REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 167 OF 2016

SOO..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence in Nakuru Magistrate's Criminal Case Number 662 of 2015 by Hon. J. N. Nthuku)

J U D G M E N T

1. The appellant herein was charged with two (2) counts of **Incest Contrary to Section 20(1) of the Sexual Offences Act** and alternative counts of **Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act.** It was alleged that the two (2) complainants; SA and VA were his daughters aged nine (9) and seven (7) years respectively and that on diverse dates between 2014 and 18th May 2015 at [particulars withheld] Estate he had defiled SA or touched her vagina with his penis. For VA it was alleged that he had committed the offences on the 18th May 2015.

2. The case for the prosecution was that the accused was the father of four (4) children, the two (2) girls and two (2) boys, the eldest V he was in class eight (8) then, and the youngest C, he was in top class. The two (2) girls were in between the boys.

3. This family lived in a two (2) roomed house. The kitchen served as the bedroom for the four (4) children, the sitting room as the bedroom for the parents. The kitchen door would be latched from inside and the water jerricans would be placed against the door. If they needed to urinate at night, they used a basin.

4. According to the prosecution on 18th May 2014, **PW2, CN, a** class three (3) teacher at [particulars withheld] school was marking homework, where each child would come up to her with her book for marking. She testified that she noticed that VA was walking with her legs apart. She enquired from the child and the child told her that her leg/knee was in pain. She had swellings. When VA went back to her seat, she saw that the child was sitting on the edge of the seat, she did not believe the child's story. She says:

> *"I later called her and examined her leg but I told her to tell the truth. I told Madam M and we talked to her and she said she had pain when sitting. We saw her vaginal area was reddish. I talked to Madam O and decided to take her to the dispensary. The doctor said the child had been defiled. She took her to Nairobi Hospital and she was treated. I told the child to confide in me and she told me her father did tabia mbaya to her. She said her father called her to the main house and told her to undress which she did dad told her to get on the bed which she also did and he came on top of her (sic) ..."*

5. When this witness was cross examined on her statements she testified that she had not mentioned that the child had a problem sitting down, and that most of the things she had said in her evidence in chief were not in her statement. That in her statement she had said that the child's private parts were inflamed not reddish, that she never mentioned consulting teacher O.

6. **PW3 teacher AO's** testimony was that she was told by C that there was a child in her class sitting and walking with difficulties. She took the child VA to the dispensary in her car, but they were referred to Nairobi Women Hospital where the child was examined in her presence after which the child remained in hospital. Teacher O said nothing about the outcome of the examination. She also said nothing as to whether she too noticed any problem with the child or whether the child said anything to her about an alleged defilement

7. A doctor **Thomas Makara** testified as **PW5** on behalf of Dr. Nore who was said to be way on study leave. He produced the P3 and Post Rape Care forms for each of the complainants. Each of them was found to have;

- Torn hymen

- Inflamed vaginal walls
- Pus and epithelial cells

He testified that pus cells indicated infection, numerous pus cells, friction. That the age of the broken hymen was not indicated.

8. **PW6 was No. 54907 PC Albert Juma**. His testimony is that on 19th May 2015, two (2) teachers had reported at Teachers' Police Post that one of their pupils was walking funny and they suspected and asked her, and she told them that her father had defiled her the previous night. He says;

> *"I booked the report and referred them to Nairobi Women's Hospital for checkup... she was admitted and treated. On the 2nd day I visited the hospital with CIP Okongo and the teacher said SA, VA's sister had also been away from school so he went home and found SA. She said she had also been defiled severally by her father. We took her to hospital and she was treated we gave P3 forms which were filled by the doctor. I recorded statements and charged the accused with this offence. On 20th March 2015 I was called by a teacher that the accused had gone to the school to look for the child. I sent a police vehicle which picked the accused and brought him to the police post. I did age assessment and found VA to be eight (8) years, SA to be seven (7). I produce the Age Assessment Report."*

He went on the state that there was a big brother V, aged fifteen (15) years who stayed with the kids. That their mother was away in Nairobi at the material time, that the mother of SA had run away a long time ago from the accused, that SA said the accused had been defiling her. He said he established that V was in the house when the girls were defiled but he never recorded his statement because he told him he was asleep. He said it was the teachers who took the children to hospital, he did not know that they had infections, he did not take accused for medical examination. He added that he had investigated sexual offences for over twenty (20) years and had not been careless with this one.

