



The state opposed the appeal. That the charge against the accused was proved. That the defence that the accused person did not know that the complainant is a minor is not tenable. That the identity of the appellant was not an issue in the case

The facts of this case is that the complainant and her sister were at the shopping centre. That the accused a married man told her that they go and watch a movie. That he took her to his house and defiled her.

When the authorities were informed they found the complainant in the accused person's house cutting vegetables. She was taken to the station and the accused person was subsequently arrested. The medical evidence adduced was as exhibit 3 indicated that there was penetration.

The accused person's defence was that he is aged 31 years old, that on the material day he had stayed at the school till 5 p.m. and went home and slept. He denied the offence

This is a 1<sup>st</sup> appeal and the same being so, the court has a duty to re-appraise the evidence, subject it to exhaustive examination and reach its own findings. The court, however, appreciate that the trial learned magistrate had the advantage of seeing and hearing the witnesses. The court further appreciate that because of that advantage, the trial magistrate is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier [1985] KLR 353**).

This has been restated in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134** where the court held that:-

***“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this neither seen nor heard the witnesses and make allowance for this”.***

(8)The issues that need to be determined are whether the rights of the accused person were breached and whether the trial was conducted in accordance with the law. Whether the charge sheet was defective. If the ingredients of the offence were proved and if the conviction was safe and.

The accused contended that his rights were breached Delay to arraign before court is an issue he was arraigned in court on the 3<sup>rd</sup> of November 2011 having been arrested on the 30<sup>th</sup> October 2008 This was clearly beyond the 24 hour time limit provided for by S. 72(3). However it is now accepted that the mere delay in bringing an accused person before a court will not entitle such an accused person to an automatic acquittal [see **ELUID NJERU NYAGA –VS- REPUBLIC 2006 KLR pg 2**]. The test is whether such delay was inordinate.

The same ought to have been raised at the earliest opportunity. This though does not negate his right in any way. It would have given the state upon whom the onus to offer an explanation as to the delay is given. An opportunity to explain the delay The appellant can institute a cause of action separately for the breach of the right given the stage where the matter has reached.

Was the charge sheet defective? It was not. It was properly prepared in accordance with section 137 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya and did not in anyway offend the provisions of the said section. The charge sheet was properly framed and included are the ingredients.

Did the magistrate disregard the accused person's defence the basis of the 2<sup>nd</sup> ground of appeal? Did she shift the burden of proof to the accused person as alleged in the 5<sup>th</sup> ground of Appeal?

The charge sheet was not defective and it complied with the provisions of section 134 and 137 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya

His defence and submissions were considered at page 3 of the judgement. See paragraph 2. The burden of proof was not shifted the conviction was based on sound and sufficient evidence.

There was penetration though examination was done 72 hours later leading to the same being referred to as old. Legally the complainant then a child in law could not give consent and it is immaterial whether or not she screamed. Contrary to what the learned Magistrate stated there was corroboration. There was evidence that there was penetration and the complainant was found right in the house of the accused person

There may have existed a dispute between the father of the complainant and the accused person but from the evidence on record an offence was committed.

This is not a case suitable for a retrial it has been stated in the case of **N'KANAKE VS REPUBLIC 1973 E.A. 67** that a retrial will be ordered only when the original trial was illegal or defective

The conviction is safe. The sentence is reasonable and according to the law.

The court therefore finds that the appeal has no merit disallows it and upholds both the conviction and sentence.

READ, DATED & SIGNED IN THE OPEN COURT THIS 24<sup>TH</sup> DAY OF NOVEMBER 2011

S.M. MUKETI  
JUDGE