LGK v Republic (Criminal Appeal E080 of 2022)
[2023] KEHC 17711 (KLR) (26 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E080 OF 2022

JRA WANANDA, J

MAY 26, 2023

BETWEEN

LGK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Butere Senior Principal Magistrate's Court Sexual Offence Case No. 51 of 2020 with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence are that on the night of 9/09/2020 at around 9.00 pm in Butere sub-County within Kakamega County, being a male person, caused his penis to penetrate the vagina of of CMO, a female child aged 15 years who was his step-sister.

2. He was also charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on the same night, time and place, he intentionally and unlawfully touched the vagina of the same child with his fingers.

3. The prosecution called 5 witnesses and the Appellant called 3 witnesses, including himself. The Appellant was represented by Mr. Musiega Advocate.

Prosecution evidence

4. PW1 was the complainant (the alleged victim). She stated that she has completed class 8, she was a student at ..... primary school [name withheld], the Appellant is her step-brother, they share a father, on 9/9/2020 at about 9 pm, her parents had left to arrange for her grandmother's funeral program, she was left with two children, at 9 pm she heard a knock on the door, she asked who it was, the person responded that it was G, she opened and ushered him in, he asked for the whereabouts of their father, she told him that he had gone to the grandmother's funeral program, he further asked for the whereabouts of his wife, his wife was staying with the PW1's family as she had differed with the

Appellant, she told him that his wife had also gone to the funeral program, he told PW1 that he wanted to talk to their father, he sat on a chair as he awaited the father's arrival, after a short while, he went and sat on the chair she was seated on and told her he was in love with her, she cautioned him and told him that he was her brother and he could not express his love to her, she left the seat and moved to another one but the Appellant grabbed her hands, she tried to shove him but he overpowered and immobilized her, he made her lie on the chair, he then removed a handkerchief from his pocket and covered her nose with it, she blacked out, she cannot recall what happened thereafter, she was awakened by some breeze, when she woke up, she realized the door was ajar, she stood up to go and close the door, she was sore all over her body, her thighs were covered in some whitish/milky substance, her thighs were aching, she shut the door and returned to sleep in the seat, at 6 am her parents returned home, she opened for them, her mother was curious about PW1's walking style, PW1 recounted to her the ordeal, her father examined her and asked her mother to escort her to Butere hospital, her mother did so and thereafter to Butere police station, she was not present when the Appellant was being arrested. She then identified her treatment notes, P3 Form and birth certificates.

5. In cross-examination, she reiterated that the Appellant was her step-brother, they share the same father, she did not consent to the sexual act, Appellant's mother separated with their father, Appellant remained behind, Appellant lived with them in the same homestead at some point, at the time of the incident, her home was in close proximity to their home, he lives with the mother in the same homestead, he lives in [Particulars Withheld] village, it is not true that she differed with the Appellant and their father chased him away, Appellant's mother differed with their father and the father chased her away, she then moved from Ematawa where they used to reside and went to live in the Appellant's mother's homestead before the incident, PW1's mother was constructed for her own house but they lived temporarily in the 1st wife's house, Appellant used to visit their homestead before the incident, he could come to visit the father, he used to come even at night, Appellant is a secondary school teacher, he completed his studies at Maseno University, he completed in 2015, her grandmother's home is about 5 km away, before she opened the door, she asked who was at the door, Appellant responded that it was him so she opened, that was the first time she had opened the door for the Appellant when she was alone with her younger siblings, she knew the Appellant was looking for their father, they stay alone in the compound, the closest neighbour is one Edward who lives in close proximity, just adjacent to our gate, she told the police that the Appellant asked her to accompany her to sleep as his wife had gone for the burial arrangement, she told him that her parents left her with the responsibility to guard the home and siblings, she had not disclosed these facts to the Court, she did not record in her statement that that her thighs were covered with whitish/milkfish substance, she did not see the Appellant remove his trousers, or penis or her pant neither did she see him insert his penis in her vagina, he also did not touch her vagina, she saw him when he covered her nose with his handkerchief, her father examined her and remarked "huyu ametombwa" (she has been defiled), her father is the one who examined her on her private parts. In re-examination, she stated that the Appellant used to visit their home at night, it was not the first time, but on the material night it was the first time he came when her parents were away.