9. After *voire dire*, SA testified on 30th March 2015 the court satisfied itself that "***child is intelligent and understands importance of telling the truth but not meaning of oath. She will give unsworn statement."*** The child proceeded to say;

> *"Our house has got two (2) rooms. I slept in the kitchen with VA and C and V. Mum and dad sleep in the sitting room. There is one bed in the kitchen which we share... nothing happened in the kitchen. We lock the door to the kitchen. Vi locks the door. He is in standard 8. We lock with jerricans. Daddy didn't come to the sitting room. I didn't tell anything to the police. Teacher took us to hospital and we were given medicine because I had lost my voice. I went to stay with VA in hospital. I wasn't examined by the Doctor in my genitalia. I never told teacher anything."*

Court*: Child shuts down and sobs*

At that point the prosecutor made the following application: *I pray that the minor be stepped down and taken to Nairobi Women's Hospital for counseling. I believe she will open up once counseling is done."*

This was objected to by the defence on the ground that the child was intelligent and knew she was saying, that the prosecutor was on a fishing expedition having failed to change her truthfulness. That her testimony was already on record and there was nothing more to add.

10. For some reason the trial court understood this to be an application to have the complainant declared a hostile witness, and after consideration, declined to do so. The record shows that the trial magistrate recorded her reasons to be that she court was convinced that the child was not telling the court what she knew, and this was because she denied talking to her teacher, and also being examined by the doctor. The court referred her for counseling and committed her to a Charitable Children Institution pending the hearing of her testimony.

11. The matter proceeded on 9th April, 2015, about a week later. On this day SA's testimony was completely different. She testified that they had gone to sleep as usual, in the kitchen which was 2 metres from the sitting room. Their mother was in Nairobi. That her brother V had placed jerricans of water at the door to lock it. There was no electricity so they were using candle light. That the accused woke her and her sister up, that she and the sister removed the jerricans from the door and opened for him. The others did not hear. That upon waking them he told to get into them he sitting room and onto the bed. He told them to shut their eyes, did bad things to them and told them to go back to sleep. She said she felt pain *mahali pa kukojolea*. That he first did *tabia mbaya* to VA, put her aside, and then did *tabia mbaya* to her. That she was behind VA as her father did *tabia mbaya* to them. That it was the first time. She cried but did not scream. She later told madam C what had happened. That she had lied earlier because she feared her father.

12. VA also testified on that date. After a *voire dire* the court concluded that she understood the importance of telling the truth but not the meaning of the oath. After giving her name and age, the court record shows;

"Child closes completely"

13. The prosecution made two (2) applications; one for age assessment, the other for the child to be taken to Provincial General Hospital for counseling. The matter was adjourned to 26th June 2015. Another *voire dire* was conducted. After giving her name the child began to cry. The record shows that the trial court *"shut the window and put the child behind the curtain to testify therefrom."* The child proceeded to say that they lived in two (2) houses, one where she and her siblings slept, the other where her dad slept with her mother. She said that her dad took her to his house. He did *tabia mbaya* to her there. She felt pain in her *chuchu*. She went back to sleep.

14. It is on the strength of this evidence that the trial court put the accused on his defence. He testified and called his wife and his son V as witnesses. His defence was that he lost a son on 10th March 2015 in a road traffic accident in Nairobi and he and his wife left for Nairobi on

11th March 2015 leaving the children on their own but under the care of their aunt L who lived nearby. He came back on 19th March 2015. He found S at home in bed. She said she was unwell. V had gone to school. When VA did not come home at 1 p.m. as usual, he went to the school to find out. A teacher told him that the child had reported sick and he should go home. He was not satisfied. He went and returned with another neighbour but he did not get the information of her whereabouts. Later he was told she was in an unnamed hospital because she had injured her leg. The next day he went back to the school. The Head Teacher told him to wait for motor vehicle to take her where the child was. What came was a police motor vehicle and he was taken to the police station where he was locked up. He produced in court a matatu receipt to show that he had travelled from Nairobi, burial permit and mortuary receipt in respect of the child who had died.

15. His wife, and mother of the complainants told the court they were together with accused in Nairobi because of the death of their son from 11th March 2015 to 19th March 2015 when her husband came home. That she came home on 20th after she learnt that he had been arrested. That it was police officers who told her that her child had been defiled. That the police beat her up in the process.

16. V testified that on the night of 18th March 2015 both his parents were in Nairobi. That he slept in the same room with his sisters and the door had a latch which he only could reach. That on 19th March 2015 S was unwell and did not go to school. VA never came back home because the teacher took her. He said he saw the teacher Cecilia give her soda and bread in school.

17. Thereafter the prosecutor moved the court under **Section 212 of the Criminal Procedure Code** for them to challenge the evidence by the accused. The investigating officer testified that he had gone to 2NK Sacco and they had said they did not have a motor vehicle of the registration on accused's ticket, that that registration number was for a motor cycle, that the person who had died was the accused's nephew and not his biological son.

18. After taking in all the evidence the trial court in a judgment delivered on 26th October 2016 found the accused guilty of each of the main counts of incest and sentenced him to two terms of life imprisonment to run concurrently.

19. The accused was aggrieved and filed this appeal. It is his position that the trial magistrate ***erred in law and fact by***;

> ***i) Convicting him when the offence was not proved to the required standard.***
>
> ***ii) Failing to consider his defence.***
>
> ***iii) Failing to take into account that age of complainant was not proved.***
>
> ***iv) Failing to consider all the evidence.***

20. At the hearing of the appeal Ms. Cheruto for the appellant submitted that the appellant was relying wholly on his written submissions.

21. On the first and second grounds, the appellant argued that the prosecution had failed to prove the ingredient of penetration. That the testimony of the two (2) minors was unreliable and they were coached on what to say, that the doctor's testimony failed the test of expert evidence. On this he cited a passage from the case of **<u>David vs Edinberg</u> Magistrate (1953) Lord President Cooper;**

> ***"the function of an expert witness duly is to furnish the judge or the magistrate or the jury with necessary scientific criteria for testing the accuracy for testing the accuracy of their conclusions as they enable the judge or the jury to form their independent judgment by application of these criteria to the facts provided in evidence."***

22. He argued that PW5 did not give any expert opinion as required by Section 48 of the Evidence Act on the two complainants but simply relied on what they said. That there was no proof that the appellant had penetrated either of them.

23. Ms. Mwangi for the state responded to this by referring the court precisely to the evidence of the two complainants and the PW5 arguing that their testimony was corroborated by the evidence of the doctor.

24. On the age of the minors, the appellant relied on **<u>Hilary Nyongesa v Republic</u> [2010] eKLR** where the judge stated that the age of the victim in a **Sexual Offences Act** Offence is critical and must be proved conclusively. He urged the court to find that that was not proved.

25. Ms. Mwangi countered this with the evidence on record. That the state produced age assessment reports and the minors were found to be eight (8) and seven (7) years old.

26. On the identity of the perpetrator Ms. Mwangi submitted that the appellant was the father of the two (2) minors and that was not in issue.

27. Regarding his defence, Ms. Mwangi submitted that the same was effectively dislodged by the prosecution, that they proved that the child who died was not the child of the appellant but his nephew, that the ticket he produced, the alleged motor vehicle he travelled in did not exist and was found to be a motor cycle.

<u>Analysis and Determination</u>

28. The duty of the first appellant court is set out in the case of **<u>Okeno vs Republic (1972) EA 372 where</u>** it was held "*The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings*

and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

29. I have relooked at the evidence afresh, re-assessed the same and drawn my own conclusions always bearing in mind that I never heard or say the witnesses testify.

