



No. 394/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 109 OF 2013

M KAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court Criminal Case No. 756 of 2012 by Hon. Mary Ashisero Akala Ochieng, SRM on 14/1/13)

JUDGMENT

1. M K, the appellant , was charged with two counts:-

- i. Incest by male person contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on diverse dates between the month of **February, 2012** and the **29th** day of **July 2012**, at [**Particulars Withheld**] in **Kajiado District** within **Kajiado County**, being a male person intentionally caused his penis to penetrate the vagina of **M M** a female person who to his knowledge is his daughter, a girl aged **14 years**.
2. In **count 2** the appellant was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code**. Particulars of the offence being that on the **29th** day of **July, 2012** at [**Particulars Withheld**] in **Kajiado District** within **Kajiado County** unlawfully did a grievous harm to **M M**.
3. He was tried, convicted and sentenced as follows:-

Count 1 - to serve life imprisonment

Count 2 -to serve four (4) years imprisonment

4. The facts of the case were that the complainant, **M M** is the appellant's daughter aged **14 years** old. The appellant separated with his wife. He retained custody of the complainant. Following allegations that he used to defile her, **PW1, Jeremiah Kiaki**, the area Assistant Chief moved to rescue her and took her in. On the **29/7/2012**. **PW1** went to church leaving the complainant with three of his children at home. At about **10.00am** the appellant went to his home. He asked the complainant to escort him but she declined. He chased **PW1's** children away. He then grabbed the complainant, forced her onto the floor, lifted her clothes and had carnal knowledge of her. On accomplishing the heinous mission he took a club (*rungu*) and hit her on the hand at the wrist injuring her. He then ran away.

5. PW1 was informed. He went home and found the complainant injured. He called village elders. They sought and arrested the appellant. He took the complainant to hospital for treatment. **PW5, Munyi**, a clinical officer at Kajiado District Hospital examined her. She had sustained a fracture of the ulna. The vagina, labia majora was swollen; the wall of the vagina was bruised. Urinalysis done showed blood in the urine. The hymen was not intact. He concluded that the complainant was defiled. Investigations carried out culminated into the appellant being charged.
6. When put on his defence, the appellant stated that he went to visit his daughter who was staying with the chief. His daughter fell down and injured her hand. He caused the chief to be called. On arrival he arrested him. In the course of being arrested his Kshs. 6000/= was taken. It was his testimony that the chief took away his wife, daughter and had framed him up in order to take his land.
7. On being aggrieved by the conviction and sentence the appellant appealed on grounds that:-
 - i. His fundamental rights to a fair trial as enshrined in Article 25(c) of the Constitution were violated:-
 - a. His application to have the case transferred to another court was denied, unfairly.
 - b. He was denied an opportunity to cross-examine PW2.
 - ii. Medical evidence was adduced by a clinical officer who was not a qualified medical officer.
 - iii. Medical evidence in his regard was not produced.
 - iv. The entire case was not proved to the required standard.
8. This being the first appellate court, it is duty bound to re-reconsider evidence adduced afresh and come up with its conclusions bearing in mind that it neither saw nor heard witnesses testify. (See **Okeno versus Republic [1972] E.A. 32**).
9. **Article 25(c)** of the Constitution provides:-

“Despite any other provisions in this Constitution, the following rights and fundamental freedoms shall not be limited-

(c) ***“The right to a fair trial”***

10. The right to a fair trial is an accused person’s fundamental right. When a witness testifies it is the duty of the court to clarify to the accused of his right to cross-examine the witness and he/she must give him the opportunity to do so.
11. In the instant case, PW2, the complainant was alone when the offence was stated to have been committed. Her evidence was recorded by the learned trial magistrate. She was not cross-examined by the appellant. The record does not show under what circumstances the appellant failed to cross-examine her yet she gave sworn evidence. This was an error on the part of the court which was prejudicial to the appellant. In the circumstances, the trial must be declared a nullity.

The question to be determined is whether a re-trial should be ordered?

12. In the case of **Mwangi versus Republic [1983] E.A. 522** the Court of Appeal held that even though a retrial could be ordered, where the original trial was defective... no trial should in fact be ordered unless the appellate court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result.
13. I also do consider another principle that no order of a retrial should be made if such an order would result into prejudice to the appellant and it all depends on the facts and circumstances of the case. (See **Manji versus Republic [1966] E.A. 343**).
14. Having evaluated evidence adduced at trial and considered principles applicable for retrials it is apparent that a conviction may result following trial and the appellant will not be prejudiced.
15. Consequently, I do quash the conviction herein and order a retrial in this case. The appellant shall be produced before the **Kajiado Principal Magistrate’s** Court for purposes of taking plea

on the **23/9/2014**.
16. In the meantime he will be held custody.
17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE