



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 19 OF 2020

COM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.26 of 2016 of the

Chief Magistrate's Court at Homa Bay by Hon. R. B.N. Maloba–Principal Magistrate)

JUDGMENT

1. COM, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 and of deliberate transmission of HIV contrary to section 26 (1) (a) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on the 25th August, 2016 in Homa Bay County being a male person caused his penis to penetrate the vagina of CAO aged 12 years, a female person who was to his knowledge his niece. On the same day he intentionally and knowingly infected CAO with HIV.

3. The appellant was sentenced to life imprisonment in count 1 and in count 2 he was sentenced to serve 15 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was represented by Robert Ochieng Advocate. He raised the following grounds of appeal:

a. That the learned trial magistrate erred in law and in fact by failing to ensure the appellant's right to fair hearing was upheld in that:

i. He was not accorded the right to cross examine the complainant.

ii. That the appellant was not given an interpreter.

iii. That the trial magistrate erred in law and in fact by failing to inform him of his right to be represented by an advocate.

b. That the trial magistrate erred in law and in fact by making an assumption that PW2 was an intermediary.

c. That the trial magistrate erred in law and in fact by failing to consider the appellant's defence.

d. That the trial magistrate erred in law and in fact by failing to get a medical report on the mental status of the complainant.

5. The state opposed the appeal through Ochengo Justus, learned counsel. He argued that the prosecution proved its case to the required standards.

6. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] E.A 32**.

7. Article 50 50(2) paragraph(g) provides:

Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

8. In the case of **BOO vs. Republic [2020] eKLR Mrima J** addressed the issue of representation as follows:

17. The right under 50(2)(h) of the Constitution given that in many instances the rights under 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under 50(2) (h) of the Constitution deals with instances where the State must assign an Advocate to an accused person.

9. The effect of non-compliance is that the entire trial is vitiated for it amounts to a mistrial.

10. I have perused the record herein and I have found that the appellant was not informed of his right of representation by an advocate. The trial therefore amounted to a mistrial. In the interest of justice, I will not evaluate the merits of the other grounds. I therefore quash the conviction and set aside the sentence.

11. I make an order that the appellant to be released, within 7 days of this judgment, into police custody and be taken to Homa Bay court for retrial by any other magistrate of competent jurisdiction other than Hon. R. B.N. Maloba.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE