



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 21 OF 2017

C O J.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.106 of 2015 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

1. **C O J**, the appellant, was convicted for of the offence of incest contrary to section 20(1) of the Sexual offences Act No. 3 of 2006.
2. The particulars of the offence were that, in the month of February 2015 at **[particulars withheld]** market of **BUSIA** County, caused his penis to penetrate the vagina of **R.A**, a female person who to his knowledge was his daughter.
3. He was sentenced to life imprisonment. He has appealed against both the conviction and the sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by ignoring the gross violations of his rights to fair trial.
 - b) That the learned trial magistrate erred in law and in fact by relying on hearsay and contradictory evidence.
 - c) That the learned trial magistrate erred in law and in fact by relying on prosecution evidence that did not support the charge.
 - d) That the learned trial magistrate erred in law and in fact by disregarding his defence.
5. The state opposed the appeal through Ms. Ngari, the learned counsel.
6. The facts of the prosecution case were briefly as follows:

The appellant is a stepfather of the complainant who at the time of the offence was about 12 years old. The complainant contended that the appellant defiled her repeatedly when her mother was away. As a result, she became pregnant. This is when it came to light what had transpired. The matter was reported to the police and the appellant was arrested and charged.
7. The appellant denied any involvement in the offence.
8. This is a first appellate court. As expected, I have analyzed 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 be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. The appellant has issues with the introduction of the **DNA** report after he had given his evidence. He was also not supplied with a copy. His contention is that this was prejudicial to him for he had no chance of rebutting this evidence. My perusal of the record, indicate that the **DNA** report was introduced by the prosecution after both sides had closed their cases. Though the appellant was given a chance to cross examine **PC (W) Subeda Makokha**, this was not procedural. The right procedure would have been for the prosecution to make an application to reopen their case under section 212 of Criminal Procedure Code. The appellant was also entitled to have a copy of the incriminating report in advance.

10. The conduct of the case by the learned trial magistrate was prejudicial to the appellant. It amounted to a mistrial. Having found merit on this ground, it would be futile for me to address the other grounds. I accordingly quash the conviction and set aside the sentence.

11. I therefore make an order for retrial before another magistrate other than Hon. Martha Nanzushi. The appellant to be taken before the Chief Magistrate's Court Busia on 11th May 2018 for the necessary orders to facilitate the retrial. The matter ought to be heard on priority and where possible on a day to day basis.

DELIVERED and SIGNED at BUSIA this 7th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE