NKK v Republic (Criminal Appeal E012 of 2023)
[2023] KEHC 26856 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E012 OF 2023

FROO OLEL, J

DECEMBER 19, 2023

BETWEEN

NKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal From The Conviction And Sentence Delivered On 9th March 2022 and 22Nd March 2022 Respectively By Hon R.w. Gitau (SRM) At Mavoko Chief Magistrate Sexual Offence No E038 of 2021)

JUDGMENT

Introduction

1. The Appellant was charged with the offence of incest by a male person contrary to section 20 (1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on the 11th day of September 2021 within Machakos County Intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female organ (vagina) of IDK a child aged 14 years old who to his knowledge was his niece.

2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 11th day of September within Machakos County intentionally and unlawfully committed an indecent act by touching the female genital organ (vagina) and breasts of one IDK a child aged 14 years.

3. During trial the prosecution called six witnesses who testified in support of their case. The appellant was placed on his defence. He gave sworn evidence and called two witnesses to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of incest and proceeded to convicted him under section 215 of the criminal procedure code. He was thus sentence to serve life imprisonment.

4. The Appellant being dissatisfied by the conviction and sentence filed his petition of Appeal on 23.03.23 wherein he raised the following grounds of Appeal that;

   a. The learned Trial Magistrate erred in law and fact by failing to consider that the prosecution had not proved its case of incest beyond reasonable doubt and by giving undue weight to the Prosecution's case and least weight to the defence case.

   b. That the learned trial magistrate erred in both law and fact and misdirected herself in finding that the element of penetration had been proved on the basis of the findings on the p3 form in isolation of the findings on the other medical reports and or treatment notes.

   c. The learned Trial Magistrate erred in law and fact and misdirected herself by wholly relying on the P3 form whose maker was neither disclosed nor called to produce the said report.

   d. That the learned Magistrate erred in law and fact and misdirected herself by finding that the maker of the p3 form must have conducted independent examination when the person who produced had expressly stated that the findings in the p3 form had been deduced from the post rape care form (PRC) and Gender Violence Recovery Centre (GRV) forms of Nairobi Womens Hospital- Kitengela..

   e. That the Learned Magistrate erred in law and in fact by failing to appreciate that the conclusions in the p3 form that the tearing of hymen was fresh had neither been supported by any medical finding nor proved by the prosecution.

   f. That the Learned Magistrate erred in law and in fact by failing to consider evidence of intoxication of the complainant and the impairment it could have caused on her judgement.

   g. That the learned Magistrate erred in law and fact, and misapprehended the provisions of section 382 of the Criminal Procedure Code by reconciling the factual contradictions and finding that the said contradictions did not go the ingredients of the offence.

   h. That the Learned Magistrate erred in law and fact by shifting the burden of proving the quantity of alcohol consumed by the complainant to the appellant.

   i. That the Learned Magistrate erred in law and fact and occasioned a miscarriage of justice by misapprehending, mis recording and failing to record the evidence tendered by both the prosecution and defence witnesses to wit

      i. failing to record the response of the prosecution's witness PW5 who on Cross examination had expressly stated that it was difficult in the circumstances to conclude that there was penetration.

      ii. Mis recording the testimony of PW6 that the vaginal walls of the complainant had lacerations, which was not the testimony.

   j. That the learned Magistrate erred in law and fact and failed to consider the Appellant's mitigation in meting out the sentence of life imprisonment.

   k. That the Learned Magistrate erred in law and fact by meting out a sentence that was too harsh in view of the entire circumstances of the case.

Facts At Trial

5. PW1 IKB testified that she currently resided in Umoja , but used to live in Syokimau xxx apartments. Further she used to school at [Particulars Withheld] International School but was now homeschooling

and that she resided with her grandparents, brothers, and house help. Previously they used to live with their father, while her mother was in America.

6. It was her testimony that on 10.9.2021 at about 6.00pm, she was picked from school by her uncle, the appellant herein, who was accompanied by the house girl JC (PW2). The appellant told them that he would take her, her younger brother and their house help for supper at Astrol Restaurant and indeed they went there, had dinner and thereafter went back home. As they were alighting, from the motor vehicle, that appellant further told them that the next day (11.9.2021) he would take them to Kitengela for Nyama choma. She later asked her father for permission to go to Kitengela and he agreed. On the material day, they got late because PW2 had a lot of house chores and the appellant stated that since they were late, he would buy the meat and they would eat from his house, which they did. The appellant then left the house to go wash the car and by 4.00pm he had not yet come back.

7. At some point later in the afternoon, PW2 did receive a call from her friend wh0 wanted to meet her at Gateway Mall. They called the appellant, who allowed them to go and informed them that he would call PW1 father and inform him of his suggestion that they would spend the night at his house. They left and first went through their home to confirm whether her younger brother had eaten. Thereafter, they went to club 254 at Gateway mall, but she was not allowed to enter the said club as she was underage. She was therefore left at the food court. PW2 did not take long inside the club and after a while she came back and hired a uber directly to the appellants house where they made chips and ate.

8. She further testified that she went to the fridge, where she saw Jack Daniels Whiskey which she took, drunk and thereafter went straight to bed. In the middle of the night, she realized that her trouser, underwear and bra were being removed and saw that it was the appellant who was removing her cloths. She was emphatic that it was the appellant as the security lights were on and the curtains had not totally covered the windows. The appellant proceeded to insert his fingers on her vagina which made her feel uncomfortable. He further inserted his private part, which act made her to started struggling with him and screamed, which made PW2 wake up from the couch where she was sleeping.

9. The appellant jumped off her and went to the washroom, where he put on the lights and that is how they further confirmed that it was the appellant who has assaulted her. PW2 inquired if she was ok, and told her that it was at night and that they could not leave and had to wait until the following morning. Pw2 thereafter slept with her in the same bed until the following morning.

10. The following morning, they boarded a motor cycle to their home at xxx apartments. She went straight to her bedroom and started to cry. PW2 came and told her not to be afraid and encouraged her to disclose what had transpired. She opened up to her big brother, she also called her mum and her Aunt who came and took her to hospital in Syokimau where tests were done but she was not treated.

11. Later they went to the police station and made a reported after which, she was escorted to Nairobi women's Hospital in Kitengela where she was treated. On 14.9.2021, they went and wrote their statements at the police station. She further testified that PW2 had initially slept with her on the bed but the Appellant came and woke her up and told her to go sleep on the couch. She affirmed that it was the appellant who assaulted her and she had positively identified him from the security light and bathroom light.

12. PW1 further confirmed that she had taken Jack Daniels whiskey but could tell what was happening as she had slept early but by the time the incident occurred, she was sober. The assailant did not remove all her cloths and the incident had occurred about 10 minutes after PW2 had been removed from the bed. After the incident they did not confront the appellant but she later informed her parents of what transpired, though her father did not believe her. Pw1 marked the medical treatment documents and identified the appellant on the dock as the person who defiled her.

13. In Cross examination, PW1 stated that she was currently homeschooling and that at on the material day she had stayed at the food court for about two hours as PW2 meet her friend within club 254. The appellant's house was a bedsitter, and had an open kitchen plan. She had drunk Jack Daniel's Whiskey from the bottle and this was not her first time to drink. She took quite some amount of the said alcohol that got her drunk and she went straight to bed. At about midnight she felt someone remove her trouser, underwear and bra. He first inserted his fingers and later his penis in her vagina by which time she was sober. The feeling of the finger was different, she felt something bigger than the fingers get in and she concluded it was his penis. She stated that prior to the incident she had not had sex with anyone else and it is at this point that she started to struggle. She had felt uncomfortable when he inserted his fingers and screamed when he inserted his penis.

14. During the incident, she had resisted by moving around, whilst so moving the pain did not increase because he would stop momentarily and do it again. Though the lights were off, she had identified the appellant using the security lights and was double sure when he put on the washroom light. PW1 further confirmed that when the appellant came, she was asleep and even when he removed her cloths, she was asleep but felt it as it was not a usual occurrence to be undressed while asleep.

15. PW2 had responded to her scream and saw the appellant going to the washroom. The next day they used a motor cycle and went straight home and thereafter went to hospital that afternoon. PW2 encouraged her to tell her brother the truth and later as she was conversing with her mother on phone, her father eavesdrop on their conversation and later expressed his doubt as to the occurrence of the incident. She had not changed her clothes and/or innerwear nor had she showered or changed the pad. She concluded her evidence by stating that the appellant was well known to her, had stayed with them and was their favorite uncle but this incident had strained their relationship.

16. PW2, JC, testified that she was a house help and that 0n 10.9.2021, PW1's father had called her called and told her to go with the appellant to pick the children from school- [Particulars Withheld] school. On their way back home, the appellant offered to take them for dinner and bought them food after which he took them home. On their way home, the appellant went to a liquor shop and bought Jack Daniels whiskey and later asked them if they could accompany him for Nyama Choma the next day in Kitengela. The appellant emphasized that he only wanted go with PW1.

17. The following day after she was done with house chores, they went to the appellant's house and he suggested that he buys the meat, which they would eat from the house. After eating, he excused himself to go to the carwash.PW1 took alcohol from the fridge and they both drank it. At 4.oo pm, she was to meet a friend at Gateway mall and she did inform the appellant that they were going to gateway mall and would be back late, he asked them to lock the door and go with the key. They first went to check on PW1 little brother then proceeded to Gateway Mall where she meet her friend at the 254 club. Since PW1 was underage she waited for her at Pizza Inn Gateway Mall and they later left at 8pm.

18. She further testified that they went back to the appellant's house since Pw1's father had granted them permission to go spend the night there. Once they got home, they did not drink alcohol again nor did they make supper. They slept at around 9pm and later the appellant came in at about midnight. She did not know how the appellant accessed the house because she had lock the door and had the keys. The house had been locked using a padlock and the appellant did not break in. At some point the appellant tapped her and told her to go sleep on the couch. She went to sleep in the couch and had not fallen deeply asleep, when she heard noise from the bed and saw the appellant "waking" on top of PW1. He thereafter went to the washroom and stayed in there for about 20 minutes. When he came back, he went to sleep on the couch as she had already moved to the bed.

19. The next day they went back home. They then called Mikal (PW3) who took PW1 to hospital and later to the police station. They were told to return the following day as it was at night. The police accompanied them to Nairobi Women's Hospital, where PW1 was examined and treated before they went back to the police station to record their statement.

20. On Cross examination, PW2 stated that she was the house manager and cleaned clothes- and cook but did not teach PW1 how to take alcohol. She had started working for PW1 family in 2020 and by then Pw1 was already drinking alcohol which information she had relayed to PW1's mother and Aunty. They had made chips before leaving the house and drank alcohol during the day and not in the evening. They drank 1/2 a bottle of Jack Daniels Whiskey from 2pm to 4pm and they were both drank, later from gateway mall they went back to the appellant's house and slept.

21. That later on in the night, she was woken up by screams from the bed, she saw the appellant head to the washroom and did not lock the door. She then went to check on Pw1 to see if she was ok. There was no third party who had entered the house and she positively saw the appellant using the bathroom light. Later that night, she wrote SMS massages to PW1 brothers but did not divulge this information to the police.

22. PW3 MWK, testified that on 12.09.2021, she did receive a phone call from her sister who resides in America who told her to rush to Syokimau xxx apartments because the appellant had defiled PW1. She went there and took PW1 Accompanied by PW2 to Vantage Health Centre where she was examined and advised to report to the police. They proceeded to the police station, reported the incident and were given an OB number. They returned the following day and were then escorted to Nairobi Women's Hospital Kitengela where PW1 was treatment and she later accompanied PW1 and PW2 to the station to record their statement.

23. It was her testimony that upon examination it was found that there was penetration and hymen was broken. She stated that the appellant and PW1 had a father-daughter relationship and she knew PW1 used to drink only after the incident. She further stated that PW1 had told her that when she was young, the appellant tried to put his finger on her vagina while carrying her on his back and she had jumped off. She concluded by stating she rarely talked with the appellant and only met when we she went to visit her sister. She had no grudge against him.

24. PW4 Corporal Dorcas Moraa testified that she was attached to Syokimau Police Post performing general and investigation duties. On 13.09.2021, she was assigned a defilement case which had been reported at the station. she called the complainant and accompanied them to Nairobi women's Hospital where the victim was examined and the P3 form filled. The following day she recorded the statements of the victim and other witnesses and on 15.9.2021 she arrested the accused person and had him charged before court with the offence of incest. The age of the victim was ascertained using a copy of birth certificate which she produced as an exhibit.

25. It was her testimony that she visited the scene of the crime and established that the accused's person house was a bed sitter, the bed was opposite the door, and from the sofa set one could see the bed. The appellant had come back to his house at midnight and found PW1 and PW2 sleeping together on the bed. He instructed PW2 to go sleep on the sofa seat and that is when the accused defiled the victim. PW1 screamed and PW2 woke up to find the appellant lying on top of PW1 and when the appellant noted that he had been seen by PW2, he went to the bathroom.

26. During her investigations, she had interrogated the minor (PW1) and she seemed disturbed and traumatized. PW1 knew the appellant well and positively identified him. When she was being defiled,

the lights were off but the security lights reflected some light into the house and she was able to positively identify the appellant.

27. On cross examination, PW4 stated that she had visited the scene of the incident after she arrested the accused person and she did not have a personal account of what happened part from the information and evidence she had gathered. The father of the victim went to the station but refused to record a statement on the basis that the appellant was his brother. She accompanied the victim to hospital and to her she appeared anxious, but as per the PRC it was stated that she was calm. In re-examination, PW4 reiterated that the minor was counselled at the hospital before the P3 and PRC forms were filled and the minor knew the appellant well as he had lived their family.

28. PW5 John Njuguna testified that he worked at Nairobi women hospital as a clinician. He held a diploma in clinical medicine and surgery and also a diploma in Pharmacy. His practice Number was 18xxx. He was in court to produce medical documents filled by his colleague Janet Njiru, a colleague well known to him as they had worked together for 2 years and he was familiar with her handwriting. Upon application by the prosecution to have him produce the medical reports pursuant to section 33 of the *Evidence Act*, he was allowed to so produce the said medical reports.

29. The witness produced the GVRC form, PRC form and P3 form for PW1, who was examined at their facility on 13.09.2021 over a report that she had been defiled on 11.09.2021 at around 10.00pm by her uncle who inserted his fingers and penis in her vagina. She had been treated at their facility on 12.09.2021 and on examination it was noted that she had no physical injuries, she had normal external genitalia and the patient was on her menses, hymen was torn.

30. On cross examination he stated that he was not the one who examined the minor as she was examined by his colleague Janet Njiru. The PRC form and GVRC form are to be filled by a nurse, clinical officer or doctor. The qualifications of Janet Njiru was not indicated in the medical forms.PW5 also confirmed that the date of incident was 11.09.21 while the date of exam was 13.09.21, two days apart. He noted that as a matter of procedure, they would do a wholesome examination and if there was any resistance, it was corroborated by injuries on the body. No injury was noted on the external genitalia-labia majora, minora and clitoris. Further the findings of the P3 form was not consistent with the GVRC as the freshness of the hymen was not captured in the GVRC form. A fresh injury would have the initial inflammatory markers such as redness, bleeding, swelling and this was not noted in the Medical document.

31. PW6 Doris Akinyi Ayieko, a clinician at vantage Medical health Centre, testified that PW1 visited their facility with a complaint of having being defiled by her uncle. PW1 had narrated to her that the incident had happened on 11.09. 2021 while she was asleep. she felt someone touch her genitalia and felt a sharp penetrating pain which caused her to screamed for help. The victim tried fighting off the uncle but she was overpowered, she reported to have been defiled 3 times lasting a total of 30 minutes. On examinations the patient was visibly shaken, she was wearing the same clothes and the clothes were not torn or crumbled but had stains.

32. On examination of the genitalia, labia minora and majora were intact with no signs of bruising, the hymen was torn, the walls on the vagina had no laceration. She formed an opinion that there was possible defilement based on the information from the complaint and her examination. She gave PW1 antibiotics, pain killers and also did counselling after which she referred PW1 to a government facility for GBV clinic. She produced the treatment notes as exhibits.

33. On cross examination PW6 stated that the normal tests they do are urinalysis, blood tests, high vaginal swabs. PW1 cloths were not stained or torn but she was on her menses. She stated that she did a

vaginal examination and the patient pushed her hand away in pain and the pain had being caused by penetration. She opined that based on her examination, this was a possible defilement case.

Defence Case

34. The appellant gave sworn evidence and called two witnesses. The appellant stated that he was an accountant and resided in Syokimau. He testified that on 11.09.21, PW1 and PW2 visited his house for lunch, they ate nyama choma then he left them in the house. At around 6.40pm, PW2 called him and informed him that she was going to meet a friend at a Club 254 at Gateway mall and he asked her to let the minor stay behind but she (PW1) had refused. At about 10.00pm, PW2 called him again informed him that PW1 was intoxicated and this forced him to rush back to the house, where indeed he confirmed what he had been told. He prepared some water and sugar and gave PW1. They (PW1 and PW2) slept on the bed while he slept on the couch. At around 11.30pm, PW1 woke up and started vomiting and there was foam coming from her mouth. He claimed that no one woke up in the middle of the night and they all woke up at 7am the following morning.

35. The next day, he went to town to do shopping and while in town, PW1's father called him and informed him that PW1 was complaining that she had been raped but did not tell him by who. They then went to the police station where they were given an overview of the situation but he was not allowed to write a statement. He stated that he had known PW1 since she was born and had even stayed with them after university while tarmacking. He took care of PW1 and her other siblings by cooking for them and taking them to school. PW1 mother had left for the USA and had not returned.

36. The appellant further testified that no investigations were conducted nor was he allowed to write his statement under inquiry. He also claimed that apart from the bulb lights in his house, there was no any other source of light. On the said night he was not drunk, does not drink alcohol and neither was there any alcohol in his house when he was leaving.

37. On cross examination, he stated that his relationship with his brother's family was okay and he was a trusted caregiver to his brother's children. That on Friday he picked them up from school and bought them food. That PW1 and PW2 asked if they could visit him and he agreed. There was no alcohol in his house and that he was not going to be back to his house, and only went back because PW2 called and said they were intoxicated. He stated that there was no breakage in his house. Further he believed that PW1's mother brought up this matter so that she could get the children and take them to the United States. It was untrue that PW1 was left at a restaurant or that they all went to the club. He did not know what made the two to frame him. He believed that his statement would have aided proper investigations.

38. DW2, IB, (PW1 Father and the accused brother), he testified that PW1 was his 2nd born daughter, and that the accused had lived with them from 2016 until end of 2020 when he got his own place 200 meters away. That on 11.0.2021, PW1 left to visit the accused and in the evening PW2 told him that they would be spending the night at the accused house as he was not around. The next day when he woke up, he heard them talking in their room, he went in and it smelt of alcohol. PW1 was crying that and told him that there was an incident at the accused house and that he had touched her. He went to look for the accused but he was not around and when they met, they went to the police station but they did not record any statement as they said they would call him if need be.

39. It was his testimony that PW1 's aunt had taken his children to go live with their grandmother after this incident. He knew the accused well as he was his last-born brother and had never seen him indulge in alcohol. The appellant was a good care giver to the children and he had never heard of any complaints

about him. He testified that PW1's mother wanted to use this case to sneak the children to go live with her in America. He also stated that he was not convinced that the accused did the alleged act.

40. On cross examination he stated that he was helping his children to get visas to travel but due to covid there were complications. The accused and the children had good relationship and that he would travel and leave the children under his care. He learnt that PW1 was taking alcohol because of that incident as he does not leave alcohol in his house. He reiterated the occurrence that lead him to learn PW1 claim of having been defiled by the appellant. He also stated that when he came back from his brother's house, he found the children had been taken away and he believed that there was external influence for they wanted the children to travel to the USA. He summarized his testimony by stating that his judgement over this incident was not clouded.

41. DW3 Josphat Kiptoo Mutai, stated that he was a nurse stationed at Machakos level 5 hospital and was currently working at a maternity and gynecology theatre providing surgical support to post rape care victims and other severely injured patients. He was in court to give his opinion on the victim medical reports. He referred to PEX 1 and stated that when a medic was presented with a defilement victim, he/she would determine the major and minor characteristics of the victim. One commences by identifying the patient, taking the history and doing the examination. The medic would start with physical examination, then genital examination. For a minor who is yet to deliver, they should generally not have scars or tears. Further there should not be perception of pain or any discomfort on physical examination.

42. As per the medical records produced, the minor was on her menses and one could not conclude that the hymen was freshly broken. Given the history of the patient (who alleged to have been defiled 3 times lasting 30 minutes), there was a mismatch in the findings presented. If indeed the incident had occurred as alleged, he would have expected major supporting characteristics. Further in normal circumstances where a sexual intercourse happens and the victim is anxious, the victim would not lubricate and therefore one would expect some more injuries especially if the sexual intercourse lasted 30 minutes.

43. From the medical report produced, he could not conclude that there was rape with a reasonable degree of scientific certainty. His view on both reports was that the finding was the same however the Vantage Hospital report was more detailed. The PRC report omitted key details that could have distinguished between fresh and not fresh (blood). His professional opinion was that the reports could not be used to support the conclude of penile vaginal penetration. Key crucial information was in the vintage hospital report and that of Nairobi women Hospital but was introduced in the P3. It was not known from where the person who documented the finding of fresh torn hymen found it as it was not supported by the other medical reports.

44. On cross examination he stated that he was testifying as an expert witness and that in his opinion there were some findings in the P3 report that were not accurate and he could not understand where the new information came from at the last stage as the P3 is usually filled using the initial treatment notes. Further in his opinion, torn hymen may mean freshly torn but he did not agree that the examiner intended for the note to mean freshly torn hymen. In re examination DW3 did further testify that the PRC and P3 form had no indication of who filled them and usually the details in the PRC form are transferred to the P3 form. There was an error in this process as the information was not accurately transferred. The doctor had also used the term alleged to mean she was not sure if penetration occurred.

Appeal Submissions

1.Appellants Submissions

45. The Appellant filed submissions on 16.06.2023 and listed the issues for determination to be:

a. whether the prosecution had proved its case beyond reasonable doubt, whether the P3 form relied on by the Trial Court was genuine, reliable and /or admissible.

b. whether the trial Court erred in law and in fact by shifting the burden of proving the quantity of alcohol consumed by the victim to the appellant,

c. whether the Trial Court erred in reconciling the inconsistences in the facts of the prosecution witnesses in favour of the prosecution,

d. whether the trial court erred in law and in fact and occasioned a miscarriage of justice by misapprehending, mis recording and failing to record evidence tendered by both prosecution and defence witnesses and

e. whether the trial court exercised its discretion to sentence the appellant judiciously.

46. It was submitted that as a first appellate court, the court should consider the evidence presented at the trial court and make its own conclusion. Reliance was placed in the case of Timothy Nzioki v Republic [2019] eklr & Killu & Another v Republic [2005] 1 KLR 174 to buttress this point. The Appellant further submitted that the legal burden of proof in criminal cases was stated in the case of Woolmington v DPP [1935] A.C 462 PP 481 where it was established that the prosecution was under the duty to prove the guilt of an accused but in this appeal, the trial court erred and shifted this burden to the appellant especially as regards to the amount of alcohol consumed by the victim. Reliance was placed in the case of JOO v Republic [2015] eklr & R v Kipkering Arap Koske & Ano [1949] 16 EACA 135 on the issue of standard of proof.

47. The Appellant submitted that section 20 of the *sexual offences Act*, No 3 of 2006 provided for the offence of incest by a male person. What the prosecution had to prove was that, there was a relationship between the offender and the victim, proof of penetration or indecent Act, Identification of the perpetrator and proof of the age of the victim. It was submitted that relationship between the appellant and the victim, the age and sex of the victim was not contested. What was vigorously contested was the identification of the appellant and penetration.

48. There were inconsistences between testimony of PW1 and PW2 as to the time the incident is alleged to have occurred, the lighting within the house, level of consumption of alcohol which PW1 and PW2 had consumed, and consideration of the fact that they had admitted they were drunk, thus were not able to judge what was happening around them.

49. On penetration, it was submitted that the medical evidence adduced cast aspersions as to whether there was penetration at all. The report from Vantage Healthcare hospital confirmed that the Victim had no physical injuries, external genitalia was intact, and the victim had vaginal bleeding associated with menstrual period. She still wore sanitary pad, which she had prior to the incident as at the time of examination. The labia majora and minora were intact and there was no sign of bruising, tear or lacerations. The hymen was broken but there was no resistance on vaginal examination (VE) associated with pain.

50. Similarly, from the medical report examination undertaken at Nairobi Women Hospital, it was confirmed that the victim had no physical injury, the external genitalia was intact, menses blood were present and the hymen was torn. On cross examination Dr Njuguna (PW5) did confirm that when hymen is freshly broken, there would be marked changes in the genetalia including bleeding, pain and broken skin and no observation of that sort was made, thus it was difficult to ascertain penetration. PW5 had further stated that he did not know where the description of "fresh" torn hymen came from

in the P3 form as freshly torn hymen, could only be inferred from evidence of there being a tear and/or bruises, which was not noted during initial examination.

51. The appellant further faulted the trial court for failing to note that "Janet Njiru" who filled the P3 form had not stated under which capacity she had done so and further erred when she failed to seriously consider and weigh the credibility, cogency, reliability of the content of the P3 form, yet the said contents were seriously contested. The court had also wrongly relied on the medical reports produced by PW5 to find that indeed there was penetration, yet the initial examination had revealed that there was no physical injuries, no bruises, no tear, no pain on vaginal examination and basically there was nothing to suggest that the hymen had been freshly torn.

