



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL APPEAL NO. 36 OF 2018**

**SKK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at ELDAMA RAVINE Criminal Sexual Offence Case No. 9 of 2018 delivered on the 27<sup>th</sup> day of June 2018 by Hon. J. Nthuku, SRM]**

**JUDGMENT**

**Introduction**

1. The appellant who was on 27<sup>th</sup> June 2018 convicted and sentenced to imprisonment for life for the offence of incest by a male contrary to section 20(1) Offences Act now appeals to the High Court urging the “*court to allow my appeal, quash the conviction and set aside the sentence and I the appellant be set at liberty.*”
2. The particulars of the offences were that the appellant had –

***“On the 4<sup>th</sup> day of January 2015 in Mogotio Sub-County within Baringo County did cause his penis to penetrate the vagina of [JL] a girl aged 6 years who accused knew to be his daughter contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.”***

**Judgment of the trial court**

3. In its judgment of 27<sup>th</sup> June 2018 the trial court considered the issues it found arising from the trial and convicted the appellant, as follows:

**“JUDGMENT**

....

*The issues for this court's determination is whether;*

- 1) *Has the age of the complainant been proved*
- 2) *Has penetration been proved*
- 3) *Whether father daughter relationship has been proved.*

*If yes, has the identity of the defiler been established?*

*On the issue of age, the child said she is aged ten years and a standard three pupil. To prove her age, the prosecution produced her clinic card showing she was born on 21/10/2008, so as at the time of the alleged offence she was aged 8 years and therefore a minor.*

*On the issue of penetration, Pw1 said that upon examination, the child was found to have broken hymen and many epithelial cells, many pus cells, bruises on her labia minora as well as majora she was discharging pus. This was on 9/1/15 is four days after the*

incident. The child had already developed an infection and this led to her admission in hospital for several days. The doctor said the epithelial cells was as a result of trauma. This coupled with the evidence of the child leaves no doubt in my mind that the injuries on her vagina were caused by a penis hence penetration has been proved.

On the issue, of the relationship between the accused and the complainant, the child said the accused is her father which evidence was corroborated by her mother pw2 who said the accused was her husband but they had since separated but he was the child's biological father. PW4 B also confirmed that the complainant is his sister whereas the accused person is his father so I am satisfied the accused is the complainant's father hence within the degrees of consanguinity prohibited by section 20 of the Sexual Offences Act.

On the last issue i.e. identity of the defiler, the child said it's the accused person herein who defiled her. She said that the accused person is her father and he chased her step mother and brother away then defiled her twice that night and threatened to kill her if she ever tells on him. Her brother B confirmed that he and his step mother were sent away from home by the accused and they spent the night at a neighbors' place that night while the accused person was left alone with the complainant and in the morning when he came back he found his sister sleeping on his fathers bed looking sickly. This corroborates the complainants evidence that she was defiled on her father's bed and she slept there till morning. The child said she knew it's her father because he first called her to his room and when she went to check what he wanted that is when she was defiled. Secondly, she spent the entire night with her defiler and come morning, he woke her up and left the house. There is no doubt the accused was the only person in the house with the child that night and even if she may not have seen him that night she did in the morning and even recognized his voice as he called her. This evidence was never at all shaken. The accused person throughout the trial never asked the complainant any question not even one and his defence was that he had nothing to say concerning the case. In short there was no defence. The prosecution witnesses gave very water tight evidence against the accused person. Further the proceedings of 13/2/18 show that the accused was earlier on charged vide Eldama Criminal case no 21/15 and after four witnesses herein testified he jumped bail and went into hiding until 12/2/18 when he was arrested and availed to face the law and when he was asked to explain his absence he simply stated that he had nothing to say. This conduct of absconding in the middle of the trial is not consistent with innocence of a suspect. Be that as it may and for the reasons earlier on stated in this judgment, I find that the charges of incest have been proved against the accused person beyond reasonable doubt and I convict him of incest contrary to section 2010 of the Sexual Offences Act. The conviction is under the provisions of section 215 of the Criminal Procedure Code cap 75 Laws of Kenya.

Right of appeal 14 days.

**Hon. J. Nthuku**

**Senior Resident Magistrate**

**27.06.2018**

**Sentence of the trial court**

4. At the sentencing hearing, the trial court considered a severe deterrent sentence was called for as follows:

“Court Prosecutor

No records.

Accused in Mitigation

I have nothing to say.

Court

I had the opportunity of seeing the accused person's daughter the (complainant) herein as she testified. She is what I would call a carbon copy of the accused person i.e she resembles him in every aspect physically so I fail to understand how the accused person could get so twisted to even begin looking at her from a sexual angle.

Even in the animal kingdom, no animal except the stoic has sexual intercourse with its young one before maturity and even the stoic does so for propagation purposes the accused person stocked lower than wild animals. He doesn't deserve to mingle with the Society. If he can be this ruthless with his own flesh and blood what about others not related to him. Even his attitude says it. No lota of remorse.

I sentence him to serve life imprisonment.

Right of appeal 14 days.

**Hon. J. Nthuku**

**Senior Resident Magistrate**

27.06.2018”

**The Appeal**

5. The appellant filed an appeal based on grounds of appeal set out in the Petition of Appeal dated 4<sup>th</sup> July 2018 as follows:

**“GROUNDS OF APPEAL**

1. THAT the learned trial magistrate erred in law and facts by dismissing the appellant's defense without giving any cogent reasons.
2. THAT the learned trial magistrate erred in law and facts in failing to appreciate that critical witness were not called upon to testify.
3. THAT the learned trial Magistrate erred in law in failing to arrive to a finding that the prosecution had failed to prove its case to the standard required in law that is, prove beyond reasonable doubt.
4. THAT the learned trial magistrate erred in law and facts in appreciate that I was not examined by the doctor.
5. THAT the learned trial Magistrate erred in law by relying on the evidence of the investigating officer despite having conducted a shoddy investigation in that he failed to even visit the scene of crime.

REASONS WHEREFORE: I pray for the honorable court to allow my appeal, quash the conviction and set aside the sentence and I the appellant be set at liberty.”

6. Subsequently, at the hearing of the appeal on 30<sup>th</sup> July 2020, the appellant filed supplementary grounds of appeal as follows:

**“SUPPLEMENTARY GROUNDS OF APPEAL**

UNDER SEC. 350 (2) (v) C.P.C.

My Lords being aggrieved and fully dissatisfied by the decision meted at by the learned trial Magistrate and upon receipt and perusal of the trial record and its judgment, I now beg leave of this Hon. Court to tender my amended grounds of appeal and subsequent submissions to be based upon instead of the one's tendered inter-alia, viz:

1. THAT the learned trial Magistrate failed in matters of law and facts yet failed to observe the following:
  - a) Contradictions and inconsistencies clouded the prosecution case.
  - b) Crucial witnesses were not called to testify (sec 158 CPC) and be cross-examined i.e the wife who took the minor to Mogotio Sub County Hospital.
  - c) Medical evidence was far much benign to prove the charge.
2. THAT the learned trial Magistrate erred in both law and fact by failing to find that the prosecution case was not proved beyond any reasonable doubt.
3. THAT the learned trial Magistrate failed to find that the charge sheet relied upon was defective.
5. THAT the plausible defence of the appellant was not considered.

REASONS WHEREFORE: May this appeal be allowed, conviction quashed and sentence set aside.

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ELD/3827/018/LIFE SAMUEL KIPLANGAT KUTOL.....APPELLANT”

**Appellant's submissions**

In urging his appeal, the appellant filed written submissions together with the supplementary grounds of appeal as follows:

**“WRITTEN SUBMISSIONS**

My lords I was charged with the offence of incest by male c/s 20 (1) of the Sexual Offences Act no. 3 of 2006. The prosecution called a total of five (5) witnesses. The witnesses tendered their evidence against I, the appellant which led to my conviction hence the basis of this appeal.

My lords, there is no dispute that P3 herein was defiled. However, the point of contention is that the appellant was not the perpetrator. **The learned trial magistrate failed to consider that whenever the prosecution case contradicts itself, then the same stands unsafe to be relied upon when basing a conviction.** See RICHARD APELA VS REP (1981) EA C.A 945. It is so stated because the first report to the police holds a lot in telling what has been reported.

**My lords it is clear from the record that the person who arrested the appellant is also the same person who investigated the entire duo from her testimony vide page 16 lines 12 – 18 and I quote:**

“...I visited the scene child at Nairobi women’s Hospitals where she was admitted for 5 days. She was committed to welcome to the family children’s Home. I recorded the statement and she said that on 4<sup>th</sup> Nov 2015 her father who was drunk chased her step-mother from home and also ordered B the son to go and sleep at friend’s place which the boy did. The accused then called the child and defiled her severally on his bed and threatened to kill her...”

This being the case and from the testimony of the Investigating Officer one should asks as to when was the incidence committed? From this evidence there is a great rise between the testimony of Pw5 and the particulars of the charge. The two dates i.e 4<sup>th</sup> Nov 2015 and 4<sup>th</sup> Jan 2015 indicates the existence of two different incidences over which the trial learned Magistrate failed to settle.

Kindly see page (3) (at column) particulars of the offence that:

“SKK on the 4<sup>th</sup> day of January 2015...”

