENT

DAVID CHERUIYOT KIPLANGAT, the appellant herein, was tried on a charge of incest by male in violation of **Section 20(1)** of the **Sexual Offences Act No.3 of 2006**. He also faced an alternative count of Indecent acts with a child contrary to **Section 19(1)** of the **Sexual Offences Act No.3 of 2006.** He was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.

> ***"The particulars of the main charge are that on diverse dates between 19th May 2009 and 12th November 2009 at [particulars withheld]sub-location in Bomet District within the Rift Valley Province, did cause his penis to penetrate the vagina of J C, a girl under the age of 18 years, who the accused knew to be his daughter in violation of Section 20(1) of the Sexual Offences Act No.3 of 2006."***

The Appellant was dissatisfied with the decision hence he filed this appeal and put forward the following grounds through the firm of Koech J.K & Co.Advocates:

1. **The trial Magistrate erred in law and in fact relying on a defective charge sheet to convict the Appellant.**

2. **The trial Magistrate further erred in law and in fact in relying on DNA findings when the maker of the same was not availed in court as an expert to confirm the results.**

3. **The trial Magistrate further erred in law and in fact in compelling the Appellant to proceed with the hearing in the absence of his Advocate thus violating his constitutional rights.**

4. **The trial Magistrate further erred in law and in fact in believing the uncorroborated evidence of the complainant as the occurrence of the incest.**

5. **The trial Magistrate further erred both in law and in fact in failing to establish by way of expert evidence that the complainant was the biological child of the accused in order to declare that there was incest committed.**

6. **The trial Magistrate further erred in both law and in fact failing to establish the correct age of the girl at the material time.**

7. **The trial Magistrate further erred in law and in fact in convicting the Appellant for indecent Acts with a child whereas the complainant was an adult at the material time and the charge sheet ought to have indicated rape.**

8. **The trial Magistrate further erred both in law and in fact in disbelieving the defence of the Appellant whereas the same was not overthrown in cross-examination by the prosecution.**

When the appeal came up for hearing, Miss. Kivali, learned Prosecution Counsel conceded the appeal on the basis that the appellant underwent part of the trial in the absence of his counsel. In ground 3 of the Petition of Appeal filed by the appellant's counsel, the appellant has specifically pleaded that he was compelled to proceed for the hearing in the absence of his advocate. The record shows that on 7th June 2012, Mr. Koech learned advocate appeared before Hon. Kwena, learned Senior Principal Magistrate and formally informed her that he had been instructed to appear for the accused. The case was thereafter fixed for hearing on 28th August 2012. On the aforesaid date the court record shows the case proceeded to hearing in the absence of the appellant's counsel. The learned Senior Principal Magistrate did not even make any reference to the advoate but she simply proceeded as if the learned advocate never existed. Mr. Koech appeared before Hon. Kwena on 14th September 2012 and was also recorded as appearing for the accused person. On 14th January 2013, this time round, the learned Senior Principal Magistrate formally noted that the appellant's advocate was absent in court but stated that he did not inform the court the reasons for his absence. She then proceeded to conduct the hearing of the case in his absence. When Hon. Kwena was transferred from Bomet Law Courts, Hon. V. Karanja, learned acting Senior Resident Magistrate took over the hearing of the case from where Hon. Kwena left. Hon. V. Karanja duly complied with **Section 200** of the **Criminal Procedure Code** and took the defence evidence. In the end, the learned Ag. Senior Resident Magistrate convicted the Appellant.

After a critial consideration of the recorded proceedings and the submissions of learned counsels, I am convinced that Miss. Kivali rightly conceded the appeal. It is apparent from the record that Hon. Kwena, did not put much attention to the fact that in cases where an accused person is represented by counsel, utmost care must be taken to ensure that the case proceeds in the presence of counsel. The case can only proceed for hearing in the absence of counsel if the accused has withdrawn instructions or for any other reason he has ceased to act for the accused. There are instances where the court is forced to make orders to discharge an accused's counsel in broad interest of justice. In the case before the trial court the appellant's advocate had not ceased to act but the learned Senior Principal Magistrate did not bother to acknowledge the appellant's counsel's absence and also failed to appreciate the importance of counsel representation under **Article 50(1) (g)** of the **Constitution**. In short, the appellant did not undergo a fair trial. Miss. Kivali has urged this court to order for the appellant's retrial. Mr. Koech learned advocate for the appellant did not oppose the prayer. The court of appeal restated to conditions which an appellate court should apply before making an order for a retrial in the case of **Fundi Reuben Ngala =vs= Republic Cr. Appeal No.268 of 2005** *(unreported)* as follows:

> ***"Whether or not a retrial shall be ordered is within the discretion of the court and will be dictated by the circumstances in each case. Ordinarily a retrial would be the appropriate order to make where there are fundamental irregularities which would result in a miscarriage of justice which is not curable under Section 382 of the Criminal Procedure Code."***

In **Mwangi =vs= Republic (1983) K.L.R 522** the court of appeal stated as follows:

> ***"A retrial should not be ordered unless the appellate court is of opinion that on a proper***

consideration of the admissible evidence, a conviction might result."

With respect, I am in agreement with the proposal of Miss. Kivali that this is a case fit to go for retrial and this is why I have intentionally avoided to make any reference to the veracity of the evidence but what is clear in my mind is that the evidence if properly taken and admitted may sustain a conviction.

In the end and on the singular ground the appeal is allowed. The order on conviction is quashed and the sentence is set aside. The appellant to be held in custody to undergo a fresh trial before another magistrate of competent jurisdiction other than Hon. Kwena and Hon. V. Karanja. The appellant to be taken before the duty Magistrate, Bomet Law Courts on 5th August 2014 for mention, for fresh plea taking and for further orders and directions on the retrial. The retrial to be conducted on priority basis.

Dated, signed and delivered in open court this 31st day of July, 2014.

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J.K.SERGON

JUDGE

<u>In the presence of:</u>

Mutai for Director of Public Prosecutions

Rono Holding brief for Mr. Mutai for Appellant