



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 137 OF 2011

LESIIT, J

Y M.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT.

(From the original conviction and sentence in Criminal Case No. 709 of 2010 in the Principal Magistrates Court at Meru by Hon. KIARIE.W. KIARIE S.P.M.)

JUDGEMENT

1. The Appellant pleaded guilty to the offence of incest contrary to section 20(1) of the Sexual Offences Act. He was sentenced to 30 years imprisonment. Being aggrieved by the sentence he filed this appeal in which he raises six grounds as follows:
 1. **That the learned trial magistrate erred in law and facts in convicting the appellant without indicating the doctors qualification.**
 2. **THAT the learned magistrate erred in law and facts in failing to note that the prosecution witness gave contradictory and conflicting evidence.**
 3. **That the learned trial magistrate erred in law and facts in conducting the trial partially and irregularly.**
 4. **That the learned trial magistrate erred in law and fact in flouting the provisions of section 169(1) of the CPC.**
 5. **That I wish to be present during the hearing of this appeal.**
 6. **THAT the grounds herein have dragged in absence of certified copy of the trial proceedings. I pray to be served with certified copy of the same to enable me draft further firm supplementary grounds.**
2. In the Appellants oral submissions he urged the court to consider that he is 51 years old and therefore reduce the sentence. He was remorseful from his demenour in court.
3. Miss Mwangi learned State Counsel represented the state in this appeal. She opposed the appeal. Counsel urged that the offence called a minimum sentence of 10 years unless the complainant was below 18 years in which case the sentence is life imprisonment. Counsel later

- conceded the appeal and observed that 30 years imprisonment was excessive.
4. The Appellant pleaded guilty to the offence and is not challenging the conviction even before this court. The Court Prosecutor in his address before sentence urged the court to treat the Appellant as a first offender. The Appellant on his part said he was an orphan and that he had three children.
 5. The learned trial magistrate in sentencing the Appellant stated.

“It is an offence that is both horrendous and repugnant to morality.”

The learned trial magistrate then proceeded to award 30 years imprisonment.

6. I noted from the facts of the case that the Appellant, his wife and daughter were all sleeping in the same bed when the incident occurred. It was at night. The age of the daughter has not been given. Why the three were in the same bed is also not explained.
7. The learned trial magistrate’s observation that incest was horrendous and repugnant does not seem to be explained. In the context of the circumstances prevailing at the time, what would be horrendous and repugnant is a mother and daughter sleeping in the same bed with the husband and father.
8. Without evidence of age of the daughter and also the fact it was dark at the time, can it be said offence was premeditated.
9. More importantly was the plea unequivocal? Since facts are that all three were in same bed, without knowing age of the daughter is it possible he did not know whose pantie he removed.
10. The P3 form was not produced as an exhibit. That was vital evidence to support the charge and may have put to rest the issues I am raising here. Without an answer to these question I find that the plea of guilty in this case was not unequivocal. In the circumstances I quash the conviction and set aside the sentence.
11. The question is whether or not to order a retrial. The principles which apply in determining whether to order a retrial or not are well settled. Faced with a similar question, the Court of Appeal in the case of **David Kiplagat Bunei Vs. Republic** Criminal Appeal Case No. 370 of 2006 observed:-

“We have considered the past decisions of this Court which includes the decision in the case of Richard Omolo Ajuoga V. Republic, Criminal Appeal Case No. 223 of 2003, in which several past cases were considered and fully analyzed as to what circumstances need to be considered before a re-trial is ordered. We have considered the decisions in the case of Pascal Ouma Ogolo V. Republic Criminal Appeal No. 114 of 2006 (unreported) Henry Odhiambo Otieno V. Republic Criminal Appeal No. 83 of 2005 (unreported) and the case of Bernard Lolimo Ekimat V. R., Criminal appeal No. 151 of 2004 (unreported). In the Ekimat Case, it was stated:-

‘There are many decisions on the question of when appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.’

I have stated that this trial was defective for reason this court discharged assessors before the case was concluded therefore denying the accused a statutory right he was enjoying. The above case has set out the principle that should inform the court when deciding whether a retrial should be ordered. The interest of justice is the cardinal principle that should inform that decision. The other principle include a determination whether an order for retrial will occasion in justice or prejudice to the appellant; whether it will accord the prosecution an opportunity to fill up gaps in his evidence as the first trial; and whether upon consideration of the admissible or potentially admissible evidence a conviction may result.”

12. I considered that the Appellant was arraigned in court three and half years ago. He pleaded

- guilty. He has served half years of his 30 years imprisonment.
- 13.The offence carries minimum sentence of 10 years and in case of a child below 18 years life imprisonment. In my view the Appellant has not served a substantial term of his sentence. I therefore find that the interest of justice do require an order of retrial to be made.
- 14.I have come to the conclusion that a retrial should be ordered in this case. I accordingly order the same. I order that the Appellant be held in custody until 5th November, 2013 when he should be presented before Chief Magistrates court Meru for a plea on the self same charges.
- 15.Those are my orders.

DATED SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF OCTOBER, 2013.

J. LESIIT

JUDGE