**My lords basing on the testimony of the Investigating Officer who stands to be the head of prosecution in this matter indicated that the incidence took place on 4<sup>th</sup> Nov 2015 contradicting the date in the particulars of the charge i.e 4<sup>th</sup> January 2015.**

Furthermore, the learned trial magistrate failed to observe that Pw2 had informed the Court that on 4<sup>th</sup> January 2015 while at [Particulars Withheld] she received a call from the doctor informing that her last born “**F**” had been defiled. **Who is ‘F’ then? There is nowhere form the charges where such a name appears?** On the other hand, the findings of the learned trial magistrate held:

“...To prove her age, the prosecution produced her clinic card showing she was born on 21/10/2018, so at the time of the alleged offence she was 8 years and therefore a minor...”

My lords having observed the above evidence keenly, there is a clear indication that the learned trial magistrate was in a hurry to conclude over the prosecution case failing to observe that the particulars of the charge did not support the evidence therein thus qualifying it to stand a nullity under defective charge sheet. Kindly see page 3 at the particulars of the charge which indicates that the alleged minor was only six years old. From the provisions under Rule 4 of the Sexual Offences Rules of court 2014 where it is stated that.

When determining the age of a person the court may take into account the evidence of the age of that person that may be contained in a Birth Certificate, any school document or in a Baptismal Card or Similar document. Kindly see FRANCIS OMURESI =VS= Uganda C.A Cr. Appeal No. 2 of 2000. The conclusion arrived at by the learned trial magistrate is not indicated as to whether it was that of J.L (particulars withheld) or F, that of 4<sup>th</sup> Jan 2015 or 4<sup>th</sup> Nov 2015.

My lords, it is the duty of the prosecution to prove the allegation under sec 107 E.A Cap 80. From the testimony of Pw2, and I quote, kindly confirm on page 11 lines 14 – 16 that:

“...On 4<sup>th</sup> January 2015, I was in [Particulars Withheld] . I was called later by a doctor from Mogotio and told that ‘Ferond’ My last born had been defiled...” This being a case before this Hon. Court, the trial been defiled...” This being a case to whether she was a witness or complainant Pw3 further had an issue subject to clarification to clear out doubt.

On page 13 lines 10 – 13 and I quote:

“I go to [Particulars Withheld] road primary school std 3, I know we are in Court. On 4<sup>th</sup> January 2015 I was at home with my brother BL and my step mother (M) and Dad...” **My lords why was it that M was not called as a witness, under sec 150 CPC, though there is no specific number of witnesses to establish a fact under sec 143 CPC, but it was vital that she be called as she is the one who is said to have rescued the victim by seeking Medical attention at Mogotio S.C. Hospital.** To buttress my contention, my lords Pw2, (one SY) informed the court that when she received the call, she went to Mogotio Only to learn that the child was in Nairobi Women in company of the Doctor, the wife to the accused person. My lords such vital witness as M would have been called to clear the doubt as to who the complainant was. See JOHN KENGA –VS- REP CA NO. 1126/84 CRCS NO. 1174/84 NRB that “...the appellant in the matter was acquitted for the fact that some of the mentioned witnesses were not summoned to clear down of his arrest especially those who arrested him...”

AJ claimed to have been defiled and the victim in this matter, however F turns to be mentioned as the victim.

May this Hon. Court clear out the tantamount (Okeno vs Rep 1982 E.A).

My lords, such allegations are strongly based on mere suspicion from the evidence on record. Kindly see MARY WANJIKU KICHIRA VS MARY WANJIKU GICHIRA VS REP CRA 17/98. I submit that would the said witness called the evidence would have been adverse to the prosecution.

Moreover, there was no medical evidence to connect the appellant with the said offence c/s 36 S.O.A. see Martin Chero vs Rep HCCR 2015 eKLR Malindi. **Furthermore, it's evident that the said two wives orchestrated the whole story with intent to implicate me over extramarital affairs vide Pw5's evidence on page 17 lines 6 that:**

“...I found you in lodging with a woman after I was given a tip of...”

My lords, both F and Aare my daughters, let this hon. Court disallow the wives to settle their misunderstandings by use of my children. Under sec 134 E.A and in the case of DAVID ODHIAMBO –VS- REP CRA NO. 5/2005 (CA) MBS, may this Hon. Court re-evaluate and re-analyze the entire evidence on a record and give the appellant the benefit of doubt, in his favour, By Coming up with an inference other than the one erred by the trial Magistrate.