52. The trial magistrate had made an unsupported finding to the effect that the P3 was prepared at Nairobi women's hospital, yet the signature on it was different from the other signatures, which was an indicator that it had been prepared by another person and not Janet Njiru on whose behalf PW5 was producing the document. It was the trial magistrate's contention that the person who filled the P3 form must have undertaken an independent examination of PW1 and rightly noted that the hymen was freshly broken and thus penetration proved. The appellant did content that this finding was erroneous for the reason that;

    a. If indeed the P3 form was filled by another person who independently examined PW1, the said medics name and capacity when he/she examined the victim ought to have been indicated in the form and in absence of such details the details contained therein were useless and had no evidentiary value.

    b. Secondly PW5 had expressly informed the court that the information contained in the P3 form were drawn from the GVRC form. It was thus not open for the court to find that the information based in the P3 form was gathered from an independent examination by an unknown doctor/medic.

    c. Thirdly the P3 form was the last to be filled. Even if there was an examination done by the undisclosed maker, a finding of freshness which could not possibly be identified at vintage Healthcare hospital and by Janet Njiru was unlikely to have been identified later.

    d. Finally, a conclusion of freshness could not be deduced without supporting findings of examination.

53. The appellant also urged this court to consider the evidence of DW3, who was an expert witness and had given an insightful analysis of the findings made in the medical documents produced, especially the P3 form which had inconsistent findings. It was therefore submitted that this court should find that the two ingredients of the offence of incest (identification and penetration) were not proved beyond reasonable doubt. Reliance was placed in the decision of MM v Republic [2020] eklr.

54. The appellant further did submit that the trial magistrate erred in law and wrongly shifted the burden of proving the quantity of alcohol consumed `by PW1 to the Appellant and disregarding the evidence of intoxication of the complainant whose judgement of the whole incident would have been Impaired due to her level of intoxication. PW1 in her evidence averred that she drank half a bottle of Jack Daniels whiskey at around 9.40pm and slept about an hour later. The court ignored the experts witness evidence (DW3) that even working with lower quantities of less than half a bottle of Jack Daniels Whiskey, it would have been impossible for PW1 to have recovered from the effects of the alcohol one hour later to judge what was happening in her surroundings.

55. From the above analysis of the evidence presented by the prosecution witnesses, there were notable inconsistences in the facts presented to court. The contradictions were as to the time when they drank alcohol, whether PW2 witnessed the victim being defiled, the inconclusive medical evidence and the fact that the court did not address itself to the possible effect of alcohol to the cognitive capacity of the victim to enable her be aware of what was happening around her. All these raised doubt about the commission of the alleged offence and credibility/ admissibility of the prosecution evidence. Reliance was placed in the case of John Mutua Munyoki v Republic [2017] eKLR, Ndungu Kimanji v Republic [1979] KLR.

56. On the issue of sentence, reliance was placed on the case of Maingi & 5 others v Director of public prosecution& Another [2022] KEHC 13118(KLR) where it was held that courts were at liberty to impose sentences prescribed so long as the same are not deemed to be mandatory minimum sentences and that mandatory nature of sentences was declared unconstitutional. Reliance made in the case of PMM v R [2018] eKLR by the trial court was thus an error. It was a fundamental and immutable principle of sentencing that sentenced imposed would ultimately reflect the objective and seriousness of the offence committed and the same must be proportional and reasonable to the crime committed. The trial court erred in applying the maximum sentence where the facts did not support the same and ended up applying a manifestly harsh and excessive sentence.

57. It was the appellant's final submission that the appeal be allowed as prayed and the court to set aside and or quash the conviction and sentence of the trial court.

ii. Prosecutions Submissions

58. The prosecution made oral submissions and stated that it was the duty of the court to review the evidence as presented and examine the reasoning of the trial court to see if indeed a correct decision was reached. It was admitted that the appellant was an uncle of the minor and thus the evidence with respect to the relationship was proved. The evidence presented did prove that the minor spent the night at the appellants house and in the presence of the appellant. It did not matter whether the minor took alcohol before they went out to club 254 at gateway mall or after they came back as such evidence was immaterial and did not affect the evidence of PW1 and PW2. Further even if indeed the minor had partaken of alcohol what was considered was the period between when the minor went to bed and when she woke up sober to know what was transpiring.

59. There was no reason to doubt the minor's evidence as she was a credible witness and was able to identify the appellant using the security light from outside. PW2 also testified that when she heard the minor struggle and scream, she woke up and saw the appellant on top of the minor. The appellant jumped off and went to the washroom. He was thus properly identified.

60. As regards the medical records, the same were credible, the details therein tallied and the findings supported the conclusion. If there was a slight difference it was because the level of examination at vintage hospital was simple, while at Nairobi women's hospital a more through and detailed examination was undertaken. That would explain the discrepancy referred to by the appellant. The Defense witnesses were also dismissed as being biased and out to cover up for the appellant. DW3 further could not discredit the medical evidence presented as he was not a doctor or medical officer with higher qualifications. He also did not have the expertise to analysis the alcohol content of the victim.

61. Finally, on sentencing, the prosecution urged court to find that a proper sentence was melted out after the court looked at all the circumstances of the case and the trial court could not be faulted in finding that the state had proved its case. The conviction and sentence were thus proper and the prosecution urged this court to uphold the same.

Analysis of The Law And Evidence

62. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of Okeno v Republic [1972] EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

63. Also in Peter's v Sunday Post [1958] E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

64. In the case of Republic v Edward Kirui [2014] eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another v State by Prosecutor, Tamil Nadu & Another [2008] INSC 1688 where the case of Bhagwan Singh v State of M. P. [2002]4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

65. Having considered the trial court proceedings, the grounds of appeal and the submissions filed by both parties, I find the following as issues are up for determination;

    a. Whether the prosecution proved the case beyond reasonable doubt (which undoubtedly would cover all the issues raised in the various grounds of appeal)

    b. Whether the sentence handed down to the appellant should be reviewed.

The Law

66. The appellant was charged with an offence of incest by a male person contrary to section 201(1) of the *sexual offences Act* No 3 of 2006 and in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No 3 of 2006.

67. Section 20 of the *sexual offences Act*, 2006 provides for the offence of incest by a male person as follows;

> " 20.Incest by male person

Any person who commits an indecent act or act which causes penetration with a female person who to his knowledge his daughter, granddaughter, sister, mother, niece, aunty or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years"

Provided that, if it alleged in the information or charge and proved 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 indecent act was obtained with the consent of the female person."

