



H.M.M.....APPELLANT  
VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. case No. 212 of 2017 by F.M. OMENTA – PM at the Principal Magistrate’s Court at Siakago on 21/11/2007**

### **J U D G M E N T**

The Appellant was charged with the offence of incest by a male person contrary to section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars as stated in the charge sheet were as follows;

***H.M: On the 5<sup>th</sup> day of February 2007 in Mbeere District within Eastern province committed an indecent act namely incest which act caused penetration with a female person namely R.W who to his knowledge the said female person was his daughter.***

He was also charged with a second count of unnatural offence contrary to section 162(a) of the Penal Code. The particulars as stated in the charge sheet were as follows;

***H.M: On the 5<sup>th</sup> day of February 2007 in Mbeere District within Eastern province had carnal knowledge of R.W against the order of nature.***

The case proceeded to full hearing and the Appellant was convicted and sentenced to life imprisonment in 1<sup>st</sup> count and 10 years in 2<sup>nd</sup> count with an order that the sentence in 2<sup>nd</sup> count was suspended. The Appellant being aggrieved with the Judgment has filed this appeal. He has raised four grounds of Appeal as follows;

- 1. That the learned trial Magistrate erred in law and fact to base a conviction upon the Appellant without putting due consideration that he had pleaded not guilty to the charge.*
- 2. That the trial Magistrate erred in law and fact when he admitted the evidence of P.W.1 overlooking the fact that no medical examination was done to proof the offence.*
- 3. THAT the trial Magistrate overlooked the grudge was existing between the Appellant and P.W.1*
- 4. That the learned trial Magistrate erred in law and fact to base a conviction against the Appellant without considering that P.W.3 admitted that he was the one who inserted the fingers into P.W.1’s private parts which could have been the possible cause of offence.*

When the appeal came before me for hearing the Appellant presented the court with written submissions. He expounded on his grounds of appeal. He states that P.W.1 was not penetrated as there was no evidence to that effect.

The State opposed the appeal saying the evidence adduced supported the charge. She stated that P.W.2, P.W.3 and P.W.4 corroborated the evidence of P.W.1. She submitted that this girl aged 10 years was the Appellant's daughter.

This being a first Appellate Court I have a duty to re-consider and re-evaluate the evidence adduced and come to an independent conclusion. I am alive to the fact that I did not see nor hear the witnesses. I am guided by the case of **OKENO –VS- REPUBLIC 1972 E.A. 32**.

The complainant herein was a minor aged 10 years. This is a child of tender years. There is a procedure to be followed when receiving the evidence of a child of tender years. In the case of **KINYUA –VS- REPUBLIC [2002]1 KLR 256** the Court of Appeal held that;

1. *There are two procedures that the trial court should follow when receiving the evidence of a child of tender years.*

a) *The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be a long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child to take his/her evidence.*

b) *If the child does not understand the nature of the oath, he/she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon intelligence, that the young person is possessed of sufficient intelligent and understands the duty of speaking the truth. This investigation must be done and when done it must appear on record. Where the court is satisfied then the court will proceed to record unsworn evidence from the child witness.*

The holding here was also followed in the case of **MUTUNGA –VS- REPUBLIC [2005] 1 KLR** where the Court of Appeal also indicated as follows;

*“Under section 19(1) of the Oaths and Statutory Declarations Act (Cap.15), it is the duty of the court to ascertain whether a child tendered as a witness understands the nature of the oath and if the finding on that question is in the negative to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, it can therefore be clearly seen that this procedure is a statutory requirement and needs strict compliance”.*

The record herein is silent on whether this procedure was followed or even an attempt to follow it made. This was an error on the part of the court. This witness was the one telling the court whom the person who defiled her was, and her evidence was material. Secondly there is a serious allegation that P.W.1 and her mother P.W.2 ganged up to fabricate this evidence against the Appellant.

It was therefore important that the Court satisfies itself with the issue of whether the witness was intelligent and understood the seriousness of speaking the truth and also understood the nature of the oath.

The other evidence of P.W.2, P.W.3 and P.W.4 only confirmed to the court that the minor had been defiled but not who did this to her. A voir dire examination having not been conducted to determine the admissibility of P.W.1's evidence leads to the non-effect of that evidence. Without P.W.1's evidence the other evidence is of no evidential value. Can this Court then order for a retrial?

In the case of **EKIMAT –VS- REPUBLIC [2005] 1 KLR 182** the court held on the issue of retrial that each case must depend on its particular facts and circumstances, but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

This case involved a Sexual Offence with a minor. This incident occurred five (5) years ago. It is obvious

that this child was traumatized and she may have healed from what the Appellant did to her. The Appellant is P.W.1's father. It would not be in the interest of justice to take this child back to memories of the past. For that reason **alone** I will not order a retrial. I allow the appeal and quash the convictions. I set aside the sentences. The Appellant to be set at liberty unless lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 17<sup>th</sup> DAY OF MAY 2012.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of:**

**M/s Matiru for State**

**Njue – C/c**

**Appellant**