



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 55 OF 2017

(FORMERLY ELDORET HCCRA NO. 167 OF 2014)

E L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of Criminal Case Number 218 of 2014 in the Principal Magistrate's Court at Kabarnet delivered on the 24th October 2014 by Ho. E. Kigen, RM]

JUDGMENT

1. The Appellant was convicted for the offences of incest contrary to section 20 (1) by a male person and sentenced to life imprisonment of 10/10/2014 by Hon. E. Kigen, RM. He faced an alternative charge of indecent act with a child contrary to section 11 (1) of Sexual Offences Act.

2. On appeal from both conviction and sentence, the DPP did not oppose the appeal but sought the retrial of the appellant on the grounds that the trial was defective, the appellant having not been given opportunity to cross-examine the complainant and the complainant's age having not been established.

3. The trial Court had on the recommendation by a doctor that the victim was traumatized and on reliance of section 31 of the Sexual Offences Act, declared the complainant a vulnerable witness and directed that the witness gave evidence in the absence of the accused, despite the appellant expressing his wish to cross-examine the witness.

4. The right to cross-examine witnesses is a fair trial guaranteed for every accused person pursuant to Article 52 (k) of the Constitution which provides for the right to **“(k) adduce and challenge evidence”**.

5. Section 31 of the Sexual Offences Act which makes provision for declaration of a witness as a vulnerable witness does not preclude the accused person's Constitutional Rights to challenge the evidence by cross-examine the witness. The section does not permit the giving of evidence in the absence of the accused. The effect of the declaration of vulnerable witness is set out in section 31 (4) of the Sexual Offences Act as follows:

“4. Upon declaration of a witness as a vulnerable witness in terms of this section, the Court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures:

(a) Allowing such witness to give evidence under the protective cover of a witness protection box;

(b) Directing that the witness give evidence through an intermediary;

(c) Directing that the proceeding may not take place in open Court;

(d) Prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) Any other measure which the Court deems just and appropriate.”

6. The accused right to cross-examine is protected under section 31 (8) (d) of the Sexual Offences Act by providing that ***“in determining which of the protective measures referred to in sub-section 4 should be applied to a witness, the Court shall have regard to act the circumstances of the case, including (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings”***.

7. In addition, section 31 (13) of the Sexual Offences Act emphasizes the accused’s right to cross-examine a vulnerable witness by providing that:

“13. An accused person in Criminal Proceedings involving the alleged commission of a Sexual Offence who has no legal representation shall put any question to a vulnerable witness by stating the question to the Court and the Court shall repeat the question accurately to the witness.”

8. Further, in failing to hold the trial of the accused in the presence of the accused as regard the evidence of the complainant the trial Court was in breach of Article 50 (2) (f) right *“to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”*

9. Accordingly, I would find that the accused’s trial was defective and nullity as properly conceded by the DPP.

10. Moreover, as pointed by the DPP, the want of age assessment opens the trial to a risk of prejudice on the accused because different penalties are prescribed for different age groups under the Sexual Offences Act, and a lesser may have been imposed on the appellant if the complainant was over the age of 18 years.

11. The accused has been in prison custody for over **4 years** since 21/10/2014.

Retrial

12. In considering whether to order a retrial the Court must consider whether the justice of the case requires it, and although the appellant has been in custody for considerable period of the life sentence, the offence is serious and as observed in ***Opicho v. R*** (2009) KLR 369, 375 a fair trial should be held so that the rights of the accused and the complainant are upheld. As urged by the DPP, the Court must seek to secure justice for the accused as well as the complainant.

13. There has not been any indication that the witnesses may not be available for retrial. The error or misdirection resulting in the defective trial was occasioned by the Court, of course, with application by the prosecution, but the seriousness of the defilement of child, if proved, is a compelling reason for the grant the order for retrial.

14. In order not to prejudice the retrial, the appellate Court does not discuss the detailed merits of the charge other than to observe that in a proper trial, there is evidence upon which a Court could convict for the offence charged.

ORDERS

15. Accordingly, for the reasons set out above, the conviction of the appellant for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act is quashed and sentence for imprisonment for life set aside.

16. The appellant shall be retried in a proper trial before a competent Court at Kabarnet Law Court. For the purpose of retrial directions, the appellant shall be produced before the Magistrate’s Court on Monday 17/12/2018.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF DECEMBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.