68. Consequently, the ingredients for the said offence are as follows

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

ii. Proof of penetration or indecent Act.

iii. Identification of the perpetrator.

iv. Proof of the age of the victim.

69. The Act proceeds to define penetration under section 2 to mean "the partial" or complete insertion of the genital organs of a person into genital organs of another and defines indecent Act to mean "any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

70. The said Section 20 of the said *sexual offences Act*, should be read together with section 22 thereof which identifies the test of relationship in the following manner;

Section 22(1) of the said Act

In case 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 uncle of the first decree and a mother includes a half mother and an aunty of the first decree whether through lawful wedlock or not.

Section 22(2) of the said Act further provides

a. Uncle means the brother of a person's parent and aunty has a corresponding meaning (emphasis added)

b. "Nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

c. "half-brother" means a brother who shares only one parent with another;

d. "half-sister" means a sister who shares only one parent with another;

e. And "adoptive" brother means who is related to another through adoption and "adoptive sister" has a corresponding meaning

71. It flows therefore from the above provision's that there must exist a defined relationship between the offender and victim, which relationship is contemplated under the Act. As such, any other relationship not contemplated under the Act does not pass the test of relationship under the *sexual offences Act*.

Burden of Proof

72. That enormous task of proving a case beyond reasonable doubt by way of directing or circumstantial evidence always rests with the prosecution and the fact the accused is put on his defence does not shift

that burden and standard of proof in any way. Lord Denning in Miller v Ministry of Pensions [1947] 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

73. In Viscount Sankey LC in the case of H.L Woolmington v DPP [1935] A.C. 462 pp 481 did describe burden of proof in criminal matters as;

> " Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquittal. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Analysis of the Facts

74. The appellant did submit in this appeal that the relationship between him and the victim was not contested, nor was the age of PW1. What was contested was his identification as the perpetrator and the element of penetration.

75. PW1 had testified that on 11.09.2021 she was with PW2 and they spent the night at the appellant house which was described as a bedsitter. Earlier in the evening they had gone to Gateway mall to meet PW2 friend at club 254 but she could not enter the said club as she was underage and had to wait for them at the food court. Later when they went back home, she saw a bottle of Jack Daniels whiskey in the fridge and drunk it after which she went straight to bed. In the middle of the night she heard her trouser, underwear and bra being removed and recognized that it was the appellant who had removed her cloths, because there was security light illuminating from outside, and the curtains had not totally covered the window. She claimed that the appellant inserted his fingers in her vagina and that she felt uncomfortable and started struggling with him. The appellant further inserted his private part partially in her and she started to scream, which attracted PW2 attention from the couch where she was sleeping. The appellant thereafter got up and went to the bathroom.

76. In cross examination, PW1 admitted that "I drunk the Jack Daniels alcohol from the bottle. This was not the first time for me to drink. I took quite some amount. At least an amount that would get me drunk. This was around 9.40p.m I never ate chips. I got drunk and went straight to bed". She reiterated that at about midnight she felt someone remove her trouser, underwear and bra. The said person inserted his fingers and later his penis by which time she was sober. The feeling of the finger was different as she later felt something bigger than the finger get in and she shouted. Even though the lights were off, she saw the appellant on top of her using the security lights and also identified him when he put on the washroom lights.

77. PW2 also reaffirmed PW1's evidence that on 11.09. 2021, they went to the appellant house at 1. 0o p.m and found the appellant, who bought Nyama Choma which they ate and the appellant later excused himself to go wash the motor vehicle. There was alcohol in the Fridge, PW1 removed it and they drunk it together. Later they left to meet her friend at Gateway mall and PW1 remained in the food court as she could not be allowed to enter club 254 for being underage. At about 8p.m they left and went back to the appellants house to sleep. The appellant came back home at about Midnight, tapped her and told her to go sleep on the couch. She did as directed but did not wake up the appellant. As she was catching sleep, she heard noise from the bed and saw the appellant "waking up on top of imani" The appellant thereafter went to the bathroom and stayed therein for 20 minutes, when he came back , he went to the couch as she had already moved to the bed where PW1 was sleeping.

78. PW2 further testified that they drunk the Jack Daniels whiskey from 2.00 p.m until about 4.00 p.m. she stated that; " we drank the entire bottle. The bottle had been opened. We only drank ½ of the bottle. We mixed with soda. This was our 1st time to take alcohol. We were not totally drunk. We could walk..... when we got back to the house we did not drink again." PW2 in cross examination maintained that they drank the alcohol in the afternoon hours aforementioned.PW3 being the PW1's aunty when contacted after the incident took the child to hospital and reported the incident to the police. She testified that PW1 was crying and was in shock. PW1 had informed her that when she was younger, there was a day the appellant had carried her on his back and had tried to put his fingers in her vagina and that she had jumped off and the appellant said he was sorry and it was a mistake.

79. PW5 produced a PRC and GVRC forms on behalf of his college Janet Njiru who had filled them. It was his testimony that PW1 had alleged vaginal penetration and on examination it was generally noted that there was no physical injury, external genitalia was normal, but the hymen was torn. The patient too was on her menses. PW5 also produced the P3 form into evidence. In cross examination he did confirm that he was not the one who examined the minor. Further he did state that "Medically it was reported that the tear was fresh-This was noted in the P3. The GVRC gives the notes. The freshness of the hymen was not captured in the GVRC. The findings of the P3 form was not inconsistent with GVRC. A fresh injury will have the initial inflammatory markers i.e redness bleeding, swelling- this was not noted on the document." In re examination PW5 did confirm in relation to the P3 form and GRVC form that, "The only omission is the word fresh. This was omitted on PRC it was stated torn hymen. On the P3 form was noted as torn hymen membrane which is fresh.

80. PW6, was a clinical officer from vintage Medical health Centre and was the first medic who examined the minor (PW1). The minor had informed her that on 11.09.21 at about 10.00 p.m while she was asleep, she felt someone touch her genetalia and felt a sharp penetrating pain causing her to shout for help. Her Aunty who was in the room witnessed the event but could not intervene for fear that the defiler would hurt her. Her evidence was that, "The victim tried fighting off the uncle but she was overpowered. She reports of being defiled 3 times lasting a total of 30 minutes. This was recounted by the Aunt."

81. In cross examination, PW6 confirmed that the libia Minora and Majora were intact with no signs of bruising. The hymen was torn and the walls of the vagina had no lacerations. There was no associated pain while conducting vaginal examination. She concluded by stating that, " I formed the opinion that there was possible defilement based on chief complainant and my examinations." The patient was given medication and referred to counselling.

