



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 69 OF 2009**

A K K APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

A K K was convicted of incest by a male person contrary to section 20(1) of the Sexual Offences Act. He was imprisoned for a term of 10 years. He filed this appeal on the grounds that all the prosecution witnesses were from the same family and that there was no doctor's evidence to support the conviction. The state represented by state counsel Mr. Kabaka did not oppose the appeal on the ground that there was no medical proof that the offence had been committed.

At the hearing of the case the doctor who was said to have examined the complainant never attended court to produce the P3 form despite the case being adjourned severally to await his attendance at court. Without the P3 form evidence the trial court was left with no evidence on which it could properly hold that the appellant was guilty as charged **see the case of RAJAB SAID ABDALLA V. R. MSA. Cr. Appeal No. 86 of 1997.**

The trial court did not comply with the provisions of S. 124 of the Evidence Act and more particularly the proviso thereto in that it did not record whether or not it believed the evidence of the victim and further failed in not giving reasons for believing the complainant. In the absence of the doctor's evidence and that failure to comply with section 124 there was no basis for the conviction. Consequently I allow this appeal quash the conviction and set the sentence aside. The appellant will be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER, 2010.

**P.M. MWILU
JUDGE**

In the presence of;

Mr. Kabaka for the State

Appellant in person

Andrew Omwenga – C.C.

**P.M. MWILU
JUDGE**