**REASONS WHEREFORE:** May this appeal be allowed, conviction quashed, sentence set aside and I be set free at liberty.

DRAWN AND FILED BY

ELD/3827/018/LIFE SKK APPELLANT”

### **DPP's submissions**

7. The DPP opposed the appeal in submissions court date stamped 10<sup>th</sup> July 2020 as follows:

#### **“SUBMISSIONS FOR THE PROSECUTION**

The appeal is opposed. The appellant herein was charged and convicted of the offence of Incest contrary to section 20(1) Of the Sexual Offences Act and sentenced to serve life imprisonment on the 27<sup>th</sup> of June, 2018. The complainant, PW3 in this matter is the daughter of the appellant. She was 7 (seven) years old at the time of the offence. A clinic card confirming her date of birth was identified by PW2, her mother during the trial. The mother indicated that she was born on the 21<sup>st</sup> of September, 2008. The complainant stated that on the 4<sup>th</sup> January, 2015 she was at home with her brother PW4 and her father (Appellant). The appellant had had an altercation with his wife (Mother to PW3 and PW4) and sent her away, then told PW4 to go stay at a friend's house. He was left with the complainant. When the complainant went to sleep, the appellant called and took her to his room. She stated that he placed her on his bed and defiled her twice. It is her testament that she stayed in his room till the following morning and PW4 found her in the appellant's room when he came back in the morning. PW4 is the brother to the complainant and the appellant is his father. His evidence corroborates that of the complainant as to what transpired on the material day. He testified that indeed on that particular day, his parents had a disagreement and the appellant sent their mother away. He prepared supper and after eating the appellant sent him to sleep at a friend's house which he did. He stated that he went to the neighbour's homestead and found his step mother there, where they both stayed the night. His evidence confirms that the complainant and the appellant spent the night together alone on the material date. He further stated that he found the complainant on their father's bed the following morning when he went back home. On trying to wake her up, she looked ill. That was when his stepmother came into the house and he left. PW1 is a Clinician attached to Mogotio Sub County medical facility who testified that he attended to the complainant on the 9<sup>th</sup> of January, 2015. On examination he stated to have noted that the complainant looked sickly, had a high fever, her pubic region had bruises on the labia majora as well the labia minora. He confirmed to the trial court that he also noted that her hymen was broken and had a foul smelling puss oozing from her vaginal cavity. On further examination she was found to have numerous puss cells and epithelial cells which indicated trauma and infection. She was admitted at the facility for a day after which she was referred to the Nairobi Women's Hospital. He formed the opinion that the complainant had been defiled. The appellant is a father to the complainant as was brought out before the trial court by PW3 and PW4 as well as PW2 who confirmed that she was the mother of the complainant and the appellant was her biological father. PW2 testified that she had differed with her husband over allegations that he had children with another woman and she left her matrimonial home for her parent's place. The appellant throughout the trial and especially his defence never disputed that the complainant was his biological child. He never cross examined the complainant and chose to say nothing during the defence hearing and said nothing in mitigation as well. The evidence adduced against the appellant before the trial court is overwhelming and remained unshaken. It is also noteworthy to highlight that the trial court in its judgement noted that the appellant was not remorseful. I humbly urge this court to dismiss this appeal.”

### **Issue for determination**

8. As a first appellate court (see **Okeno v. R** (1972) EA 32), this court has a duty to re-evaluate the evidence before the trial court, giving allowance that it did see or hear the witnesses, to determine for itself whether the facts of the case disclosed an offence perpetrated by the appellant; before considering whether the conclusion of the trial court in the judgment subject of this appeal is to be upheld or otherwise.

### **DETERMINATION**

#### **Right to fair trial upheld**

9. This matter is a remarkable case of the observance of the immutable and inviolable fair trial guarantee of Article 25 (c) of the Constitution and the particular fair trial rights of Article 50 (2) of the Constitution (i) **to remain silent and not testify during proceedings**; (k) **to adduce and challenge evidence**; and (l) **to refuse to give self-incriminating evidence**.

10. The appellant was after every witness called by the Prosecution invited to cross-examine the witness and the record shows that the appellant chose not to ask any questions save for a couple of questions against his son B (PW4) and the Investigating officer PW5. His statement when placed on his defence was terse two sentences that “*I have nothing to say concerning this case.*” and he did not make any statement in mitigation despite invitation by the court. Failure to take benefit of the rights to fair trial despite invitation to do so by the court cannot be held to be a denial of those rights.

### **Hearing of the case**

11. The court has examined the record of proceedings in the trial court and noted that the trial court conducted the trial with scrupulous observance of the rights of an accused. The trial started on 13.02.2018 following arrest of the appellant following his absconding from previous trial for the same offence in Cr. Case No.21/15 **Rep. vs. SKK** where four witnesses had testified with only one witness the investigating officer remaining, and the trial court was justified in denying him bail in this case on the ground that he is likely to abscond going by his previous conduct. When the matter came for trial on 15.03.2018, the accused indicated that he needed time to get an advocate, and as the DPP was also not ready to proceed the trial court ruled that “**Both sides are not ready to proceed [and] Hearing [was] adjourned to 11.04.2018.**” In the meantime, the appellant was on 04.04.2018 the Court Prosecutor supplied statements, and the accused confirmed that he had received the same and hearing was confirmed for 11.04.2018 when upon both Prosecutor and the Accused confirming that they were ready to proceed the trial went on with the five prosecution witnesses testifying, and upon the appellant being placed on his defence, the defence hearing was subsequently had on 24<sup>th</sup> May 2018.

### **The Evidence**

12. The Prosecution’s case was given by five witnesses who testified in the trial court, as shown on the Record as follows:

PW1 Winrose Kigen clinical officer Mogotio Sub-County Hospital. My registration No.4473. I have a treatment chit from our facility for a minor aged six years old from Ngusero. She was seen on 9<sup>th</sup> January, 2015 by myself. She was brought to the Hospital by her mother having history of being defiled by her father on 4<sup>th</sup> January, 2015 night in absence of the mother. On plan. She was sick looking and high temperature. She was tender on pubic region and hip joint. On her genitalia, I found bruises on the pubic and bruises on labia majora and labia minora. Her hymen was broken and she had foul smelling pus from her vagina. Lab tests done here.

Hours which showed numerous pus cells and epithelial cells. These indicate trauma and infection.

HIV and VDRL were both negative. I concluded she had been defiled. I gave her antibiotics and admitted her for one day I referred her to Nairobi Women Hospital.

I produce the treatment chit and P3 form as exhibits.

Treatment card – exh.1

P3 forms – exh.2

From the P3 form approximate age of injury was five days. I formed an opinion of defilement.

I can see a letter from Nairobi Women Hospital.

#### Cross Examination by accused

No qsns [questions.]

PW2 SY, the complainant’s mother:

I stay in [Particulars Withheld]. I work in a butchery. On 4<sup>th</sup> January, 2015 I was in [Particulars Withheld]. I was called later by a doctor from Mogotio and told that F my last born had been defiled. I had left her in Ngusero with their father SK. I differed with S my husband about a year before this incident and left the children with him then went to my parents. When I received the call, I went to Mogotio but learnt the child was in Nairobi Women and found the child and the doctor and the accused current wife. The child was traumatized and very sick. She was admitted in Hospital for almost one week. She was then taken to a Children’s Home welcome to the family where she still stays. J was born on 21<sup>st</sup> September, 2008. This is her clinic card. I produce it as an exhibit – exh.3.

The accused is her father (biological).

Court

Accused identified by the witness. I got married to him in 1999.

Cross examination by accused person

I have no question.

PW3 Voire Dire

**Habari yako?**

AJ

**How old are you?**

Ten.

**Where do you live?**

Welcome to the family.

**Do you go to school?**

I do in std.3.

**Do you go to Church?**

Yes Catholic.

**Are lies good?**

No liars will go to hell.

**Do you know the President of Kenya?**

Yes Uhuru Kenyatta.

**Do you know what oath is?**

Yes, its telling the truth by calling out God's name.

Court

**Though child is young she is intelligent and she understands importance of telling the truth and nature of oath she will be sworn in.**

PW3 the complainant

I am AJ. I stay in Welcome to the Family Children's Home. I go to [Particulars Withheld] road Primary School std.3. I know we are in court. On 4<sup>th</sup> January, 2015 I was at home with my brother BL and my step-mother (M) and dad. Dad sent away my mother after a dispute and I remained with him and B. He told B to go and stay with his friends so B went away.

It was at night so I was with dad. I went to the place I usually sleep with my brother; Daddy called me to his bed room and I went to see what he wanted. He akatoa dudu yake ya kukojoa na akaingisha kwa yangu. He placed me on his bed and lifted my dress and then removed my panty. He removed his trousers. It was dark but I know it was dad because he is the one who called me out to his bed room. After that he told me he will kill me if I ever tell anyone. I was crying because of pain. I then dressed when he finished. He then inserted his thing in mine again and he refused to let me go back to my room.

I slept on his bed till morning when dady left. B came and found me very weak in bed. He woke me up and left. My step-mother came and took me to hospital. I know I was taken to two hospitals but I don't know the 1<sup>st</sup> one. I wasn't taken to hospital immediately after telling my step-mother.

Court

Accused identified by the witness.

Cross examination by accused

No questions

PW4 Male Child – Voire Dire

**What's your name?**

BK

**Where do you stay?**

[Particulars Withheld] .

**Do you go to school?**

Yes Kiplombe std.7.

**Are lies good?**

No liars will go to hell.

I don't know what oath is

Court

He is intelligent, he understands importance of telling the truth and not meaning of oath. He will give unsworn evidence.

PW4 BK, a child said:

I stay in [Particulars Withheld] I am in std 7. On 4<sup>th</sup> January, 2015 I was living with dad SK and step-mother S and J my sister in [Particulars Withheld] . Dad came in the evening and quarrelled with step-mother. She left home so I cooked supper. Dad told me to go and sleep at my friend's house so I left leaving my sister and father. I found my step-mother there so both myself and step-mother spent the night at our neighbours. In the morning I went home and found J on my dad's bed I called her out to wake up but she looked sick. My step-mother came and I went out. Its only one day later when my step-mother told me J had been raped and she wants to take her to hospital.