82. In defence the appellant denied defiling his niece. PW2 had called him at 10.00 p.m and informed him that PW1 was intoxicated as they had been drinking at club 254 situated at Gateway mall. This forced him to rush back to the house and his worst fears were confirmed. He gave PW1 sugared water and let

both of them sleep on his bed. At some point in the night PW1 woke up to vomit and went back to sleep. He denied defiling the minor.DW2 also confirmed that the minor was his daughter, while the accused was his brother, the last born in their family. The accused had stayed with him and was a care giver of his children when ever he travelled out of the country.

83. The minor's mother had left for a business trip to the USA in 2017 and never came back. He further testified that there was friction between her and the accused and that was part of the reason she left as she did not appreciate having a relative leaving in their house.DW2 was not convinced that the accused defiled the minor. He felt that was not true. DW3 was an expert witness and based his evidence on a review of the medical reports filed. He pointed out that if indeed the minor was defiled for 30 minutes as alleged, there was bound to be more significant findings which was not the case from the medical report produced into evidence. It was his opinion that, "I cannot conclude there was rape with a reasonable degree of scientific certainty."

84. As regards the medical reports, his views were that, "My view on both reports is that the reports nearly have the same findings no major inconsistency. However, vantage report is more detailed but the PRC form omitted key details that could distinguish between fresh and not fresh. After examining both reports I would not conclude penile vaginal penetration."

85. He also pointed out that a key crucial information was omitted from the medical report of vintage hospital and Nairobi women's hospital, but was introduced In the P3 form, where it was indicated that the minor had "fresh torn hymen". This information was not found in the initial reports and he did not know where the person who documented the P3 form found that information. DW3 further gave detailed evidence as to how blood alcohol is ascertained and gave his opinion that given the level of alcohol the minor is alleged to have consumed, she would not have been in a state to remember what happened as at the time of the incident.

Determination

86. On the issue of identification, the Court of Appeal in the case of Peter Musau Mwanzia v The Republic [2008] eKLR expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

87. There is no doubt that in the appellant was in his house on the material night of the incident. The appellant in his testimony stated that upon being called by PW2 that PW1 was intoxicated he rushed back home. This is his own admission that he was present in the house at the time the alleged offence occurred. PW1 testified that the security lights from the outside illuminated the house and one was able to see well using the said light as the curtains were light. She further recognized the appellant, when he went to the bathroom and opened the bathroom light.

88. PW2 also corroborated the testimony of PW1 to the effect that she saw the appellant wake from the top of PW1 and head to the washroom. Prior to this the appellant had also woken her up and directed her to go sleep on the couch. Finally, both parties confirmed that they all woke up from the same house the

next morning. It is therefore odd for the appellant to contest the issue of identification yet there was no breakage overnight or any suggestion that a fourth party was at the scene. I have no doubt whatsoever that the appellant was positively identified to have been in the house on that material night and time of occurrence of the offence.

89. As regards the central issue of penetration, PW1 stated that when they got back to the appellant's house from Gateway Mall, she drank the whiskey that she found in the fridge. Pw2 on the other hand alleged that they drank the said alcohol from 2-4 pm before they left the house. However, what is not in doubt is that they were intoxicated at one point either in the afternoon or evening on the said date of the incident. This turns to the next question as to whether the appellant penetrated PW1 and given that she had drank alcohol was she fully in her senses to have realized the same or sensed it.

90. In her evidence in chief PW1 stated that, "in the middle of the night I heard my trouser, underwear and bra being removed from my body. I saw it was keiyo because the security lights from outside were on and the curtains had not totally covered the windows." She further on contradicted herself and further testified that "the person removing my cloths was not talking he was only holding my hand. He did not remove all my cloths. This evidence is contradictory and creates doubt as to whether all the minor's cloths were removed or not.

91. Be that as it may, PW2 stated that she was woken up by some noise and saw the appellant wake up from on top of PW1 after which he went to the Bathroom for 20 minutes. On her part she went and joined the minor and reassured her before they slept until morning. The minor and Pw3 her Aunty first went to vintage hospital where PW1 was initially treated. PW6 testified that the two told her that the minor was defiled 3 times lasting 30 minutes. This evidence again is doubtful and contradicts PW1 evidence that she was conscious and could see her uncle remove her cloths and eventually screamed immediately when she was penetrated. Nowhere in her evidence did she allege to have been defiled for 30 minutes.

92. PW1 also confirmed in her own evidence that, " I drunk the Jack Daniels alcohol from the bottle. This was not the first time for me to drink. I took quite some amount. At least an amount that would get me drunk. This was around 9.40p.m I never ate chips. I got drunk and went straight to bed". Having drank whiskey from the bottle implied that PW1 drank the whiskey "neat" (she took it dry) and confirmed it was not the first time she had drank alcohol. She became drank and went straight to bed. If this be true then again her cognitive strength two hours into sleep must have defiantly be subjective as she was 14 years old and would definitely have taken a longer time to recover from the alcohol induced sleep/ black out. Therefore, her recollection of the events that night would definitely be clouded.

93. But the most crucial evidence which raised an insurmountable level of doubt was the inconsistent finding on the medical reports especially the findings in the Vintage hospital treatment notes (Exhibit P1), GVRC (Exhibit P3), PRC (Exhibit 6) as compared to the P3 form (Exhibit 5). PW1 was treated at Vantage Healthcare Hospital on 12.09.2021, on the following day after the incident. It was noted that the patient had vaginal bleeding associated with menstrual period, she wore sanitary pads, which she prior to the incident, the labia majora and minora were intact and there was no sign of bruising tear or lacerations. The hymen was broken and there was no resistance on vaginal examination (VE) associated with pain on penetration.

94. After this first visit to Vintage healthcare hospital, PW1 was taken to Nairobi women hospital in Kitengela where she was again examined by a clinical officer known as Juliet Njiru. The GVRC report and PRC report filled and were produced into evidence by PW5 one Mr John Njuguna a fellow clinician. The findings in these two reports were remarkably similar to the medical report from Vintage healthcare Hospital. There was no physical injury noted, the external genitalia were intact, menses

blood were present and the hymen was torn. The said PW5 also produced the P3 form, which at section 2(a) noted that, "Normal external gentalia ; torn hymen membrane, fresh."

95. There is no doubt that on the medical report from Vintage Hospital, the GVRC form, and PRC form, it was never noted that the hymen was "freshly broken". PW5 never examined the minor and therefore rightly confirmed in cross examination that "The freshness of the hymen was not captured in the GVRC..... A fresh injury will have the initial inflammatory markers i.e redness, bleeding, swelling- this was not noted on the document." In re examination again he did confirm that, "The only omission is the word fresh. This was omitted on the PRC it was stated as torn hymen."

