



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.31 OF 2015

JOHN KIPKORIR LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kericho CM Cr. S. O. No.44 of 2012 by Hon. J. Ndururi)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act, No, 3 of 2006. He was convicted by the Principal Magistrate's Court in Kericho on 25th June 2015 and sentenced to life imprisonment. Dissatisfied with the conviction and sentence, he appealed to this court through his Petition of Appeal dated 8th July 2015.

2. When the appeal came up for hearing on 13th September 2016, Mr. Moturi, Learned Counsel for the appellant, indicated that he and Ms Keli for the State had considered the matter and were requesting for a mention date as they were likely to record an order that will obviate the need for a hearing of the appeal. Ms Keli confirmed this and sought two weeks to consider the matter and address the court. The matter was then set for mention on 27th October 2016.

3. On this date, Ms Keli informed the court that there had been a mistrial because section 208 and 302 of the Criminal Procedure Code were not observed in the trial of the appellant by the trial court. She further stated that the appellant, who was not represented, was not informed of his right to cross-examine the complainant in the matter. It was her submission that this was a breach of the two sections and the view of the prosecution was that justice would be served if there was a re-trial.

4. Section 208 of the Criminal Procedure Code provides as follows:

“(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.” (Emphasis added)

5. At section 302, the Criminal Procedure Code provides as follows:

“The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.”

6. I have read and considered the proceedings before the trial court. The complainant, then a child aged 10, testified on 29th May 2013. After conducting a *voire dire*, the trial court had concluded that she did not understand the nature of an oath, and directed that she should give unsworn testimony.

7. At the end of her testimony, the trial court adjourned the matter to 21st August 2013 after observing that there was another matter with witnesses and the court would not have sufficient time to hear the witnesses in the matter out of which this appeal arises.

8. When the matter came up again before the court on 21st August 2013, the prosecution called its second witness, a teacher at the complainant’s school. No opportunity was given to the appellant to cross-examine the complainant, nor was he informed of the right to cross-examine the complainant as is required under section 208 of the Criminal Procedure Code.

9. An essential feature of our justice system is that an accused person must be given an opportunity to cross-examine the prosecution witnesses and to challenge all the evidence adduced against him. This is not only what section 208 and 302 of the Criminal Procedure Code require in mandatory terms, but is expressly provided for as one of the core elements of the right to a fair trial guaranteed under Article 50(2) of the Constitution.

10. Further, I have considered judicial precedents on this point. The Court of Appeal in **Nicholas Mutula Wambua & Another vs Republic Mombasa Criminal Appeal No. 373 of 2006 (UR)** construed sections 208 and 302 of the Criminal Procedure Code and concluded that cross-examination of a witness who had given evidence not on oath is permitted by law. With respect to a child witness, it was held in the case of **Sula vs Uganda [2001] 2EA 556** cited with approval by the Court of Appeal sitting in Nyeri in **Criminal Appeal No. 12 of 2014- DW vs Republic** that:

“A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.”

11. I note from the proceedings before the lower court that the appellant was accorded an opportunity, and did indeed cross-examine all the other witnesses presented by the prosecution. However, this does not detract from the first, fundamental error made by the trial court in failing to accord him an opportunity to cross-examine the complainant. As conceded by Ms. Keli for the state, this error resulted in a mistrial, and the conviction and sentence cannot be allowed to stand. Consequently, I hereby quash the conviction and set aside the sentence.

12. The matter is remitted back to the Senior Principal Magistrate’s Court in Kericho for a retrial before a magistrate other than Hon. Ndururi.

13. It is so ordered.

Dated, Delivered and Signed at Kericho this 9th day of November 2016.

MUMBI NGUGI

JUDGE