J was walking with feet apart that day.

That's dad.

Court

Accused identified by the witness.

Cross examination by accused

That night I slept at our neighbours place. It wasn't the 1<sup>st</sup> time for me to do so.

Re-examination

There are some nights I used to sleep at the neighbours house. You told me to go and sleep at my friend's house that night.

PW 5 No. 93415 PC Teresiah Adupu of Railway Police Station.

In January, 2015 I was working in Mogotio Police Station. I am the investigation officer in this case on 09.01.2015 a case of incest was reported at Mogotio Police Station and the OCS allocated it to me. I went to Mogotio Sub-County Hospital where the victim was admitted and I found her in serious condition. She was discharging pus in her vagina. I called officer from Nairobi women hospital who came and took the girl to that hospital for specialized care. I visited the child at Nairobi Women Hospital where she was admitted for five days. She was committed to Welcome to the Family Children's Home. **I recorded her statement and she said that on 4<sup>th</sup> November, 2015 her father who was drunk chased her step-mother from home at night and he also ordered Brian the son to go and sleep at friend's place which the boy did.** The accused then called the child to his room and defiled her severally on his bed and told her never to tell anyone lest he kills her. Her condition worsened and her step-mother took her to Mogotio Hospital. The step-mother said her life was in danger so she couldn't record statement and that's why she couldn't take the child to hospital in time because the accused is her husband and he threatened her. We arrested the accused person herein in a lodging in [Particulars Withheld] and I charged him in court i.e on 9<sup>th</sup> January, 2015.

*He's a person I never knew before. The lady he was with in a lodging said he's called S. The child and his mother also identified him.*

Court

*Accused identified by the witness.*

Cross examination by accused person

*I found you in lodging with a woman after I was given a tip off.*

Re-examination by Prosecutor

*No re-examination."*

13. When put on his defence, the appellant gave a sworn statement as follows:

**DW1**

*"I am SK. I stay in Emining. I trade in cattle. I have nothing to say concerning this case."*

**Conviction**

*Proof of penetration*

14. The child testified with clarity the assault by her father as follows:

*"Daddy called me to his bed room and I went to see what he wanted. He akatoa dudu yake ya kukojoa na akaingisha kwa yangu. He placed me on his bed and lifted my dress and then removed my panty. He removed his trousers. It was dark but I know it was dad because he is the one who called me out to his bed room. After that he told me he will kill me if I ever tell anyone. I was crying because of pain."*

15. Clinical officer (PW1) examining the child on 9/1/2015 found, as recorded in the treatment notes PEX 1 -

*"Tenderness at the supra-pubic region and hip joint; Bruises on the pubis, labia minora/majora & inflammation. Hymen torn. Pus oozing from vagina foul smelling investigations pus swab Microscopy pus cells and epithelial cells".*

16. The appellant did not seek to challenge this evidence by cross-examination of the child, although this was within his rights. Penetration is proved.

*Proof of relationship between the accused and the victim, and age of the victim*

17. PW2 the mother of the complainant testified that the victim was their biological daughter with the appellant and produced a child health card indicating the appellant as the father of the child and her date of birth as 21/9/2008. The appellant did not question the witness to challenge his paternity of the child, or of his knowledge of the relationship with the complainant. Section 22 (3) of the Sexual Offences Act gives the accused the burden of proof as want of knowledge of the relationship follows:

*"(3) An accused person shall be presumed, **unless the contrary is proved**, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest."*

18. The complainant PW3, her mother PW2 and her brother PW4 all testified that the appellant was the father of the child. The appellant did not challenge the evidence that he was the father of the child by cross-examination of the mother or otherwise. I find the appellant's relationship with the child as father and child proved.

19. The age of the victim of an offence of incest, unlike defilement, is only significant to the extent that in the case of the enhanced sentence under the proviso to section 20 (1) of the Sexual Offences Act, the victim must be shown to have been a child within the meaning of the Children Act. Whether the child herein was shown to be **6 years** as charged or **7 years** as submitted by DPP; **6 years 3 months** by accurate arithmetic calculation from date of birth on the Clinic Card on 21/9/2008 to date of offence on 4/1/2015, or **8 years** in the opinion of the trial court probably counting down to the date of trial in 2018 (see Judgment of 27/6/2018 above), she remained well below the age of 18 years, and was, therefore, a child for purposes of the section 20 (1) Proviso of the Sexual Offences Act, and no prejudice can be shown in terms of section 382 of the Criminal Procedure Code to warrant the setting aside of the conviction of the appellant on the ground of proof of age of the child victim of the incest.

