



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 22 OF 2018**

**E M S.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against Conviction and Sentence imposed in Criminal Case Number 9 of 2017 in the**

**Senior Resident Magistrate's Court at Winam delivered on 27.2.18 by Hon. C.N.Njalale (RM)**

**JUDGEMENT**

**The Trial**

1. On 27th February, 2018; the Appellant was convicted for the Offence of Sexual Assault Contrary to Section 5 (1)(a)(i) as read with Section 5(2) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years imprisonment.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the grounds of Appeal filed on 15th March, 2018, Appellant raised 11 grounds of Appeal which I have summarized into 3 grounds as follows **THAT:**

- 1. The prosecution case was not proved beyond reasonable doubt**
- 2. The Learned trial Magistrate erred in Law and in fact in failing to consider glaring inconsistencies in the prosecution case**
- 3. The Learned trial Magistrate failed to consider the Appellant's Defence that he was implicated by the Complainant**

3. When the Appeal came up for hearing on 8th May, 2018, Mr. Sala, advocate for the appellant submitted that the prosecution case was not proved and further that complainant had in her evidence conceded that her mother coached her on the evidence that she as to give in court. Ms. Wafula for the state conceded to the appeal.

**Analysis**

4. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (see **Okeno v Republic [1972] EA 32**). This duly was aptly stated in the case of **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR where** the Court of Appeal said:-

**“A Court hearing a first Appeal (i.e. a first Appellant Court), also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor so the first Appellate Court would give allowance of the same.”**

**The prosecution's case**

5. Complainant testified that she was normally left with one W and that it was her mother that told her to tell the court that the appellant, who is her father had touched her genital organ. Complainant's mother confirmed that her younger brother W used to pick complainant from school when both her and appellant were not available. The clinical officer and the doctor both examined complainant and found no injuries in her genitalia.

### **Defence case**

6. In his sworn defence, appellant denied the offence. He stated that he was framed by his estranged wife (complainant's mother) after they feel out.

### **Analysis**

7. From the evidence on record, complainant in her evidence told court that appellant did not do anything to her. She conceded in cross-examination that it was her mother that told her to tell court that appellant had touched her genitalia.

8. With this kind of evidence, I have no doubt in my mind that the trial court might have arrived at a different decision had she considered that complainant had been couched by her mother to implicate the appellant.

9. From the foregoing; I am satisfied that the prosecution case was not proved beyond reasonable doubt and appellant ought to have benefitted from that doubt.

### **Decision**

10. From the preceding analysis, I am in agreement with the state that the evidence presented by the prosecution is not watertight. I therefore find that the conviction and sentence entered against the Appellant was not safe and should not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant shall be set be at liberty unless otherwise lawfully held.

**DATED AND SIGNED THIS 10th DAY OF May, 2018**

**T. W. CHERERE**

**JUDGE**

**IN THE PRESENCE OF**

**Court Assistant - Felix**

**Appellant - Present**

**For the appellant - Ms. Sala**

**For the state: - Ms. Wafula**