6. At this point, the Court is recorded to have noted down the following:

> "I have observed PW1 as she testified. She's avoiding eye contact with the Court. Her testimony however was very lucid but she seems to be economical with the facts"

7. The next witness, PW2, was TT She stated that she resides in Bukolwe, she is a peasant farmer, PW1 is her daughter, the Appellant is her step-son (son to his co-wife), on 9/9/2020 she left for burial arrangements, she had lost her mother-in-law, she proceed in company of the Appellant's wife and PW2's husband, they left home at around 4 pm to escort the body to the mortuary, PW1 remained with her two young siblings, they returned home the next day at 6 am, she noticed PW1 was in the

living room, her husband pushed the door and opened it, PW1 was in the living room and the lights were on, she was also in tears, she then recounted to her that L (Appellant) approached her the previous night and asked her to accompany him to his house for a sleep-over but she declined, she further told her that the Appellant covered her nose with a handkerchief, he then removed her panty and "lay on her", PW1's father later gave PW2 cash to escort PW1 to hospital, she had examined PW1 with her husband, PW1 did not open for PW2 and the father, it is the father who pushed the door to open it, PW2 used to stay with the Appellant in her homestead after his mother chased him from home, PW2 escorted the Appellant to hospital in Butere, the Appellant was arrested at a bar drinking den where he usually drinks. She then identified the P3 Form and treatment notes.

8. In cross-examination, PW2 stated that she lived with the Appellant in her house for 6 months, her husband did not chase him, he was sent away by people who complained that he was still spending at his parents' house yet he was a grown up, she did not witness the incident but noticed PW1 had sustained injuries when she examined her, she admitted that she recorded in her statement that it is PW1 who opened the door for her and the father and that thereafter they proceeded to the bedroom and inquired what was wrong, she also admitted that she never recorded that she examined PW1, what she recounted to the police is that her daughter recounted her ordeal to her and thereafter her husband examined PW1's private parts and then asked PW2 to escort PW1 to hospital. At this point, it is recorded that the trial Court made the following observation:

> " When questioned whether she heard her husband remark "huyu ametombwa" (this girl has been defiled), she seems unsure of her answer."

9. PW2 continued and stated that her husband did not record his statement at the police station, the Appellant differed with his wife and the wife left their matrimonial home and came to stay with them, they stayed with the Appellant's wife for 1 week before the incident.

10. PW3 was one Khamila Khaemba. She testified that she was from Butere sub-county hospital, the patient was seen by her colleague Anastacia Munyan who has since been transferred, she worked with Anastacia Munyan for 1 year, she is conversant with her signature and handwriting, she recorded that on 10/09/2020, a patient came with history of having been defiled, she stated that she knows the person who defiled her, upon examination, it was found that there was inflammation/swelling of labia majora and minora, there was severe tenderness, the hymen was freshly broken, there was foul smelling discharge, patient was sent to lab test, HVSB test revealed epithelial cells, pregnancy was negative, HIV test was positive, it was known for a while back that the patient was positive, she was given antibiotics, pain-killers and emergency pills, she also filled the P3 Form and PRC (Post-Rape Care) Form.

11. In cross-examination, she agreed that she had not told the Court her professional qualification, she also agreed that one cannot tell the qualification of Anastacia just by looking at the P3, she was aware that people could forge documents like P3 Form, she agreed that she did not see the patient herself, being HIV positive cannot take away the hymen, for epithelial cells there is an accepted level but hers were a bit high, the P3 Form has not revealed when the hymen was broken, the hymen was freshly broken, that is what her colleague noted in the treatment notes, for freshly broken one cannot be sure of exact time but it is a recent occurrence, PW1's external genitalia was indicated to be normal, on the P3 Form, it was indicated that PW1 was not under influence of drugs during examination but from her history, she stated that she was covered with a handkerchief on the nose then she passed out, not everyone bleeds when the hymen is broken, PW1 still had the same clothes she had worn when the incident happened, there was nothing positive to record about the clothing, itchiness can break the hymen but it is very rare, only if the itchiness is very deep that is when one can insert the fingers inside the hymen, she has not seen an STI (Sexual Transmitted Disease) that causes swelling on both labia majora and minora.

12. PW4 was one Inspector Beatrice Rono. She testified that she is attached at Nambale Police Station, on 10/09/2020, PW1 and her mother (PW2) came to the station, the reported a complaint that PW1 had been defiled, PW1 had already been treated at Butere sub-county hospital at the time of making the report, she gave them P3 Form, she recorded their statements, she also compiled a police file, the complainant had a birth certificate which showed she was 15 years, on 27/09/2020 the suspect was arrested by officers from Butere police station. She then identified the birth certificate. She admitted that she never visited the scene. In cross-examination, she stated that she did not draft the Charge sheet, she only compiled the police file, she recommended that the Appellant be charged with incest, it was established that the Appellant's mother and PW1's mother were co-wives.

13. PW5 was one Police Constable Maureen Akhamu. She testified that she was attached at Butere Police Station, she was in Court to produce PW1's birth certificate on behalf of PW4 who was then at Busia police station, she wished to produce it, she did not record any statement as a witness, she admitted that one name is folded in the original birth certificate, the name of the mother is also faded in the original and that the copy is very clear.

Defence evidence

14. At the close of the prosecution case, the trial Court ruled that the Appellant had a case to answer and put him to his defence.

15. On the date of defence hearing, it is recorded that the same proceeded in the absence of the Appellant's Counsel. After initially seeking an adjournment on the grounds that both himself and his Counsel were sick, the Appellant later changed his mind and stated that he would proceed without his Counsel. Before that date, there had been several adjournments instigated by the defence on similar allegations that either the Counsel or the Appellant was indisposed.

16. In his defence, the Appellant testified as DW1. He stated that he was a teacher at a Secondary school, on 9/09/2020 he was at Emusungwi in company of his father, he was attending her grandmother's funeral, the funeral was at his ancestral home, he stays in Sabatia, it cannot be that he left the funeral and headed "huku" (this side). It is recorded that at this point the Court probed the Appellant to clarify what he meant by "huku" but that the Appellant failed to explain what he meant by that description. The Court then made the following observation:

> " Accused is incoherent, his testimony is not logical. He is narrating to Court that he has a wife and children and he was in the company of his father. He keeps repeating that his father lives in Sabatia."

17. In cross-examination, the Appellant stated that his wife was at the funeral, PW1 is his cousin, she stays in Sabatia with his biological father, he did not defile PW1, she wondered why she never screamed, a lady can make false allegations against a man, he believed that this is exactly what happened in this case.

18. DW2 was the Appellant's father, PA. He confirmed that the Appellant was his biological son and PW1 is also his biological daughter, he has 2 wives, they are step-siblings, on 9/09/2020 he had lost his mother in Shiraha area, he proceeded to the funeral in the company of the Appellant and the step-mother, they left behind PW1 and other young children, he returned home the following morning and found the Appellant lying on the floor and she had been defiled, she queried her and she told the Appellant DW2 that the Appellant had accessed the house and defiled her, he clarified that at the funeral they were also in the company of the Appellant, he reported to the police and ensured PW1 got treatment. In cross-examination, he stated that they all left Mutoma in the company of his 2nd wife (PW1) and the Appellant, Mutoma is a parcel that DW2 purchased whereas Shiraha is his ancestral

home, his 2nd wife is the mother to the Appellant, at the funeral there is a lot going so there was no way he could have been in the company of the Appellant the whole time, he has stayed with both Appellant and the complainant as they are both his children, he has not had any issues with both of them, he tried his level best to be neutral and avoided taking sides in the matter, what he did was escort the complainant to hospital.

19. DW3 was one HE He testified that the Appellant was his nephew, a son to DW3's brother, on 9/9/2020 her mother passed on, all family members gathered at Emusunguri for the funeral, after burial, he was surprised to learn that the Appellant had been charged with defilement, he wondered how the Appellant left Emusunguri and proceeded to Mutoma to commit the crime, he wished to bring to the Court's attention that on 9/9/2020 the date of the alleged offence, the Appellant was at Emusunguri at his grandma's funeral. In cross-examination, he stated that that the Appellant and the father came in the evening, he spent time with the Appellant and other family members, the Appellant was with them the whole night, if at all they parted, then it was not for more than 10 minutes.

Trial Court's Judgment

20. At the end of the trial, the Learned Magistrate, on 2/11/2022 found that the charge of defilement was proved and convicted the Appellant. It is recorded that at this point one Mr. Odhiambo Advocate stood up and informed the Court that he had been requested to hold brief for Mr. Musiega Advocate and make a few remarks in mitigation. The Advocate was then allowed to mitigate on the Appellant's behalf. Subsequently the Court sentenced the Appellant to 25 years imprisonment.

Petition of appeal

21. Being dissatisfied with the decision, the Appellant filed the Petition of Appeal on 11/11/2022. The same was drawn by the Appellant by himself and as a result, it is not quite comprehensible. Doing the best that I can however, I can paraphrase the same as follows:

    i. That the learned trial magistrate erred in law and fact by failing to ensure that the Appellant was accorded a fair trial when he failed to interrogate testimonies by the prosecution witnesses and the Appellant's defence in the absence of legal representation

    ii. That the learned trial magistrate erred in law and fact by failing to interrogate evidence potentially exonerating the Appellant.

    iii. That the learned trial magistrate erred in law and fact in believing the evidence of a single witness (PW1) without inquiring into the need for corroboration regarding identification.

    iv. That the learned trial magistrate did not observe and consider that this was a systematic planned and implemented strategy to implicate the Appellant in the crime.

    v. That the learned trial magistrate erred in law and fact in convicting the Appellant notwithstanding that the medical evidence produced in Court was inadequate and did not support the charge of defilement.

    vi. That the trial Court erred in law and fact by failing to note and appreciate that there was no evidence ever produced to render credence to the testimony of PW1.

    vii. That the trial Court erroneously convicted him without giving the defence due consideration but instead shifted the burden of proof to the Appellant.

    viii. That in all manner and circumstances, the sentence imposed was harsh and excessive noting that the Appellant was a 1st offender with a background of good conduct and behaviour.

ix. That the learned trial magistrate erred in law and fact by failing to make a finding that the case was not proved beyond reasonable doubt despite glaring contradictory evidence.

x. That more grounds will be adduced after receipt and perusal of the trial Court proceedings and Judgment.

22. From the record, there seems a second Petition of Appeal filed by the same Appellant on 23/11/2022. The same this time contains 9 grounds. I will not recite the same since what is contained therein is basically in general terms and can all be dealt under the grounds raised in the initial Petition.

23. It was then directed that this Appeal be canvassed by way of written Submissions. The Submissions for the Appellant were filed on 13/01//2023 by Messrs Oscar W. Munyendo representing Oscar Wachilonga & Associates Advocates while the Respondent filed their Submissions on 17/01/2023 through Prosecution Counsel J. Busienei.

Appellant's submissions

24. Counsel for the Appellant submitted that the charge as presented was incurably defective, the Section 20(1) of the *Sexual Offences Act* that was relied upon does not disclose the offence of incest, the relationship between the Appellant and the complainant did not fall under the description in Section 20(1), the relationship is captured under Section 22 of the Act, the Appellant was not charged under that section, the trial Magistrate therefore erred in law by convicting the Appellant under Section 20(1) without even bothering to mention Section 22, it is trite law that a person cannot be convicted under a section of law that does not disclose an offence against such person, the Appellant ought to have charged the Appellant under "Section 20(1) as read with Section 22 of the Act" as is ordinarily done in similar circumstances.

25. Counsel added that the prosecution did not prove its case beyond reasonable doubt as is required by law, the demeanour of PW1 (complainant) was questioned by the trial Magistrate in her notes, the Magistrate stated of PW1 that she had "observed PW1 as she testified. She is avoiding eye contact with the Court. Her testimony however was very lucid but she seems economical with the facts", that statement goes to the core of the case, it implies that the witness may have been coached to frame up the Appellant, this is a case of step-siblings with the complainant's mother (the step-mother) playing a crucial role in the matter, she is the one who took up the matter, went to hospital and police and had her step-son who is a high school teacher arrested and charged with the offence that called for his life imprisonment, the father who was present did not record any statement and in fact appeared as a witness for the defence, the complainant who was 15 years old and had completed standard 8 cannot be said to be a child of tender age who could not understand the meaning of taking oath in Court, by being economical with the truth it follows that the witness was hiding some information that would have worked against her case or against her "coaching", it is trite law that any iota of doubt in a criminal case should be interpreted in favour of the accused person who should be acquitted for the doubt, the evidence of PW1 & PW2 did not even tally, PW1 told the Court that she opened the door for her parents but PW2 said the door was found not locked and it is her husband who pushed it open.

26. He submitted further that this is a strange case whereby the complainant did not see the Appellant defile her allegedly because she was unconscious after the Appellant allegedly covered her nose with a handkerchief, there is no evidence tendered in Court to prove that any chemical was applied against the complainant, the police did not even investigate that limb of evidence, the complainant was taken to hospital a few hours later but no lab investigation was done on her nose to disclose the presence of any chemical on her nose or any other part of her body, the medical evidence tendered in Court did not disclose any presence of spermatozoa on the complainant, the complainant informed the Court that

there was a whitish/milky substance all over her thighs, that substance was not spotted by the medical officer who examined her almost immediately, the complainant had not taken a bath before going to hospital, where the whitish milky substance disappeared to remains a mystery, the mother told the Court that her husband, father to the complainant examined the complainant and stated that "huyu ametombwa", that was her very serious allegation made in the presence of the mother, the mother did not bother to examine her child despite that, this is a strange reaction of a mother.

27. Counsel added that the Appellant was found with a case to answer and placed to his defence. The defence was done in the absence of Counsel for the Appellant who had been handling the matter, his defence was therefore prejudiced against the Appellant's wishes to have Counsel to represent him at such a crucial stage of his case. Nevertheless, the Appellant offered the defence of alibi, he told the Court that he was attending his grandmother's funeral at the time the offence is alleged to have been committed, he called 2 witnesses, his father who confirmed the matter, the funeral was held about 5 kilometres from where the complainant was staying, the father confirmed that he left with his wife and the Appellant for the funeral but was not always with the Appellant during the night, DW3, the uncle confirmed that he remained with the Appellant throughout the night and at no one point were they separated for more than 10 minutes, that was a solid evidence that is consistent and credible, that evidence cast real doubt in the complainant's allegation that the Appellant visited her house at night looking for his father with whom they had earlier on left for the funeral, the Appellant had known where his father was and could not have gone looking for him as purported by the complainant, strangely, the trial Magistrate decided to disregard the defence, she cast doubts in the prosecution's case which are very clear but did not believe the defence which was consistent, the evidence of DW2 that he was not always with the Appellant that night as many things happened did not mean that the accused went to defile the complainant, that is mere suspicion which cannot sustain a sentence no matter how strong.

Respondent's submissions

28. On his part, the Prosecution Counsel submitted that the conviction and sentence should be upheld, the prosecution was able to prove all the ingredients of the incest and the Appellant to assert contrary is misleading and erroneous. On the ingredients of the offence of incest, Counsel cited the case of DMK vs R, Criminal Appeal No. 14 of 2019, the ingredients were proven through oral and documentary evidence, regarding proof that the offender was a relative of the victim, this was established by PW1, the victim, who testified that the Appellant is her half-brother and they share a father, her evidence is corroborated by PW2 who confirmed that PW1 is her daughter and Appellant is her step-son, further DW2 confirmed that the complainant and the Appellant are his biological children, the Appellant did not challenge this at the trial, on penetration, this was established by PW1 who stated that the Appellant showed up at their home at night asking about their father, he moved closer to PW1 and told her that he loves her, he got hold of her hands, pinned her down on a chair and took a handkerchief and covered her mouth whereby PW1 blacked out, when PW1 woke up, her body was sore and had a whitish/milky discharge on her thighs, her evidence was corroborated by PW3, the clinical officer, on examination her labia majora and minora were found to be inflamed and swollen with severe tenderness, the hymen was freshly broken with a foul discharge coupled with the presence of epithelial cells, this piece of evidence was proved beyond reasonable doubt by the prosecution, PW1 testified that she is 15 years old and was born on 20/01/2005, her evidence corroborated by PW5 who produced her birth certificate, therefore at the time of the incident the minor was 15 years of age.

29. On identification, Counsel submitted that PW1 positively identified the Appellant as the person who defiled her, the Appellant was well known to PW1 as he is her half-brother thus the identification was proper and positive, the trial Court properly evaluated the evidence on record and rightly dismissed

the evidence of the Appellant, Section 124 of the *Evidence Act* provides that notwithstanding the provisions of Section 19 of the Oaths & Statutory Declarations Act, where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him, provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth, the defence of the Appellant was considered and the evidence on record confirmed that the Appellant defiled the victim who in his knowledge was his half-sister aged 15 years old. Counsel added that in sentencing, this Court should look at the aggravating circumstances which includes the age of the victim and the nature of injuries sustained when the offence was committed. He cited the case of Abdalla vs Republic, Criminal Appeal No. 44 of 2018 in which, he argued, it was held that the Supreme Court of Kenya in its directions in Francis Karioko Muruatetu & Another vs Republic 2021 eKLR has since pronounced that its earlier decision in the same case did not invalidate mandatory or minimum sentences.

Analysis & Determination

30. This being a first appeal, this Court has the duty to exhaustively examine all the evidence tendered before the trial Court, evaluate and analyze it and arrive at its own findings and conclusions. However, this Court must make allowance for the fact that it neither saw nor heard the witnesses testify whereas the trial Court had that opportunity, including the opportunity to assess the witnesses' demeanor. (see Okeno v Republic (1972) EA 32).

Issues for determination

31. Upon considering the petition of appeal, the record and the submissions by the parties, I find the following to be the issues that arise for determination in this Appeal:

    i. Whether the charge sheet was defective.

    ii. Whether the prosecution proved the offence of incest beyond reasonable doubt.

32. I now proceed to analyze the matter.

i. Whether the charge sheet was defective.

33. The Appellant was charged under Section 20(1) of the *Sexual Offences Act*. His Counsel has submitted that the charge as presented was incurably defective because Section 20(1) under which the Appellant was charged does not disclose the offence of incest. He argues that the relationship between the Appellant and the complainant (step-brother and step-sister) did not fall under the description in Section 20(1) of the Act but under Section 22. Since, according to Counsel, the Appellant was not charged under Section 22, the trial Magistrate erred in law by convicting the Appellant under Section 20(1). He added that a person cannot be convicted under a section of law that does not disclose an offence against him and that the Appellant ought to have been charged under "Section 20(1) as read with Section 22 of the Act" as is ordinarily done in similar circumstances.

34. It is true that the offence of incest is created by Section 20(1) of the *Sexual Offences Act* which provides as follows:

> " Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge, his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.
>
> Provided that, if it is alleged in the information or charge and provided that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

35. Section 22 then provides as follows:

> " (1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

36. It can be seen right away therefore that Section 20(1) is the substantive provision. Section 22 is merely a definition section. For the purposes of this case, it is well understood that the offence was basically having sexual intercourse with a "sister" contrary to Section 20(1). Section 22 then comes in to define "sister" as including "half-sister". Being simply a definition section, omission of Section 22 in the charge sheet cannot therefore render the charge sheet defective.

37. Section 134 of the Criminal Procedure Code provides as follows:

> " Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

38. In addition, it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

39. Applying the test above and upon keenly perusing the charge sheet, I find that the particulars of the offence of incest were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

40. I find nothing wrong with the charge sheet. Save for the period during the defence hearing when the Appellant's Counsel failed to show up in Court, the Appellant was represented by Counsel in the trial. They did not raise any objection before the trial Court or any contention that the charge sheet was defective, they fully participated in the trial in clear demonstration that they understood the charge, they cross-examined the witnesses and were able to put an appropriate defence. This is sufficient indication that the Appellant and his Counsel understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there is no allegation that because

of the way that the charge sheet was drafted or framed, the Appellant was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant cannot be said to have been prejudiced.