***Alleged contradictions in Prosecution evidence***

20. In his submissions on the appeal, the appellant has sought to challenge the conviction on fictitious claim of contradictions in the

prosecution evidence as to the name of the complainant and the date of offence, and alleged gaps in failure to call crucial witnesses.

#### *Name of the complainant*

21. The appellant claimed that the mother of the child victim had testified as to her daughter being called *F*. A perusal of the handwriting of the word *J* in the testimonies of the complainant PW3 and the mother PW2 in the original handwritten record is in the same shape. The appellant was present during the entire trial and he knew that the witness did not refer to any child by name *F* and that the name is a mistype of the name *J*. The submission is, therefore, mischievous. There is no merit in the objection to the competency of the charge and credibility of the evidence based on the difference in the names *J* and *F* as urged in the appellant's submissions.

#### *Date of the offence*

22. The question whether the offence is said to have taken place on 4<sup>th</sup> November 2015 or 4<sup>th</sup> January 2015 is resolved by reference to the charge particulars and the testimony of the witnesses as recorded in the proceedings. The particulars of the charge give the date of the offence as 4/1/2015. PW1 the clinical officer stated that she examined the child on the 9/1/2015 which she said was five days after the sexual assault. PW2 the mother of the child said she had been informed by the hospital about the daughter's presentation for treatment on the 9/1/2015. PW3 the complainant her-self gave the date of assault as 4/1/2015. PW4 the complainant's brother also gave the date of the incident as 4/1/2015. It is the investigation officer who although giving the date of the report at the police station as January 2015 is recorded in the course of his testimony to have said "I recorded her statement and she said that on 4<sup>th</sup> November, 2015 her father who was drunk chased her step-mother from home at night and he also ordered B the son to go and sleep at friend's place which the boy did." A perusal of the original handwritten proceedings of the trial court indicates the date given in the short date format as 4/1/2015, with an emphasis in the ink on the slash (/) between the month and the year parts of the date making it appear as 11 therefore typed in long format as. There is no reference to date of 4/11/2015 in short format or in long format 4<sup>th</sup> November 2015 anywhere in the proceedings and in fact the date of arrest and charge is given as 9/1/2015, as follows:

*"We arrested the accused person herein in a lodging in [Particulars Withheld] and I charged him in court i.e on 9<sup>th</sup> January, 2015."* [in original handwritten record as 9/1/2015]

23. The claim, therefore, that the charge is defective for reason of discrepancy as to the date of the offence between the particulars of the charge and the evidence adduced is rejected as unmeritorious.

#### *The Investigator as arresting officer*

24. The wisdom in not having the arresting officer as the Investigating Officer is to secure, in my view, that the investigation and subsequent prosecution is not clouded by the information already in possession of the Investigation Officer as a witness to the circumstances of arrest. That danger, however, did not arise in this case as the Investigation Officer was merely instructed to investigate the case of alleged incest by the OCS whereupon she commenced investigation into the matter by visiting the girl in hospital. The Investigation Officer is not shown to have been in possession of any prior information on the matter as would prejudice her investigation into the matter.

25. The statement of the Investigation Officer that "We arrested the accused person herein in a lodging in [Particulars Withheld] and I charged him in court i.e on 9<sup>th</sup> January, 2015", does not indicate that the investigation officer was **also** the arresting officer. And in this case, no prejudice has been alleged or demonstrated with regard to his arrest. The evidence tending to prove the appellant's involvement in the crime is not given by the arrest or circumstances of arrest but on the testimony of the child, her brother and the examining clinical officer. I reject the appellant's objection in this regard.

#### *Uncalled witnesses*

26. No number of witnesses is required to prove a fact. Section 143 of the Evidence Act is clear that –

**"143. Number of witnesses**

*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

27. That M, the appellant's wife was not called as a witness is explained by the Investigation Officer's testimony that the said witness could not come to testify because she had been threatened by the appellant. In view of her marital relationship with the appellant, the appellant's wife although a competent and compellable witness under section 127 (b) of the Evidence Act against the appellant as he is charged with an offence under the Sexual Offences Act, it is understandable that the Prosecution was not able to secure her testimony for the reasons given by the Investigation Officer that -

***"The step-mother said her life was in danger so she couldn't record statement and that's why she couldn't take the child to hospital in time because the accused is her husband and he threatened her."***

28. The Prosecution's case was, however, not poorer by the want of the evidence of the appellant's wife. The clinical officer PW1, the complainant herself PW3, her mother PW2 and brother PW4 all confirm that the complainant was taken to hospital by the appellant's wife. The adverse inference for failure to call a witness or adduce certain evidence arises only where the evidence then adduced is barely adequate, unlike in this case where there is ample alternative evidence. See *Kingi v. R* (1972) EA 280 (Sir James Wicks, CJ and Simpson, J) and *Bukenya & Ors v. Uganda* (1972) EA 549 (Court of Appeal, Spy Ag. P. Lutta, Ag V.P and Mustafa J.A.), *Nguku v. R* (1985) KLR 412 and

