



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 59 OF 2018

IOKAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Maseno (Hon. C N. Oruo RM) dated the 29th May 2018 in Maseno SRMCCRC No. 1565 of 2015]

JUDGMENT

The Appellant, **IOK** was convicted for the offence of **Incest** Contrary to **Section 20(1)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his appeal, the Appellant has submitted that the trial court had failed to observe the provisions of **Article 50 (2)(1)** of the **Constitution**.
2. First, he said that the prosecution did not provide him with copies of Witness Statements and other relevant documents the Appellant intended to rely on. In the circumstances the Appellant complained that he was denied the opportunity to prepare adequately for his defence.
3. Secondly, he complained that the trial was conducted in English and Kiswahili, whilst he was only conversant with the Luhya language.
4. The other issue canvassed by the Appellant was the evidence on record showed that the Complainant used to live with her grandmother.
5. According to him the Complainant could not have been the victim of his alleged repeated acts of defilement, when it is borne in mind that she lived with her grandmother.
6. The Appellant cited from the evidence of **PW2** who said that she had seen the Complainant pass by her house on 2nd September 2015.
7. Another issue that was raised by the Appellant was that there was no evidence to prove that the Complainant was mentally handicapped.
8. In that regard the Appellant appeared to have made some confusing statements in his submissions, as follows:-

“My Lord, the victim was found not to be mentally handicapped (see page 28 line 1). She was psychologically unstable. PW4 stated that the victim was not mentally stable.”

The Appellant submitted that the court had erred by allowing the Complainant to testify on oath, considering that the said Complainant was mentally handicapped.

9. As regards the sentence which the trial court handed down, the Appellant said that Life Imprisonment was too harsh.
10. Finally, the Appellant submitted that pursuant to **Article 50 (2)(p)** of the **Constitution**, he was entitled to the benefit of the least severe sentence.
11. As **Section 20 (1)** of the **Sexual Offences Act** provides for the minimum sentence of 20 Years Imprisonment, the Appellant faulted the trial court for jailing him for life.
12. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.

13. Of course, in the process of the said re-evaluation, I will bear in mind the fact that I did not have the benefit of observing the witnesses when they testified.

14. **Section 20 (1)** of the **Sexual Offences Act** defines the offence of Incest as follows;

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed as incest and is liable to imprisonment for not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

15. The provisions of **Section 21** of the **Sexual Offences Act** defines the offence of Incest, where the perpetrator is a female.

16. In this case, the Complainant is the daughter of the Appellant.

17. Her age was indicated as being 11 years, as at the date when the offence was committed.

18. The Complainant gave sworn testimony, after the court had conducted a voire dire examination, and had come to the conclusion that the Complainant understood the importance of telling the truth.

19. As at the date when she testified, the Complainant was 12 years old.

20. She testified that;

“On diverse dates between Year 2013 to 02/09/2015, I was living with my father, Ibrahim. My mother died, leaving me with 3 siblings who left to stay with my grandmother. I lived with my father and step mother who later left.”

21. Clearly, the Complainant was not living with her grandmother. She was living with the Appellant, whilst her other siblings lived with their grandmother.

22. A perusal of the record of the proceedings before the trial court reveals that on 15th October 2015, the Appellant confirmed that the Complainant was his child.

23. Therefore, there is absolutely no doubt that if the Appellant committed an indecent act or an act which caused penetration with the Complainant, he would have committed the offence of Incest, as defined at **Section 20 (1)** of the **Sexual Offences Act**.

24. As regards the language used at the Appellant’s trial, the record shows that the proceedings were conducted in English and Kiswahili.

25. The record shows that the Appellant had indicated that he understood Kiswahili.

26. However, when the Charge Sheet was amended, and the Appellant took a plea a second time, he said that he understood the Luhya language.

27. Notwithstanding that fact, all the proceedings were thereafter conducted in English and Kiswahili.

28. Whilst it appears that the Appellant participated actively in the trial, through the cross-examination of the prosecution witnesses, I find that there was a possibility that the Appellant was denied the opportunity to follow and to understand everything that went on during the trial.

29. Pursuant to **Article 50 (2) (m)** of the **Constitution**;

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

.....

.....

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

30. It is further appreciated that pursuant to **Article 25 (c)** of the **Constitution**, one of the rights and fundamental freedoms that shall not be limited is the right to a fair trial.

31. As the Appellant did cross-examine witnesses, I find that he cannot be said to have been unable to understand Kiswahili.
32. Nonetheless, as he had indicated that it is the Luhya language which he understood, I find that the learned trial magistrate erred by failing to make available an interpreter.
33. In the circumstances, the Appellant's right to fair trial was curtailed.
34. This court is unable to ascertain whether or not the Appellant could have handled the case better or differently, if he had had the benefit of an interpreter.
35. On the other hand, the offence that the Appellant was convicted for is extremely serious.
36. Justice can only be done to both the Appellant and the Complainant through a re-trial.
37. Accordingly, I allow the appeal; quash the conviction; set aside the sentence; and order that the Appellant shall be re-tried by a Magistrate other than Hon. C.N. Oruo.
38. In order to facilitate an expeditious re-trial, I further order that the Appellant be presented before the learned Magistrate In-charge of the Maseno Court on 16th July 2019, when the Court will give further Directions.
39. For the avoidance of any doubts, the further Directions to be given on 16th July 2019 may include the taking of a plea, by the Appellant.

DATED, SIGNED and DELIVERED at KISUMU This 8th day of July 2019

FRED A. OCHIENG

JUDGE