41. Even assuming that there was some defect or omission in the charge sheet, the same is still curable under Section 382 of the Criminal Procedure Code which provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

42. Similarly, the Court of Appeal in Fappyton Mutuku Ngui v Republic [2014] eKLR stated the following:

> " 30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the Criminal Procedure Code which provides that:
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> .....
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> .....
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> 31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

43. Further, in Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party) [2020] eKLR, a three Judge High Court bench held as follows:

> " 46. The law contemplates that there may be occasions when there may be an error, omission or irregularity in a charge sheet. In addition, there may be errors, omissions or irregularities that may defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a miscarriage of justice. This is the foundation of Section 382 of the Criminal Procedure Code[21] ....."

44. In light of the foregoing, I am not persuaded that the omission to expressly refer to the Section 22 of the *Sexual Offences Act* resulted into any error, omission or irregularity that may be said to have occasioned a failure of justice. This ground therefore fails.

i. Whether the prosecution proved the offence of incest beyond reasonable doubt

45. To establish a case of incest, the prosecution must prove the following elements:

    a. Proof that the alleged offender is a relative of the victim.

    b. Proof of penetration or indecent act.

    c. Identification of the perpetrator.

    d. Proof of the age of the victim.

46. I now proceed to interrogate whether these ingredients were proved.

    a. Proof that the Appellant was a relative

47. The allegation that the Appellant was a relative to the complainant was not challenged. In any case, the complainant (PW1) stated that although their mothers are different, herself and the Appellant share one father (DW2). The Appellant is therefore the complainant's half-brother. This account was also confirmed by both the complainant's mother (PW2) and also by the father (DW2) to both the complainant and the Appellant. I am therefore satisfied that it was sufficiently proved that the alleged offender was a relative.

    b. Proof of penetration or indecent act

48. "Penetration" is defined under Section 2 of the *Sexual Offences Act*, as follows:

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person"

49. On the other hand, "indecent act" is defined under the same Section 2 to means "an unlawful intentional act which causes-

    (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

    (b) Exposure or display of any pornographic material to any person against his or her will."

50. The complainant (PW1) alleged that the Appellant came to their house at night when the parents were away at a funeral planning gathering claiming that he wanted to know the whereabouts of her father and the Appellant's wife, that the Appellant then began behaving and touching her inappropriately before becoming aggressive and eventually subduing her, that he then covered her nose with a handkerchief which presumably contained a substance that made the complainant pass out. According to the complainant, when she woke up, her whole body was sore and there was a whitish/ milky discharge on her thighs. PW3, the clinical officer presented a report that contained findings that the complainant's labia majora and minora were inflamed and swollen with severe tenderness, the hymen was freshly broken, a foul-smelling discharge emanated from the complainant's genitalia and there was presence of epithelial cells.

51. The complainant therefore admits that since she had passed out, she did not see the act of defilement being actually performed on her. I also note that according to the report, no spermatozoa was found.

However, despite this, in light of the rest of the medical findings, I am satisfied that indeed sexual activity with penetration took place thereby proving penetration. Of course, I am yet to deal with the issue of whether or not the Appellant was sufficiently identified to be the defiler.

c)Identity of the defiler

52. The issue that now remains for determination is whether there is sufficient evidence that the Appellant is the person who engaged in the sexual activity with PW1. There is on record evidence of PW1 as the sole witness that the Appellant is the person who defiled her. The trial Court handled this issue and found the evidence of the complainant credible. However, the Court also noted that her demeanour raised some questions.

53. One of the grounds of appeal is that the trial magistrate erred in believing the evidence of a single witness (PW1) without inquiring into the need for corroboration regarding identification. That the law requires corroboration of evidence by minors is clear from Section 124 of the *Evidence Act*. However, there is a proviso to that section that there need not be corroboration if the Court believed that the minor told the truth and recorded its reasons. The section and the proviso provide as follows:

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."
>
> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

54. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact.

55. The issue of demeanour of PW1 (complainant) and PW2 (complainant's mother) has disturbed me a lot. As has already been stated, the Magistrate questioned the two witnesses' demeanour and even made notes about it. In respect to PW1, she remarked as follows:

> " I have observed PW1 as she testified. She's avoiding eye contact with the Court. Her testimony however was very lucid but she seems to be economical with the facts"

56. In respect to PW2, the trial Magistrate note as follows:

> " When questioned whether she heard her husband remark "huyu ametombwa" (this girl has been defiled), she seems unsure of her answer."