29. There is no merit in the submission that the two women, the complainant's mother and the step-mother M, had ganged against him to trump up the charges in view of his being found at a lounging with another woman. That is a matter of evidence which the appellant could only adduce by testimony before the trial court, which he did not do. In addition, it is improper use of written submissions to adduce Evidence. See decision of the Court of Appeal (Nambuye, Ouko and Kiage, JJA.) in ***Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited*** [2014] eKLR that –

*“there shall be **no evidence by submissions** – that is, attaching to the written submissions filed in a matter evidence which ought to have been put in evidence by affidavit or oral testimony is invalid way of production of evidence.”*

And this defence allegation of trumped charge by his two disgruntled wives does not, in any event, explain the corroborative evidence of his daughter PW3, the son PW4 and the medical findings of PW1 establishing the sexual defilement.

30. In this case, the evidence adduced by the Prosecution is consistent and overwhelming, and unanswered by any evidence or challenge thereon as to raise any reasonable doubt that the appellant committed the offence of incest against his daughter herein aged slightly over 6 years at the time of the offence. The offence of incest contrary to section 20(1) of the Sexual Offences Act has been established against the appellant as charged.

### **Sentence**

32. The penalty for incest in case of a child victim aged 18 years is prescribed under section 20 (1) Proviso of the Sexual Offences Act as follows:

#### **“20. Incest by male persons**

*(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:*

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

33. In judicial acceptance of the phrase “shall be liable” (see ***Opoya v. Uganda (1967) EA 752***) the sentence of imprisonment for life in the proviso to section 20 (1) in cases where the victim is a child is a **maximum** sentence. This court had opportunity to consider the sentence in a similar case of incest where the victim was aged 9 years and 10 months appellant was as a first offender in KBT Criminal Appeal No. 22 of 2018, ***Peter Kipsoi Cherogony v. Republic*** of 6<sup>th</sup> May 2020, as follows:

*19. The appeal from sentence succeeds in that section 20 (1) proviso of the Sexual Offences Act only sets out the **maximum** sentence for which the offender in the offence of incest by male where the victim is a child below the age of 18 years. As held in ***Opoya v. Uganda (1967) EA 752***, the phrase “shall be liable” used in the Proviso provides the **maximum**, and not **mandatory**, penalty and the trial court in this case, with respect, fell into error in sentencing the **first offender** herein the **maximum** penalty. See ***Arissol (Josphine) v. R (1957) EA 447, 449*** and ***Wanjema v. R (1973) EA 493, 494***.*

*20. The court, however, takes a serious view of the matter considering the tender age of the victim who was 9 years 10 months at the time of the offence, and of the fact that incest on a child is just **defilement** by a relative, and a relative offender should not suffer any lighter sentence than would be imposed on a non-relative. Indeed, it should be more severe to deter so minded relatives who have ready access, and therefore ample opportunity, to defile the children.*

### **Orders**

*21. Accordingly, for the reasons set out above, pursuant to section 354 (3) of the Criminal Procedure Code, the appellant's appeal from conviction for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 is dismissed.*

*22. However, pursuant to section 354 (3) (b) of the Criminal Procedure Code, the sentence of life imprisonment shall be reviewed to **imprisonment for twenty (20) years** for the offence of incest by a male under section 20 (1) of the Sexual Offences Act herein committed by the first offender appellant on a child aged 9 years and 10 months.*

*23. The sentence of imprisonment for twenty (20) years shall commence pursuant to section 333 (2) Proviso of the Criminal Procedure Code on **19<sup>th</sup> December 2017**, when the appellant was first remanded to await his trial.”*

34. In this case, in view of the very **innocent age of the victim at only 6 years 3 months, the circumstances of the offence where the appellant father who chased away the mother and step-mother of the child, leaving him the sole protector and care giver of the trusting daughter, and the trial court's observation of lack of remorse on the part of appellant**, the appellant is disentitled to the benefit of first offender consideration to a sentence shorter than the maxim prescribed. The court does not find any reason to interfere with the sentencing discretion of the trial court on the principle in ***Wanjema v. R (1971) EA, 493, 494***. I consider the severe deterrent sentence of

imprisonment for life to meet the justice of the case.

**Orders**

35. Accordingly, for the reasons set out above, the appellant's **appeal from conviction and sentence** in the Judgment of the trial court dated **27<sup>th</sup> June 2018** herein is without merit and the same is dismissed.

*Order accordingly.*

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF AUGUST 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in Person.

Ms. Kitilit Cheyech, Prosecution Counsel for the Respondent.