



**REPUBLIC OF KENYA**

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

**Criminal Appeal No. 85 Of 2012**

J C N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the convict and sentence of Hon. J. Kwena, Senior Principal Magistrate, Bomet dated 30th November, 2012)*

**JUDGMENT**

The appellant herein, **J C N**, was tried on a charge of incest contrary to **Section 20(1)** of the **Sexual Offences Act**.

*“The particulars of the charge are that on the 4th day of April 2011 at about 1930hrs at [particulars withheld] Location in Bomet District within Rift Valley province, intentionally did cause his penis to penetrate the vagina of F C K, a child who was to his knowledge is his niece. The appellant also faced an alternative charge of indecent contrary to Section 11(1) of the Sexual Offences Act.”*

At the end of evidence, the appellant was convicted on the main charge and was sentenced to serve 17 years imprisonment. Being aggrieved, the appellant preferred this appeal and put forward the following grounds:

1. **That your Lordship, the learned trial magistrate erred in both law and fact by convicting me, the appellant on contradicting evidence adduced by Prosecution witnesses.**
2. **That your Lordship, the learned Magistrate erred in both law and fact by failing to consider the failure of prosecution side to produce a birth certificate or age assessment report to prove the age of the complainant.**
3. **That your Lordship, the learned trial Magistrate failed to re-summon PW1 and PW2 for further cross-examination as I had requested.**
4. **That your Lordship, the learned trial Magistrate erred in both law and fact by failing to supply me with the witnesses statement and any other prosecution documents as required by the law.**
5. **That the learned trial Magistrate erred in both law and fact by convicting me on hearsay evidence by entire prosecution witnesses.**
6. **That your Lordship, the learned Magistrate erred in both law and fact by convicting me and**

**yet, the appellant was not medically examined to prove that I committed the offence.**

**7. That your Lordship, learned Magistrate erred in both law and fact by failing to consider the long existing grudge between me and the mother of PW2.**

When the appeal came up for hearing, the appellant relied on written submissions while Miss. Kivali, learned Prosecution made oral submissions to oppose the same. Let me at this juncture set out the case that was before the trial court before considering the substance of this appeal. On 4th April 2011, **B K** (PW1) left her home at Masindoni for Bomet township to sell firewood. She left unattended her two young children namely: **F** (PW2) and **K**. When she came back PW1 found PW2 a child aged six years crying. Upon questioning her, PW2 told PW1, that her uncle, the Appellant, had defiled by inserting his penis into her vagina. PW1 screamed prompting her neighbours to respond. PW2 told PW1 that the person who had defiled her was inside the house. PW1 promptly latched the door from outside. One of those people who responded to PW1's screams is **Simon Koech** (PW3). He opened the Kitchen door and pulled out the Appellant. The villagers escorted the appellant to Bomet Police Station. PW1 took the child to the police station where she was issued with a P3 form which was duly filled at Siongiroi Health Centre. PW1 took PW2's torn pants to the police. The child (PW2) testified in court. She told the trial magistrate that she went to prepare a place for her young brother to sleep at the Kitchen. While inside their Kitchen the appellant suddenly appeared. She said she noticed the intruder to be her uncle with the assistance of light emanating from burning firewood. PW2 also said that she managed to recognise the appellant because he had the habit of making sniffing noise, which he made that fateful night. PW2 said the appellant removed the water which was boiling and poured the same on the fire she had lit. He then pushed her to the corner, forcefully removed her pant and begun to defile the child. P.W.2's screams did not perturb the appellant from completing his mission. **Philip Mutai** (PW4), a clinical officer based at Siongiroi Health Centre examined PW2 and found her hymen broken with whitish vaginal discharge, reddened and bruised labia Majora and slight bleeding of the vagina. PW4 concluded that PW2 was penetrated hence defiled. When placed on his defence, the appellant denied the offence. He alleged that the complainant's mother (PW1) had a grudge against him because he refused to inherit her after her husband passed away. The learned Senior Principal Magistrate considered the evidence and came to the conclusion that the appellant was placed at the scene of crime and that there was cogent evidence proving the charge to the standard of beyond reasonable doubt.