57. Every day, in the course of trials, judicial officers make observations on the conduct of witnesses, their composure and other such like body language habits but not always do Courts find it necessary to include such as part of the record. For the trial Magistrate in this case to have determined that her said observations were so important to the extent that she needed to expressly include them in the record makes a very loud pronouncement on what she thought about the witnesses.

58. For this reason, one can understand the Appellant's Counsel's basis for his submissions that possibly, PW1 may have been coached on what to say in Court. Counsel's observations that this is a case of rivalry between step-siblings with the complainant's mother (the step-mother) playing a crucial role in the matter is not far-fetched in the circumstances. It may not be fair to make adverse inferences over the fact that it is the step-mother who appears to have single-handedly taken up the matter, went to the hospital and also to the police. I say so because any concerned and responsible mother would have been expected to handle the matter in a similar manner in the face of a report that her 15-year-old daughter had been defiled. My concern however is the fact that the record reflects that the father who was present did not record any statement with the police and in fact appeared as a witness for the defence. For a father to agree to appear as a defence witness in a defilement case in which his own daughter is the complainant and his own son is the accused, raises a lot of questions.

59. PW2 (the mother) stated that the father (her husband) did not record his statement at the police station. The father having been with the mother as the first people to reach the scene after the alleged defilement, there was no explanation why the father did not record a statement. Is there something the father knew but did not tell the Court? Was there some family secret that he sought to protect? Did he perhaps feel that his son was being unfairly accused but felt powerless to intervene or did not want to offend the complainant's mother? Did he perhaps, like Pontius Pilate, want to "wash his hands off the "crucifixion" of his son? Why did he seem aloof over the whole matter? Why did the complainant and her mother display the kind of demenour that was noted by the trial Magistrate? Why was the complainant recorded to be evidently economical with the facts? Had she and the Appellant perhaps been engaging in the sexual activities for some time and she only decided to "throw the Appellant under the bus" when they were discovered? As posed by the Appellant's Counsel, were the two witnesses hiding some information that would perhaps have worked against them? We may never know the truth but evidently there seems to be much more within the family that none of the protagonists wanted to bring out.

60. In *Ndungu Kamanyi vs Republic* [1976-80] 1KLR, the Court stated as follows:

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trust worthiness or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."

61. I note that in his testimony, the Appellant alleged that the charge against him was based on false allegations made by the complainant. Although he did not present any possible motives for such false allegations, it is not lost on me that the complainant's mother and the Appellant's mother are co-wives. I also note that it was stated in evidence that the Appellant's mother was in fact "chased away" from the home by the husband. While the extent of their relationship was not disclosed and while that it may afterall have been cordial, it is a matter of general notoriety that co-wives rarely see eye-to-eye and have been known to consistently engage in scheming against each other. I am not making any conclusion that this is what happened in this case since doing so would be "manufacturing" facts which no witness presented to the trial Court. All I am saying is that this Court has the obligation to consider the matter holistically and take into account each and every circumstance which could have a bearing on the outcome of the case, particularly since on the date of the defence hearing, the Appellant's Counsel was absent from Court and as a result, the Appellant had to conduct the entire defence hearing on his own.

62. The Appellant's Counsel also pointed out some inconsistencies and contradictions in evidence of PW1 and PW2. He identified for instance, the fact that while PW1 told the Court that she opened the door

for her parents, PW2 said that the door was found not locked and it is her husband who pushed it open. Indeed, this is one glaring contradiction that adds to the doubts already raised above. If the door remained unlocked overnight, as alleged by PW2, is it possible that any other male person, besides the Appellant, could have in fact been the one who gained access to the house and committed the act? We may not unravel what transpired but what it does is that it raises further doubts.

63. I also observe that while PW1 (complainant) herself stated that she did not see the Appellant remove her panty since she had already passed out by then, on the other hand PW2 (her mother) stated that PW1 told her that she saw the Appellant remove her panty and "lay on her". If it is true that the above is what PW1 told her mother, then why and at what point did the complainant decide to change her story and for what reason or motive?

64. The complainant also stated when the parents left for the funeral, they left her to take care of her 2 younger siblings. The presumption therefore is that these siblings were in the house when the Appellant is alleged to have showed up around 9 pm. There is however no explanation on several scenarios. For instance, did the siblings see the Appellant in the house or at least even hear his voice? Could they have witnessed, seen or heard anything? Could they have been of ages at which they could have been interviewed by the parents and also the police and their account considered? Could they have been called as witnesses?

65. The complainant also stated that the nearest neighbour's home, one Edward, was in close proximity to their home and that it was just adjacent. She does not however disclose whether she tried to even scream or do anything else to attract the neighbour's attention or of the two siblings in the house with her when the Appellant became aggressive and was still in the process of trying to subdue her before covering her nose with the handkerchief. These gaps in the evidence leave a lot of questions answered.