96. If indeed the accused defiled the minor three times over a period of 30 minutes, there would have definitely been major signs of penetration and bruising associated with forced penetration of a minor by an adult. Further it Is not known where the maker of the P3 form got the impression that the hymen was freshly broken, yet on initial examination the same was not noted, nor was there any swelling, redness, bleeding or fresh scar noted on the genitalia.

97. The said P3 form too was signed by an unknown individual, a fact which this court has confirmed physically by going through the original documents as filed in the trial file. The said Juliet Njiru did fill and sign the GRVC form and PRC form, but the P3 form was filled and signed by a third party not known to PW5 nor was she/she called to explain the discrepancy noted. The signature on the P3 form too is different from Juliet's Njiri signature as captured in the GRVC form and PRC form. Under the *Evidence Act* the content of the P3 form thus remined unproved and would be worthless as its maker remained unknown and was not called to defend the content of the said P3 form.

98. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (see Uganda v Rutaro (1976) HCB ; Uganda v George w. Yiga [1979] HCB 217).

99. In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the high court of Kenya in Philip Nzaka watu v Republic [2016] CR APP 29 of 2015, had this to say:

> "The first question in this appeal is whether the prosecution case was riddled with contradiction and in consistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent version of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.
>
> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies' in evidence render it believable or otherwise must turn on the circumstances of each case and the mature and extent of the discrepancies' and inconsistencies' in question.

100. Further In the case of Jospeph Maina Mwangi v Republic Criminal Appeal No 73 of 1993 it was held, inter alia that;

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz, whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.

101. The evidence as analyzed is obviously self-contradictory in material particulars and cannot give the assurance that a court needs to be satisfied beyond reasonable doubt, that indeed the minor was defiled and more particularly it fails to establish that there was penetration. The evidence leading to establishment of a said fact remained gravely doubtful and the benefit of doubt would tilt in favour of the appellant on this issue. The trial magistrate thus erred in relying on the finding of the unsupported P3 form to find that "penetration was proved" and thus arrived at a wrong conclusion as regards the charge of incest.

102. Despite so finding, I do further find that based on the evidence presented, an inappropriate incident did occurred between the appellant and the minor and that further the appellant inappropriately touched PW1 on the material night. It is not in doubt that the appellant at some point had been a care giver to the minor and resided with them in the same house at some point from 2017 to 2020 when he moved out.PW1, PW2 and PW3 all confirmed this close relationship, with PW3 confirming that the appellant was the nieces favorite uncle. DW2, also confirmed that he would travel a lot and the minor's mother to had relocated to USA in 2017 and never came back. The appellant would be the one tasked to care his children as the adult in the house and even on 10.09.2021 is the one he assigned to picked PW1 and her brother from school.

103. The minor held the appellant in high esteem and trust. She insisted on visiting him, a day after he had picked her up from school and was obviously very comfortable in his presence. After the incident she was shocked and cried. I do find that she had absolutely no reason to lie as against the appellant who was her best uncle. The level of emotional turmoil she experience as explained by PW2 , PW3 and PW6 shows that the shock of the incident must have been occasioned by something extremely distressing. The foundational evidence indeed proved that the appellant inappropriately touched PW1 or attempted to defile her and in the process, she did indeed wake up and screamed, which attracted PW2 attention.

104. PW1 and PW2 evidence to that extent was believable. Further even if indeed it is true that PW1 had drank alcohol and blacked out, PW2 evidence too was that when the appellant came back at midnight, he woke her up and directed her to go sleep on the couch. She had barely caught sleep again when she was awoken noise from the bed and saw the appellant "wake up from on top of the minor". P2 also had no reason to lie against the appellant and I do therefore find that what the appellant did constitute an indecent act which is defined below:

> " Indecent act" under Section 2 of the *Sexual Offences Act* means:
>
> "any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

105. Therefore Considering the totality of the evidence presented and after considering the appellants defence I do find that there is no doubt that the prosecution did proved their case beyond reasonable doubt as to the offence of indecent act with a child.

106. As regards the sentence, This Court is guided by the principles set out in the Court of Appeal case of Bernard Kimani Gacheru v Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

107. Sentencing is also a discretion of the trial court, but the court should look at the facts and the circumstances of the case in its entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi v Republic [2017]eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira v The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

108. The same court in the case of Dismas Wafula Kilwake v Republic [2019] Eklr stated as follows;

> " Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

105. In Maingi & 5 others v Director of Public Prosecution & Another (Petition No.E117 of 2021) [2022] KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of

sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

> " to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

109. What are the relevant circumstances herein? The Appellant did take advantage of a minor and committed an indecent act against his niece, who looked up upon him as a caregiver. I do reiterate that she had absolutely no reason to lie that the appellant inappropriately touched her and/or attempted to sexually molest her. The appellant ought to have known better that the consequences of any kind of sexual offences against the minor or anyone for that matter will be punished, and should have had the forethought to behave in a better manner. This incident has deeply scared his brother family and widened family divisions which had earlier existed.

110. Having considered the sentence meted out, the circumstances of this case, and also having considered the penalty provided for under said Section 11(1) of the *sexual offences Act* No 3 of 2006, the mitigating factors including the evidence of DW2 and the need for rehabilitation and reconciliation of the family I do find that the trial magistrate erred by melting out an excessively punitive sentence, which was completely inappropriate given the circumstances herein. The said sentences too do not take into account the dignity of the appellant as mandated under article 27 of *the Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases. See Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011 and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 0f 2104.

Disposition

111. The upshot is that I do find the appeal filed as against conviction and sentence to be partially successful. I do hereby set aside the conviction imposed on the appellant In Mavoko Chief Magistrate criminal (S.0) case Number E038 of 2021 with regard to the offence of incest and convict him on the alternative offence of indecent assault.

112. Further the sentence of life imprisonment imposed on the Appellant in Mavoko Chief Magistrate criminal (S.0) case Number E038 of 2021 is hereby set aside and substitute it therefrom with a sentence of five (5) years imprisonment to run from the date of sentence in the lower court.

113. The court makes special recognition and praise both counsels herein for the incisive legal submissions made to advance their case. In particular the appellant should thank God and pray for his counsels who fought tooth and nail to have him release.

114. Right of Appeal 14 days.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF DECEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of December, 2023.

In the presence of:-

Appellant present from Kamiti prisons

Mr. Mangare for Respondent

Susan Court Assistant