<u>The testimony of the minors</u>

30. Before I get into the appeal itself, I must with due respect point out, based upon consideration of the record, that police, the trial court and the prosecution clearly the two complainants. These children were evidently vulnerable witness as provided by **Section 31 of the Sexual Offences Act** on account of their ages, their alleged relationship to the accused person, the nature of the subject matter - sexual offence- and the possibility of intimidation. What the court and the prosecution did in the middle of the testimonies of these minors was too little too late.

31. I have said this before and even if I sound like the proverbial broken record I will say it again. This is about the purpose of the Protection and Care file expected to be opened by the police, the prosecution or the court where the child is a victim of an offence. That child is a child in need of care and protection. This file ought to be opened at the earliest possible time so as to take care of the welfare needs of the child, pending or simultaneous to, and post the criminal proceeding. The information gathered by the I.O about the vulnerability of the child and the subsequent social inquiry report ought to inform the courts directions on protective and other measures.

32. A child is alleged to have been defiled is a child in need of care and protection. (**Section 119 of the Children Act,)** the police officer who receives the report must take the necessary action including informing the children officer and a Protection and Care filed opened. There is in place the **P & C Form** developed by **the NCAJ *Special Task Force on Children Matters*** for use by all the Juvenile Justice Agencies for this purpose. This file ought to be placed before the Children Court, a social inquiry conducted at the earliest to establish these needs, and for the Children Court and the prosecution to take the necessary measures, these may include rescue from the abusive environment, counselling, assessment of risk of any siblings to the same offence, the likely impact of the release of the accused person on bond on the child, among others.

33. In this case the record demonstrates that both the rescue and the counseling were applied for by the prosecution and ordered by the court because the child did not tell the court what the prosecution expected her to say. This ended up creating the impression that the child had been coached to change her testimony. The trial court even descended into the arena, stating on record that the child was not telling the court what she knew. How would the court know what the child knew?

34. It is noteworthy that despite sending the child for counselling, there was no evidence of any counseling even after the case was adjourned. The only thing that happened was that SA's testimony changed completely from, nothing happened to something happened, creating doubt as to her credibility by placing on record two completely different sets of testimony.

35. In her first testimony she said she never told teacher anything. This is borne by the record. PW2 teacher CN's testimony is very clear. She never spoke to SA. She only spoke to VA. VA never mentioned that she was defiled together with her sister SA. PW3 teacher AO's testimony only made reference to VA. So, from the record it is true the SA never told teacher C, or teacher A anything. On this, she told the truth as per the court record.

36. PW6 the investigating officer is the one who introduces SA into the case. He says *"… I booked the report... in the second day... the teachers said SA, VA's sister had also been away from school so he went home and found SA [who] said she has been defiled severally by her father. We took her to hospital and she was treated."*

37. From the investigating officer's testimony, it is an unnamed male teacher who allegedly spoke to SA and SA told him she had been defiled severally by her father. This teacher was not PW2 or PW3.

The I.O also testified it was the teachers who took the children to hospital but neither teacher N nor teacher O mentioned taking SA to hospital on account of the alleged defilement. He says he recorded statements but does not state whose statements he recorded.

38. The record also proves that child SA never spoke to the police officer. He does not say anywhere that he spoke to her. The police officer says it is the teachers who told him.

39. SA also said she was never examined by the doctor in her genitalia. That she was home because she had lost her voice, and was treated for that. Hence though there was a P3, the doctor who allegedly examined her did not testify. The prosecution did not produce the treatment notes which would show what complaints she had at the hospital.

40. She said she had lost her voice and did not go to school that day. Her brother, **DW3** who went to school with VA also testified that SA remained home because she was unwell, her father the appellant also said he came home and found her unwell. The, I.O confirmed that the child was not in school that day and was found at home by the teacher who went there. These circumstances create the impression that the child SA may have told the truth. Especially due to the fact that she when she testified she had just been taken through *voire dire*, the trial court had satisfied itself that she understood the importance of telling the truth. The fact that she *"shut down and sobbed"* does not necessarily mean she was lying. It could have a combination of factors, including relief that she had said what she "knew" and not what was expected of her, or the pressure of being in court. We shall never know because the trial court and prosecution did not apply the appropriate tests, having the child declared as a vulnerable witness, getting her the counseling she needed before her testimony, and taking her out of the home environment at the earliest time. Failure to do so compromised her testimony as we have two sets of evidence from the same child on record.

41. Similarly, with VA, the trial court sent her for counselling. There is nothing on record to show that this was done and if it was, what the outcome was. Counselling is a process that is expected to help the deal with the ordeal they have gone through so as they can not only speak about but live with it. It cannot be a tool used by the prosecution to get vulnerable witnesses to say what the prosecution wants them to say.

42. In this case in the middle of the child's testimony the court came up with a "witness box", with the child testifying from behind the window curtain. The assumption is that the court drew the conclusion that the child did not wasn't to speak in the presence of the accused person. Though this was done in good faith and in an effort to protect the child, one can only envisage the drama and its effects on the child. These are things that ought to have been done before the trial, preparing the child and ensuring she was aware of what was going to happen during the hearing.

43. In any event the court could not arbitrarily just come up with this, it could only do so after a declaration of vulnerability. This is provided for under **Section 31 (4) and (5) of the Sexual Offences Act**

> ***"S. 31 (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -***
>
> ***(a) allowing such witness to give evidence under the protective cover of a witness protection box;***
>
> ***(b) directing that the witness shall give evidence through an intermediary;***
>
> ***(c) directing that the proceedings may not take place in open court;***
>
> ***(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or***
>
> ***(e) any other measure which the court deems just and appropriate.***
>
> ***(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary."***

44. The court was also expected to comply with **Section 32 (1) and (2) of the Act;**

> ***"32. (1) The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent or guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 31 and of the protective measures listed in paragraphs (a) to (e) of section 31(4) prior to such witness commencing his or her testimony at any stage of the proceedings.***
>
> ***(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in this section and the court shall note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed."***

There was no compliance with these provisions of the law and it is no wonder the defence formed the view that the witnesses were coached and were expected to testify in a certain way, failure to which, they were removed from the custody of their parents and taken for counseling. This was obviously the wrong approach and it indeed compromised the case for the prosecution.

45. SA and VA said that the father did *tabia mbaya*. The term 'tabia mbaya' has acquired the notoriety of a technical term just like the term 'defilement' when it is used with reference to sexual offences. It behooves the prosecution to present evidence to show what this tabia is in the context of each case. Simply stating tabia mbaya was done is like just stating that defilement happened. The ingredients of that tabia mbaya can only be proved by evidence. SA said she felt pain where she urinates from. VA said she felt pain in her *'chuchu'*. There was no description of how this pain was inflicted. For SA it was alleged the defilement was repeated. But the minors said nothing to that effect. Neither was there any description of how these others were done, where and when.

46. **Section 33 of the Sexual Offences Act** provides that evidence of surrounding circumstances of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of sexual offence where such offence is tried in order to prove whether a sexual offence is likely to have been committed towards or in connexion with the person concerned. In this case it is said the four children shared a bed, and that the appellant only woke up the two (2) complainants and the others never heard anything. From the description of the room, this was not possible because of the size of the rooms and the manner in which the room had to be opened. It appears unlikely that they would have been woken up, lifted or pushed the water jerricans away from the door without being heard by V. There is no evidence of threats of any harm to the two minors so as to stop them from talking.

47. PW2 told the court she examined VA private parts. How did she carry out that exam? PW2 and PW3 took the child to a dispensary where VA was examined by an unnamed doctor who allegedly made the first impression of defilement. The I.O never visited that dispensary and never obtained the treatment notes or the doctor's testimony. Again, the evidence of what kind of examination he carried out is not on record.

48. Finally, at Nairobi Women's Hospital the minors are said to have been examined by a doctor Njoroge. For VA it was indicated that the child had left marks on the perpetrator, that there were bruises in the outer genitalia, the vagina was normal but the hymen ring was broken. The defilement was said to have happened on 18th March 2015 where her father had forceful sex with her. On 24th March 2015, another Post Rape Care Form was filled it said her outer genitalia was inflamed, vaginal walls were inflamed, hymen was torn. The circumstances indicated were that the father took her and her sister to the main house and had penetrative sex with both of them. The P3 replicated the same details, stating that VA was seven (7) years old. There was no indication in the P3 of any previous treatment prior to the filling of the P3. The age assessment done at the same Provincial General Hospital on 17th April, 2015 showed that VA was eight (8) years old, and For SA, seven (7) years old. According to doctor Njoroge the;

> *"father had repeatedly had sex with this child and her sister and always threatened with severe beating or death if they disclosed this to anyone."*

This was not borne by the testimony of the minors. The testimony on the record speaks of one incident.

He found the vaginal walls to be inflamed, hymen broken. For the circumstances, he/she recorded that *"the sister reports that their father puts both of them on his bed and force her to have sex with him and order her not to say anything to anyone."*

49. There is nothing to show that SA was repeatedly defiled as alleged. The evidence of medical examination was doubtful.

50. It is also on that Post Rape Care that SA was brought in with history of having been sexually assaulted by the paternal father. The alleged defilement is indicated to have happened on 19th March 2015 in the Post Rape Care of Nairobi Women's Hospital and the one filled at Provincial General Hospital Nakuru. The P3 does not bear date and time of the offence but shows that report was booked vide OB 5/24/3/2015 while that of VA is vide OB 20/3/15. For VA offence is alleged to have been on 18th March 2015, reported to police on 19th March 2015, and sent to hospital but booked in OB on 20th March 2015. For SA report is indicated to have been made on 20th March 2015 but booked in OB on 24th March 2015. These dates are of great concern. The allegation is that the defilement took place on the same night. However, the documents suggest that VA was defiled on 18th March and SA on 19th March, that creates a contradiction in the case for the prosecution that cannot be described as idle. According to PW2 the case for VA was reported on the 18th to the Police but the OB is for 20th. SA's case was discovered on 19th but the OB report is for 24th. These anomalies were not explained by the prosecution as they create uncertainty as to the truthfulness of the whole story.

51. Granted, both children were below the age of 11 years. However, the I.O sought to confirm the same through an age assessment report. From the charge sheets and the evidence on record in general SA was the older one of the two. The P3 's give age nine (9) years for SA, seven (7) years for VA. The age assessment report says VA was 8 years and SA 7, leaving unanswered questions and adding further to the inconsistencies.

52. The appellant's defence is that he was not at home on 18th March 2020. That he came on 19th March 2020, and went to school. It is the same night he is alleged to have defiled SA.

53. It is not in dispute that his nephew died in Nairobi. He produced the burial permit, which indicated who the body was released to and the Post Mortem which showed who identified the body. He produced these knowing the contents. His son and his wife confirmed that he was away on the 18th and came back on 19th.

54. In seeking to dislodge his defence the investigating officer gave hearsay evidence that he was told by 2NK officials that they had no such motor vehicle, as was written on the appellant's receipt. He did not say why he could not call those officials to testify. He testified that Kenya Revenue Authority (KRA) records showed that the registered motor vehicle recorded in the appellant's receipt was a motor cycle. There was no evidence that it was the appellant who wrote that number. Only officials from the transport company 2NK could explain that. The appellant did not have to prove his innocence and his defence sound credible in view of the circumstances of the case for the prosecution.

55. The irony is that the prosecution sent out the I.O to conduct investigations to counter the defence, while what was crucial was for them to investigate the crime. There was no investigation conducted by the investigating officer of the crime itself. None at all. He never visited the scene immediately he received the report. He did not search the house. He did not speak to the other children. He did not speak to the aunt of the children one Lavender or any other neighbour. There was no investigation of the alleged repeated defilement of SA by the father, nothing. The complainant and the accused are equal at law. Each of them deserves the highest standard of services from the police and this includes investigations of the case.

56. From the foregoing, I find that the conviction was unsafe. Consequently, the appeal succeeds. The conviction is quashed. The sentence is set aside and the appellant is to be set free unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 12th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of: - VIA ZOOM

Edna Court Assistant

For state

N/A for appellant

Appellant present