



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 181 of 2008

B M N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

B M N hereinafter referred to as the appellant, was initially charged with 1 count of incest by male person Contrary to Section 20 (1) of the Sexual offences Act No. 3 of 2006. He pleaded not guilty and the matter proceeded to hearing before the Principal Magistrate Siakago.

On 26/3/2008, before the prosecution closed its case, the prosecutor made an application to substitute 2 other counts and alternative charges for each count. The application was allowed and the fresh charges were admitted. The same were read over to the accused person and he pleaded not guilty to all of them. The prosecution then closed its case and the matter proceeded to defence hearing. After the close of the defence case, the learned trial Magistrate who heard the case rendered the Judgment dated 13/6/2008.

The sentence was nonetheless pronounced by Mr. S.M. Mokuu the Senior Resident magistrate who sentenced the appellant to 15 years imprisonment.

Being aggrieved by the conviction and sentence, the appellant filed this appeal initially in person but later through Duncan Muyondi & Co. Advocates who filed an amended petition of Appeal in which he raised 11 grounds of Appeal. When the Appeal came up for hearing before me, the learned State Counsel stated that he supported both conviction and sentence and urged the court to uphold the same.

As I was going through the proceedings herein, I noted very serious anomaly which neither counsel appeared to have noticed. I noticed that the Judgment in question is fatally defective as it fails to comply with the provisions of Section 169 (2) of the Criminal Procedure Code which provides:-

“ In the case of a conviction, the Judgment shall

specify the offence of which, and the section

of the Penal Code or other law under which the

accused person is convicted and the

punishment to which he is sentenced.”

In convicting the appellant, the learned trial magistrate stated;

***“Hence case against accused is proved
beyond any reasonable doubt and I now
find accused guilty of the offences as
charged and shall convict him accordingly.”***

The magistrate who passed the sentence on the other hand stated;

“ The accused is sentenced to 15 years imprisonment.”

Clearly, there was a problem in both the Judgment and the sentence. The appellant had been charged with 3 main counts of incest and 3 alternative counts. This Judgment does not say whether he was convicted on all 3 main counts nor does it say whether he was acquitted on the main counts and convicted on the alternative counts. The sentence is a blanket sentence which does not say which count the appellant was being sentenced on. If the appellant was convicted on all the main counts, the magistrate should have stated so in unambiguous terms. The sentence should also have reflected the sentence on each count with an accompanying order that the sentences run concurrently etc. This is why I say that Judgment in question is fatally defective and the same must be quashed. If I were to determine this appeal on its merit, I was going to dismiss the same and so in the interests of justice, I will quash the Judgment in question which I hereby do and set aside the sentence of 15 years imprisonment. The appeal is therefore allowed but I order that the appellant be retried before any other magistrate of competent jurisdiction in Siakago other than Mr. Omenta. I order that the appellant be released from prison and be remanded in custody to await his presentation to court for fresh plea and subsequent hearing which should be done on priority basis.

**W. KARANJA
JUDGE**

Delivered, signed and dated at Embu this 25th day of Feb 2010.