

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 8 OF 2017

G O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. C.R.T Ateya – RM dated 24th May 2016 at the Principal Magistrate’s Court at Ogembo in Criminal Case No. 1388 of 2013)

JUDGMENT

1. The appellant was charged and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act (‘the Act’). The particulars of the offence were as follows:

On the 14th day of December 2012 at about 1000hours in Gucha South District within the Kisii County, being a male person, caused his penis to penetrate the vagina of SKA a female aged five years a person who was to his knowledge is his niece.

2. The appellant was sentenced to fifteen (15) years imprisonment and now appeals against the conviction and sentence. The petition of appeal raised issues of the sentence but in the supplementary grounds of appeal, the appellant stated that he was not given a fair trial and that the prosecution failed to prove its case. For reasons that will become apparent, I will not go through the evidence.

3. After the close of the prosecution case and after the appellant had been put on his defence, the appellant made an application that the doctor who gave evidence be recalled for cross examination. The prosecution did not object to the application. Consequently, the prosecution case was re-opened. Unfortunately, the doctor was not re-called as directed as the appellant kept raising other applications including applications to be allowed to commence the case de novo. Those applications were all dismissed and the appellant directed to make his defence.

4. The trial magistrate did not call the clinical officer as directed yet it is the duty of the court to ensure that the accused person’s right “to have adequate time and facilities to prepare a defence” in terms of Article 50(2) (c) of the Constitution.

5. This is a proper case for retrial as the appellant’s fair trial right was violated as the trial magistrate failed to ensure that the clinical officer who had been recalled did not testify after the prosecution case had been re-opened.

6. Since the prosecution case was still open, I direct that the appellant be taken to the trial court to proceed with the prosecution case. I therefore quash the conviction and sentence and direct that the hearing proceed from where it had reached on 21st October 2015 after the trial magistrate re-opened the case to either recall the doctor for cross examination as requested by the appellant or further orders. The matter may be heard by any other magistrate if Hon. Ateya, RM is not at the station. The appellant shall remain in custody and shall be taken to Ogembo Magistrate’s Court on 18th October 2018 to continue the hearing.

Dated and delivered at Kisii this 11th day of October, 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Appellant in person.