

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 131 OF 2014

BETWEEN

V L J APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P.Mayova, RM in Chief Magistrates Court at Homa Bay in Criminal Case No. 360 of 2013 dated 7th January 2014)

JUDGMENT

1. The appellant, V L J, was charged with and convicted of the offence of incest contrary to **section 21** as read with **section 20(1)** of the *Sexual Offences Act, 2006*. He was sentenced to life imprisonment. He now appeals against conviction and sentence.
2. Mr Oluoch, learned counsel for the respondent, conceded that the appeal should be allowed on the ground that the appellant was not given an opportunity to cross-examine the child.
3. The complainant, after a voire dire, testified how she had been defiled. According to the record, after her examination in chief, the court stated, ***“Due to the tender age of the child, she will not be cross-examined by the accused.”***
4. The learned magistrate erred as the right of an accused to cross-examine the complainant is a fundamental right under **Article 50(2)(k)** of the Constitution. An accused person should always be given an opportunity to cross-examine a witness. Where the witness is a vulnerable child, **section 31** of the *Sexual Offences Act* permits the use of an intermediary through which the child can be asked questions.
5. In this case, then the court found that the child was intelligent and from the record, she gave evidence which implicated the accused. It was therefore wrong for the learned magistrate to deny him the opportunity to cross examine her. I have no option but to quash the conviction and sentence on account of violation of the right to a fair trial.
6. As there is overwhelming evidence against the accused and the matter occurred in 2013 within the local limits of the subordinate court’s jurisdiction, I direct a re-trial. The appellant shall remain in custody and be taken to plead before the Chief Magistrate’s court, Homa Bay on **5th June 2015**. The matter shall be heard by any other Magistrate other than Hon, P Mayova, SRM.

DATED and DELIVERED at HOMA BAY this 4th day of June 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.