On appeal, the appellant enumerated a total of seven grounds. On the first ground the appellant complained that he was convicted on contradictory evidence. This court was referred to the evidence of PW1 and PW3. It is said by PW1 that PW3 opened the door while PW3 denied opening the door of the kitchen where the complainant was allegedly was defiled. The appellant also claimed that the complainant referred to her assailant by name as J while he is called J. Miss. Kivali did not address her mind to this ground. I have on my part examined the record and it is clear that the aforesaid contradictions are apparent on the face of record. In my estimation I do not think those contradictions or discrepancies go to the root of the prosecution's case. In the case of **Michael Muriithi =Vs= R C.A.C.R.A. No.498 of 2007 (unreported)**, the Court of Appeal stated in part at paragraph 6 as follows:

***“We wish to add that a trial court is obliged to look at the case as a whole to see whether notwithstanding any discrepancies the prosecution's case is credible and the evidence adduced is reasonably sufficient to discharge the burden squarely on it to prove a charge beyond any reasonable doubt.”***

In the circumstances of this case and applying the above principles, this court is entitled to overlook those discrepancies.

The second ground argued on appeal is that the complainant's age was not ascertained by the production of a birth certificate to prove that the complainant was aged six years. Again Miss. Kivali did not submit on this ground. I have looked at the P3 form and it is clearly indicated that the child was aged six years. The appellant did not object to the production of such evidence when the prosecution tendered the same in court. It would appear from the charge the accused was convicted for, age was not a requirement to sustain a conviction. I find the contention misplaced.

The third ground argued by the appellant is that the trial Magistrate erred when she refused to grant his request to recall PW1 and PW2 for cross-examination. Miss. Kivali again did not address her mind on this ground. The appellant further complained that he was not given witness statements to enable him adequately prepare his defence. I have looked at the record and it is clear that the appellant requested to be supplied with witness statements on 6th January 2012. It would appear the witness statement for PW1 were given to the appellant on the day of hearing i.e on 22nd March 2012. On the aforesaid date the appellant cross-examined PW1 but at the end he applied to the trial Magistrate to recall PW1 for further cross-examination after he has gone through with PW1. The court made order to have PW1 recalled later. After receiving the evidence of PW2, the appellant cross-examined PW2 but by that time he had not been served with the PW2's witness statement. The court again made an order directing the prosecution to supply the appellant with the witness statements and further directed that PW1 and PW2 would be recalled. What happened thereafter is unfortunate. On 24th July 2012, the prosecution without confirming to the trial court whether or not they had supplied the witness statements to the appellant proceeded to close the prosecution's case. The learned Senior Principal Magistrate without further reference to the orders made on 6th January 2012 and 22nd March 2012 to recall PW1 and PW2 proceeded to close the case. In fact, the learned Senior Principal Magistrate without complying with the provisions of **Section 210** of the **Criminal Procedure Code** proceeded to make a finding that the appellant had a case to answer. The learned Magistrate was enjoined by law to invite the parties to submit on whether or not a case had been made out to enable her place the accused on his defence. It would appear the learned Senior Principal Magistrate at the altar of expediency mechanically made the order finding the appellant with a case to answer. It suffices to state that had the learned trial Magistrate given the appellant a chance to make submissions most probably she would have been told that she denied the appellant a chance to recall PW1 and PW2 further cross-examination. She would have also known that the appellant had not been served by the prosecution with the witness statements. In fact, during his defence the appellant requested the case to start afresh but the trial magistrate refused the request. At the conclusion of his defence the appellant told the trial court that nobody read to him the proceedings hence he did not understand the case. It is obvious from the record that the appellant did not get a fair trial before the learned Senior Principal Magistrate as under **Article 50(1)** of the **Constitution**. On this ground alone I do not intend to belabour to consider the other grounds of appeal in view of the orders I propose to make hereinafter. The appeal is allowed. The orders on conviction and sentence are quashed and set aside respectively. In **Fatehali Manji =vs= R (1966) E.A 343** the Court of Appeal for East Africa, restated the principles to be considered before making an order for retrial when it held interalia:

***“In a general 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 purpose 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 own facts and circumstances and an order for retrial should only be made where the interests of justice require it;”***

I have applied the above principles to this case and I am satisfied that this is a case fit to be heard afresh which I hereby order before another Magistrate of competent jurisdiction other than Hon. Kwena, learned Senior Principal Magistrate. The appellant is to be held in custody pending a fresh trial which in any case should be done on priority basis. The appellant to be taken before the Senior Resident Magistrate Bomet on 5th August, 2014 for fresh plea taking and further orders and directions on the retrial.

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

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**J.K.SERGON**

**JUDGE**

**In the presence of**

Mr. Mutai for Director of Public Prosecutions

Appellant Present In Person