



J.M.J. ....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case number 342 of 2010 of the Senior Resident Magistrate's Court at Kisumu – Mr. T. Obutu Esq.)

### JUDGMENT

The appellant herein was on 5<sup>th</sup> July 2010 charged with the following offences:-

**On the diverse dates between the month of February 2007 and in Kisumu East District within Nyanza Province being a male person caused his penis to penetrate the vagina of W.A.M. a female person who was to his knowledge his daughter**

**Alternative Charge: Indecent act with a child contrary Section 11 (i) of the Sexual Offence number 3 of 2006.**

**On the diverse dates in October 2007 at N[...] in Kisumu East District within Nyanza Province commit an indecent act to W.A.M. by touching her vagina.**

After a full trial he was convicted and sentence to life imprisonment. He then filed this appeal citing ten (10) grounds as per his amended petition of appeal. These are:-

- 1.The Learned trial Magistrate grossly erred in law as he did by failing to comply with Section 211 (1) of the Criminal Procedure Code Cap 75 of the charge to the Appellant, inform the Appellant inter alia about his right to give evidence either on Oath or not on oath, right to give evidence either on oath or not on oath, right to call witnesses or adduce other evidence thus rendered the whole trial a nullity ab intio.**
- 2.The learned trial Magistrate grossly misdirected himself by law by his failure to comply with Section 150 of the Criminal Procedure Code and in particular when he failed to summon PW1's elder brother who was alleged to be in the same house in the first night when the complainant was allegedly defiled by the Appellant in their home at N[.], when he failed to summon the complainant's grandmother from whose house the complainant was allegedly removed at night at their rural home by the Appellant who allegedly defiled here and lastly, to call the complaint's uncle whom was requested by the complainant to return her to her mother's home at Kisumu after the alleged defilement thus ended a wrong decision.**
- 3.The learned trial Magistrate erred in both law and fact in holding that the complainant's hymen had been perforated when the examination was done after a year from the alleged assault and despite the fact that its common sense that a hymen may be broken irrespective of a sexual activity.**
- 4.The learned trial Magistrate grossly misdirected himself in law and fact as he did when he found against evidence that an elders meeting had the complainant against the Appellant and yet no**

relative of the Appellant nor an elder gave evidence in Court to that effect.

**5. The learned trial Magistrate erred both in law and fact when he erroneously relied on the evidence of PW1 & PW2 when the investigating officer failed to take statements from and summon witnesses who were said to be with the complainant at the time of the alleged sexual assaults and ended at arriving in an unlawful conviction of the Appellant.**

**6. The learned trial Magistrate grossly misdirected himself in law by failure to draw adverse inference against the prosecution case by its failure to summon essential witnesses.**

**7. The learned trial Magistrate misdirected himself in law and fact by his failure to consider the Appellant's defence of alibi.**

**8. The learned trial Magistrate failed to consider the Appellant's defence that he had separated with PW2 from the year 2006 and further that the complainant was actuated by malice.**

**9. That the verdict in its entirety is against the weight of evidence on record and the sentence is manifestly excessive.**

**10. The appellant therefore prays that the Appeal be allowed, the conviction be quashed and the sentence be set aside.**

The brief facts of this case are that on diverse dates in February 2007 PW1 W.A.M. aged eleven (11) years by the time of testifying in court was sleeping in their house. Her mother had gone for a funeral. The accused who is her father defiled her while she was on her bed. According to her testimony she confirmed that it was her father for she put on the electricity light and confirmed so. After the defilement the appellant left and left PW1 bleeding and in pain.

On another occasion when the complainant's mother had gone to Muhoroni for a seminar or training the appellant also defiled the complainant and when her mother came home she did not tell her as she had been warned by the appellant.

Equally, on a third occasion the complainant had gone to visit her grandmother. The appellant came and took her from her grandmother's house and they slept together in his bed. The appellant defiled her and warned her not to tell anybody. The following day her uncle brought her to Kisumu.

The complainant further testified that after sometime she felt sick and this was the time she told her mother PW2 of her ordeal in the hands of the appellant.

**PW2 R.A.M.** the appellant wife testified that they were blessed with five (5) children. The complainant was their last born. She told the court that she discovered in October 2007 that the complainant was acting very abnormally. Upon inquiry the child told her of her illness and what her father had been doing while she was not around. Upon taking her to hospital she was diagnosed with some venereal disease. She called for some meeting with elders but the appellant failed to attend. She subsequently, reported to the police who took over the proceedings from there.

**PW3 Peris Auma Wawire** a clinical Officer examined the complainant and later filled the P3 form. She established that her hymen had been broken and concluded that the complainant had been sexually assaulted.

**PW4 Clement Kibet** a medical officer equally came to the same conclusion as PW3.

**PW5 Florence Koech**, is the police officer who received the brief from the OCPD and carried out the investigation. This was on 16<sup>th</sup> August 2008.

After establishing that the complainant had been sexually assaulted by the father, she proceeded to

have him arrested and charged with the offence.

**PW6 Godfrey Shadrack Oduor** the Civil Registrar Siaya District produced the notification of birth and birth certificate for PW1.

When the appellant was put on his defence he denied the charge. He told the court that he has had serious disagreements with his wife. PW2 said that they no longer stayed together as husband and wife. His conclusion was that PW2 wanted to finish or kill him.

I have analysed the entire proceedings carefully as well as the judgment. I have also carefully listened to their arguments on the part of the appellant's counsel as well as the respondent. At the hearing of this appeal the state conceded but only on a point of law and prayed for a retrial. Their concession was based on the fact that the trial court failed to observe the provisions of Section 211 of the Criminal Procedure Code.

Before proceedings therefore it is worth dealing with this arguments extensively. Upon perusing the proceedings the same on 21<sup>st</sup> February 2011 when this matter came up for hearing states that:-

**“Ruling: I have considered the evidence on record. I am of a well considered opinion that the prosecution have established a prima facie case. The accused is accordingly put to his defence”.**

From there onwards and after several adjournments the appellant on 30<sup>th</sup> March 2011 was put on his defence. Section 211 of the Criminal Procedure Act is so pertinent that it is worth producing it here:-

**“211 (1) At the close of the evidence in support of the charge and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficient to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box and that if he does so, he will be liable to cross examination or to make a statement not on oath from the dock and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence and the court shall then hear the accused and his witnesses and other evidence ( if any) (*Underline mine*).**

**(2) If the accused person states that he has witnesses to call but that they are not present in court and the court is satisfied that the absence of whose witnesses is not due to any fault or neglect of the accused person and that there is a likelihood that they could, if present give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses”.**

Clearly, the trial magistrate did not fulfill the above mandatory provisions of the law. I do agree therefore with both the appellant's counsel as well as the State Counsel. Should this matter be referred for a retrial as suggested by the State Counsel?

From the proceedings herein, it is not fair that this matter should be retried. The prosecution failed in their investigations greatly. The P3 form for example was filled one year after the alleged act of incest. How sure was the medical officer that the cause of the broken hymen was the sexual assault by the appellant?. It is now medically understood that broken hymen as much as it is caused in the usual ordinary cause of events by sexual intercourse could be caused by other external factors well known in medicine.

Further I shall decline to order a retrial as the prosecution failed to summon key witnesses, as no statements were taken from the complainant's grand mother nor her uncle, one, E who were material witnesses. The nature of the offence allegedly committed by the appellant are not ordinary in any way. The complainant is a minor and more so her daughter. The prosecution were never serious at all. Neither was the victim's mother. For some strange reason she took a very long time from the time she was told by PW1 till she reported to the police.

For the foregoing reasons I shall allow the appellant's appeal. I set aside the judgment and sentence and order the appellant to be released forthwith unless otherwise held.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 9<sup>th</sup> day of July 2012**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

.....State Counsel

.....Advocate for the appellant

*HKC/ao*