



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 200 OF 2010

(From Original Conviction and Sentence in Criminal Case No.1329 of 2008 of the Principal Magistrate's Court at Kwale: A.M. Obura – S.R.M.)

M.H APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **M.H** alias A, has appealed against his conviction and sentence rendered by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned before the lower court on 12th September 2008 charged with the offence of **INCEST BY MALE PERSONS CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were as follows –

“On the night of 8th and 9th September 2008 in Kinango District of Coast Province, intentionally and unlawfully committed an indecent act or an act which caused penetration with C.A a girl under the age of 18 years knowing her to be his daughter”

The Appellant entered a plea of **‘not guilty’** to the charge and his trial commenced on 30th October 2008. The prosecution led by **INSPECTOR SIBUDA** called a total of eight (8) witnesses in support of their case. The complainant **C.A** a girl aged 17 years told the court that the Appellant is her biological father. On 8th September 2008 her mother had gone to attend a funeral nearby, thus she remained in the house with her father and her siblings. After the complainant had fallen asleep she felt someone touching her body. She awoke to find it was the Appellant. After defiling her the Appellant returned to his own bed-room. The following day when the complainant's mother **PW4 M. N** returned from the funeral she met her daughter crying in distress. The complainant told her mother what had happened. The matter was then reported to the authorities. The complainant was taken to Kinango Hospital where she was treated and her P3 form filled out **Pexb1**. Thereafter the Appellant was brought to court and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. In exercise of his options under S. 211 of the Criminal Procedure Code the Appellant opted not to offer any defence to the charge. On 15th March 2010 the learned trial magistrate delivered her judgement by which she convicted the Appellant of the charge of Incest by Male and sentenced him to serve twenty (20) years imprisonment. It is against that conviction and sentence that the Appellant now appeals.

MR. ONSERIO, learned State Counsel who appeared for the Respondent State opposed the appeal and urged the court to uphold both the conviction and sentence of the lower court.

The fact that the complainant is the biological daughter of the Appellant is not in any doubt. **PW4** the complainant's mother confirms that this is so. More importantly at no time in the proceedings did the Appellant ever deny that the complainant was his child. I have perused the Appellant's written submissions which were duly filed in court. However before I delve into an analysis of the evidence on record I find that concern is raised as to whether the Appellant was accorded a fair trial in terms of S. 77 of the old Constitution of Kenya under which this trial was conducted. On 30th October 2008 when the matter came up for hearing the Appellant applied to be provided with witness statements. The court ordered that the witness statements be supplied to the accused that day. Later at 3.00 p.m. the accused complained that he had not been supplied with the statements. The learned trial magistrate nevertheless proceeded to take the evidence of the complainant, despite the fact that no witness statements had been supplied to the Appellant. S. 77(1) of the old Constitution provided that:

"77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law"

S. 77(2) (c) of the same Constitution went on to provide as follows:-

"77(2) (c) Every person who is charged with a criminal offence –

- (a)***
- (b)***
- (c) Shall be given adequate time and facilities for the preparation of his defence"***

The above provisions have severally been held by our superior courts to include a right by the accused to be provided with all witness statements to enable him prepare for his defence. This was not done in this case. In the case of **THOMAS PATRICK GILBERT CHOLMONDELEY –VS- REPUBLIC Criminal Appeal No. 116 of 2007**, the Court of Appeal sitting in Nairobi cited with approval the decision of the High Court in **GEORGE NGODHE JUMA & 2 OTHERS –VS- THE ATTORNEY GENERAL Misc. Criminal Application No. 345 of 2001**, where it was held that:

"The right to a fair trial with regard to criminal matters guaranteed in section 77 of the Kenya Constitution which is the supreme law of the country, of necessity, involved the duties on the part of the prosecution to supply an accused person with all the relevant material in its possession, and to do so in advance of the beginning of the trial so that the party to be tried is made aware of the case to be advanced against him and to accordingly prepare his answer to that case" [my emphasis]

It is manifestly clear therefore in commencing the hearing of this case with full the knowledge that the witness statements had **not** been supplied to the Appellant the trial judge breached his rights to a fair trial as guaranteed by S. 77(1) and failed to accord to the Appellant adequate time and facilities to prepare his defence as directed by S. 77(2) (c) of the Constitution. In making this decision it would appear that the trial magistrate was influenced by the statement of the court prosecutor made at page 2 line 28:

"PROSECUTOR: I pray that the matter be mentioned later for the accused to have an opportunity to go through the statements. If convenient, I pray that we proceed later. The witnesses are school going and teachers. It is costly to them"

The trial magistrate was obviously influenced to proceed with the hearing despite the Appellant's confirmation that he had not been supplied with witness statements by the prosecutor's plea that it was costly for the witnesses to return by trial. This with respect was an erroneous decision on her part. How much more costly was it for the Appellant to be forced to proceed in an unfair process. In any event witnesses who come to court are entitled to seek and be paid travel reimbursement. I find that the actions

of the trial magistrate violated the Appellant's rights to a fair trial as guaranteed by S. 77 of the Constitution. The witness heard on that day was the complainant who was the key witness and this only added to the injustice of the situation. It is only **after** hearing this witness that the trial magistrate comments at page 4 line 25:

“Court: The court indicated that I will hear 4 witnesses. However, the accused has been unable to obtain statements. It would be unfair to proceed further. He should get the statements before the next hearing date. If need be, he may re apply to re-call PW1 for cross-examination ...”

The trial magistrate here **confirms** that no witness statements had been supplied to the Appellant. It is laughable that she terms this **‘unfair’** yet she had proceeded with the trial in total disregard of this **‘unfairness’**. Her rider that the Appellant would be at liberty to recall the complainant does not in my view salvage the situation. The Appellant was not represented by counsel. He was a lay person and was ignorant of the law or legal procedures. In such a case it fell on the court itself to ensure the protection of the Appellant's rights to a fair trial. Her failure to do this renders the whole trial null and void. A conviction based on an unjust process cannot stand and will not be upheld by this court. On this ground alone, I allow this appeal. The conviction of the Appellant is hereby quashed and the attendant twenty (20) year sentence is also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 13th day of April 2011.

**M. ODERO
JUDGE**

In the presence of:
Appellant in person
Mr. Onserio for State