66. Counsel also made weighty submissions over other interesting areas that I cannot ignore. For instance, he submitted that although PW1 alleged that she was unconscious because the Appellant covered her nose with a handkerchief which presumably contained some substance or chemical that made her pass out and go into a deep slumber, the medical examinations did not reveal any such substance or chemical on the complainant. Further, the police did not even investigate this limb of the evidence. Further, the complainant was taken to hospital only a few hours later but no laboratory investigation was done on her nose to ascertain the presence of any chemical on her nose or any other part of her body. These are valid observations that this Court cannot ignore.

67. I have gone to great lengths to point out the areas that left gaps in the prosecution case because one of the grounds of appeal is that the "learned trial magistrate did not observe and consider that this was a systematic planned and implemented strategy to implicate the Appellant in the crime".

68. Further, although I have already made a finding that the medical records presented in evidence sufficiently demonstrated that sexual activity was performed on the complainant, I cannot downplay the fact that although the complainant stated that when she woke up there was a whitish/milky substance all over her thighs, the medical examination did not find any spermatozoa on her. PW3, the clinical officer also testified that the complainant still had the same clothes she had worn when the incident happened but that there was nothing positive to record about the clothing. This is strange considering that the complainant had not taken a bath and was taken to the hospital and examined not long after the alleged defilement. As posed by Counsel, where the whitish/milky substance disappeared to remains a mystery. I also note that in cross-examination, the complainant admitted that in her statement, she did make any reference to this alleged whitish/milky substance on her thighs. Was this therefore an afterthought?

69. Further, from the evidence of PW1, PW2 and PW3, it is agreed among them that it is the father who examined the complainant's genitalia and remarked that the complainant had been defiled. None of them stated that the mother participated in the examination. I do not know the level of intimate relationships within the family but I find it curious that a girl aged 15 years, only 3 years to adulthood, would readily agree to be examined in that manner by her father on her most private parts yet the mother who naturally would be the one expected to carry out such examination is available. Of course, I am not stating that a father cannot in any case carry out such examination. All I am saying is that in the ordinary course of things, it rarely happens like that. The question is, why did the mother steer clear of the examination of her own daughter and instead left it to the father?

70. The Appellant also offered the defence of alibi. He testified that he was attending his grandmother's funeral at the time that the offence is alleged to have been committed. He claimed that he was there throughout the night. His father (DW2) and uncle (DW3) testified and confirmed that indeed the Appellant had accompanied them to the funeral meeting and was with them at the grandmother's homestead. The father stated that although the Appellant was with them at the vigil at night, he had no way of confirming whether the Appellant stayed there throughout since they were not necessarily together at all times during the night. On his part, the uncle was emphatic that he was with the Appellant at the vigil throughout the night and at no one point were they separated for more than 10 minutes. I also note that the complainant in her testimony stated that the distance from her home to the grandmother's place where the funeral meeting was being held was about 5 km away. This is not a short distance by all means. While all the witnesses saw the Appellant at the funeral meeting, no one has come forward to allege that he or she saw the Appellant leaving. Further, no one has come forward to state that he/she saw the Appellant going to or entering the complainant's house or even met him on the way. It has not been alleged that the uncle had a reason or motive to come to Court and "protect" the Appellant by lying to the Court that he was with the Appellant throughout the night. While it may not be possible to verify the truthfulness of the uncle's statement, it casts serious doubt on the complainant's allegation that the Appellant visited her house at night and defiled her.

71. I agree with the Appellant's Counsel that any iota of doubt in a criminal case must be interpreted in favour of the accused person who should then be acquitted for the doubt.

72. In view of the foregoing, I find that there exists serious and valid doubts against the prosecution account of what transpired and that the evidence before the trial Court was therefore not sufficient to sustain a conviction. In my view, the prosecution failed to prove the case beyond reasonable doubt

d. Age of the complainant

73. In light of my findings above, the issue of the complainant's age is of no consequence. This is because the issue only becomes relevant, in a case of incest, at the time of determining the sentence to be imposed.

74. Nevertheless, I may just mention that the complainant's age has not been seriously challenged. The production of a copy of her birth certificate as proof of her date of birth is sufficient evidence of her age. According to the birth certificate, the complainant was born on 20/1/2005. It therefore follows that on 9/09/2020 when the defilement is alleged to have taken place, she was approaching 15 years. I therefore find that the complainant's age was proved. However, as already stated, in light of my findings above that identification of the Appellant as the alleged defiler did not meet the required standard, the issue of the complainant's age has no bearing at the end

Conclusion

75. In view of the foregoing, I find that the prosecution failed to prove its case beyond reasonable doubt and that the Appellant's conviction was unsafe and cannot therefore stand. In the circumstances, I hereby quash and/or set aside the conviction.

Final Orders

76. The upshot of the foregoing is that I make the following orders:

    i. This Appeal is allowed.

    ii. The conviction of the Appellant by the trial Court in Kakamega Senior Magistrate's Court Sexual Offence Case No. 51 of 2020 is hereby quashed and the sentence imposed therein set aside.

    iii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE