REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 8 OF 2020

NMM.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Kangundo Senior Principal Magistrate's Court Criminal Case No. 3 of 2017, Hon. M Opanga on 6th January, 2020)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

NMM.....ACCUSED

JUDGEMENT

1. The appellant, **NMM**, was charged before the Senior Principal Magistrate's Court at Kangundo with the offence of Incest contrary to Section 20(1) of the ***Sexual Offences Act No 3 of 2006*** the particulars being that on the 13th day of January, 2017 at [particulars withheld] Village in Matungulu sub-county within Machakos County being a male person caused his penis to penetrate the vagina of **TWM**, a female person who was to his knowledge his daughter. Alternatively, he faced a charge of Committing an Indecent Act to a child contrary to **Section 11(1)** of the said Act, the particulars being that he on the said date at the same place intentionally touched the vagina of **TWM**, a child aged 13 years with his penis.

2. In this case, PW1 testified that she was born on 7th August, 2003 based on her Child Care Card which she identified. On the 13th January, 2017 the appellant who is her father woke her up and told her to go with him to his bed. When she refused, he threatened to beat her up. On that day the appellant had quarrelled with her mother and chased her away. The appellant told her to sleep with him for him to forgive her for the Kshs 2000/ she had stolen to buy books. It was her evidence that the Appellant took a stick, took her to the sitting room and threatened to beat her up, burn her fingers and hand her on the roof. She added that when she told the appellant she wanted to go for a short call, the appellant held her hand and led her to the outside toilet and beat her again. The appellant took her back into the house, and despite her struggle, took her clothes off, while complaining that she was delaying him yet he was getting late to go for work. The appellant then unzipped his trouser, removed his penis and defiled her. According to the Complainant though she struggled the Appellant was stronger than her.

3. In the morning the Appellant woke up and took a shower to go to school but her mother who had spent the night at her grandmother's returned and she narrated to her what had happened. The mother then reported the matter to Tala Police Post and she was referred to Kangundo District Hospital where the P3 form she had been issued with was filled in after he was treated. A PRC Form was similarly filled in after she was examined and treated. It was her evidence that that was the second time the Appellant was defiling her and that the Appellant had threatened to harm her if she disclosed the same.

4. On 13th January, 2017, PW2, a carpenter was at the Assistant Chief's office when a woman arrived with the Appellant's daughter and reported that the Appellant had defiled her daughter. According to him, they were required to take the girl to the Health Centre. The next day,

the Assistant Chief called and told him that the Appellant had resurfaced from his hiding where he was after committing the offence. According to the witness they found the Appellant at the nearby centre and when he called the Assistant Chief, the Assistant Chief told him that he was far away. He then called the Senior Chief who went with the police and arrested the Appellant. According to him, he did not know the name of the woman who was with the girl but stated that the woman was not the girl's mother. According to him he arrested the Appellant on 14th January 2017.

5. PW3, **Brigit Kawinzi**, a clinical officer at Kangundo Level 4 Hospital testified that the Complainant was seen at the Hospital on 18th January, 2017, 3 days after the incident, with a history of defilement on 13th January, 2017 at around midnight and reported the recurrences of similar episodes by the same person since August, 2016. Upon examination, she was found to be in fair general condition. She however had several healing bruises on her upper limbs and that the type of weapon used was blunt. She had been treated at Nguluni Health Centre on 13th January, 2017. Upon her further examination, pregnancy test was negative but urinalysis revealed infections though there was no spermatozoa. The external genitalia was normal but she had a foul smelling discharge with a long standing tear. In her opinion there was no spermatozoa because of the infection noted on urinalysis and the tear of the hymen. She produced the treatment notes, the P3 form and the PRC form as exhibits. In cross-examination the witness stated that the witness disclosed that she knew the person who had defiled her.

6. PW4, **Cpl James Miano,** the investigating officer received the report of the incident on 13th January, 2017 when the complainant and her mother reported the incident in the company of a village elder, PW2, having been referred to Tala Police Post from Nguluni AP Camp. The report was that the Complainant had been defiled by her father. PW4 recorded the report and referred them to Nguluni Hospital where the Complainant was treated after which she was given a P3 form which was filled in at Kangundo Hospital. PW4 recorded al the statements but the Appellant disappeared after the offence. And was arrested on 14th January, 2017. Upon the completion of the investigations these charges were preferred against the Appellant after the Appellant was positively identified. According to PW4, the mother of the Complainant refused to attend the Court and her residence was unknown.

7. Upon being placed on his defence, the Appellant testified that the Complainant was his daughter. According to him, his wife ran away from home. On 13th January, 2017, he was at home. he however contended that the charges against him were fabricated and false. It was his evidence that he had a road traffic accident wherein he had claimed damages.

8. By her judgement delivered on 6th January 2020, the learned trial Magistrate found the evidence of the complainant truthful. She found that the Appellant committed incest with the Complainant as well as indecent act. It was also proved that the Complainant was 13years old at the time of the commission of the offence having been born on 7th August, 2003. According to the Court the presence of an infection was evidence of penetration as well as the long standing tear and the foul smell. The Court therefore returned a verdict of guilty on both counts. And proceeded to sentence the Appellant to 10 years in each count to run concurrently. *It is that decision that provoked this appeal in which the* Appellant has raised 8 grounds of appeal. However, as appreciated by the Appellant's Counsel, **Mrs Nyaata** there are three issues which arise for determination by this Court, and these are:-

a. Whether the evidence on record met the threshold to convict the appellant herein of the offence.

b. Whether the facts fit the ingredients of offences charged.

c. Whether the sentence fits the crime convicted.

9. After setting out the principles guiding this Court's first appellate jurisdiction, it was submitted that it was submitted that the evidence the court relied upon to convict the appellant was tendered by the victim, the chief, the doctor and a policeman. However, the only alleged direct evidence is that of the victim while the other witnesses gave circumstantial evidence. As regards the latter, the Appellant relied on **Sawe vs. Republic [2003] eKLR.**

10. It was however submitted that the evidence of the victim was not corroborated by the mother even after she was listed as a witness. Similarly, the medical report proved penetration but it did not in any way link the penetration to the accused.

11. In regard to the second question the appellant submitted that the facts of the case do not fit the offence of incest as described in **section 20 (1) of the *Sexual Offences Act.*** While it was conceded that that the Appellant *is the father of the complainant, the Appellant did not penetrate or attempt to penetrate the complainant and it was submitted that the evidence of penetration only emanated from the Complainant and the doctor. However, t*he doctor's findings did not connect the accused to the offence as he merely testified there were no spermatozoa on the complainant's, that she had an infection and that this examination was done three days after the alleged incident. According to the Appellant, the absence of the appellant's spermatozoa on the complainant's genitalia is evidence that the penetration was not caused by the appellant and further, the doctor did not examine the appellant to investigate whether he had the said infection which he allegedly transmitted to the complainant. This fact, it was submitted, solidifies the appellant's innocence. While appreciating the medical evidence, it was contended that it fell short of connecting the Appellant to the injuries on the complainant since he Doctor's findings did not connect the date of the alleged incest of the Complainant with the age of the injuries noted. In this regard the Appellant relied on ***Ben Maina Mwangi vs. Republic [2006] eKLR*** in which the High Court allowed an appeal on similar grounds holding that the doctor's findings did not connect the accused with the offence.

12. It was submitted based on case of **Woolington -vs- DPP (1932) AC 462,** that from the facts and evidence before the trial court, the appellant created a reasonable doubt about his guilt and should have been given the benefit of doubt and acquitted. It was submitted that it is trite law that the prosecution evidence should be credible and watertight but in this particular matter, the evidence by the prosecution witnesses is wanting and does not meet the threshold to convict the appellant herein of the offence of incest.

13. According to the Appellant, this matter was precipitated by a long standing domestic misunderstanding between a wife and a husband (the appellant) as well as the desire by the wife to be paid the compensation which was due to the Appellant in an upcoming injury

compensation award which she intended to be paid to her in his absence. It was contended that the investigation officer did not conduct proper investigations to ascertain or disprove this claim by the accused yet the absence of the wife as a witness even when she was listed in the charge sheet, cemented this claim. Though the Appellant sought to cross-examine her on the issue, his request was declined. According to the Appellant had his requested been acceded to the doubt he raised would have been confirmed. In the Appellant's view, in criminal cases, when the defense creates a believable doubt against the prosecution case or evidence, the benefit of such doubt has to be given to an accused person, the result of which is an acquittal. The learned magistrate should therefore have given him the benefit of doubt and acquitted him on the authority of the cases of **F N M vs. Republic [2016] eKLR** and **M K M v Republic [2018] eKLR**.

14. The Court was urged to allow this appeal be allowed, set aside the conviction and quash the sentence.

15. In opposing the appeal, the Respondent submitted that the minor in his testimony stated that the appellant is her father, an allegation which was not disputed by the Appellant. As regards the Complainant's age it was submitted that the prosecution through PW4 produced a birth card of the complainant as evidence. According to the birth card, the complainant was born on 7th August, 2003 hence placed the complainant at the age of 13 years at the time of the offence.

16. As to whether penetration was proved, it was submitted that penetration according to Section 2 of the ***Sexual Offences Act*** is partial/complete insertion of the genital organs of a person into the genital organs of another person. Reliance was placed on the evidence of PW1 and PW3 and on the authority of **George Owiti Raya vs. R [2013] 2 KLR** and **Mwangi vs. Republic [1984] KLR 595,** it was submitted that there was penetration of the complainant's genital organ.

17. As to whether penetration was occasioned by the accused, it was submitted that the appellant was a person known to her as he is her father. The appellant defiled her during the night of 17th January, 2017 therefore there was no possibility of mistake in identification.

18. Regarding corroboration, the Respondent relied on Section 124 of the ***Evidence Act*** and contended that from the evidence, nobody else was in the room but the minor and the appellant, the Complainant's mother having been chased away by the appellant, which the appellant did not dispute. On examination the doctor noted that her hymen had a long-standing tear and there was foul smelling discharge. Reliance was placed on **Mohamed vs. Republic [2006] 2 KLR 138, Chila vs. Republic (1967) EA 722 at 273 and Moses Nato Raphael vs. Republic [2015] eKLR** and it was submitted that **the court once satisfied that the complainant is telling the truth there shall be no need for corroboration and the evidence brought against the appellant was enough to warrant a conviction for a charge of incest.**

19. In light of the foregoing, it was submitted that the Appellant has not raised sufficient grounds to warrant this court to interfere with the sentence and conviction by the trial court hence this appeal should be dismissed and the court to uphold both the conviction and sentence of the trial court.

Determination

20. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

21. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. 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 witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

22. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

23. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

> **1. An Appellant on a first appeal 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.**

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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 witnesses.

24. However as held by **Mativo, J** in **Sylvester Wanjau Kariuki vs. Republic [2016] eKLR**, a decision in which he cited the decision of the Supreme Court of India in **K. Anbazhagan vs. State of Karnataka and Others Criminal Appeal No. 637 of 2015:-**

"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

25. Section 20 of the **Sexual Offences Act** provides as follows:

(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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

26. In this case there is no doubt as regards the age of the Complainant. It is clear that the Complainant was aged below 18 years and this was confirmed by the Child Health Card.

27. In explaining the distinction between the offence of defilement and incest, **Majanja, J** in **F O D vs. Republic [2014] eKLR** held that:

"While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

28. It is therefore clear that in order to prove incest the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other words, once there is evidence of indecent act, penetration is not necessary. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

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

29. "Indecent act" on the other hand means an unlawful intentional act which causes-

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

(b) exposure or display of any phornographic material to any person against his or her will.

30. What it means is that even in the absence of penetration as legally defined under the ***Sexual Offences Act***, where there is evidence of contact between any part of the body of the accused with the genital organs, breasts or buttocks of the complainant, the other ingredients of the offence being satisfied, commission of sexual offence may still be proved. In this case the complainant's evidence was that on the night in question, the Complainant's mother quarrelled with her father, the Appellant and the children were left alone with the Appellant. At night the Appellant woke up the Complainant, and told her to go with him to his bed. When she refused, he threatened to beat her up. The appellant told her to sleep with him for him to forgive her for the Kshs 2000/ she had stolen to buy books. It was her evidence that the Appellant took a stick, took her to the sitting room and threatened to beat her up, burn her fingers and hand her on the roof. She added that when she told the appellant she wanted to go for a short call, the appellant held her hand and led her to the outside toilet and beat her again.

The appellant took her back into the house, and despite her struggle, took her clothes off, while complaining that she was delaying him yet he was getting late to go for work. The appellant then unzipped his trouser, removed his penis and defiled her. According to the Complainant though she struggled the Appellant was stronger than her.

31. The Appellant has submitted that there was no evidence of penetration. In this case, the examination of the Complainant revealed several healing bruises on her upper limbs, infections though there was no spermatozoa with a foul smelling discharge and a long standing tear. In the case of **George Owiti Raya vs. Republic [2013] eKLR** it was held:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."**

32. It follows that the existence of the foul smelling discharge and a long standing tear was sufficient for the purpose of a finding of penetration even in the absence of spermatozoa since as was held in **Mwangi vs. Republic [1984] KLR 595** at 603, the Court rendered itself thus:

> **"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."**

33. An issue was taken with the failure to have the Appellant examined. However as held in **Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR**;

> **''As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.''**

34. According to the Appellant, this matter was precipitated by a long standing domestic misunderstanding between a wife and a husband (the appellant) as well as the desire by the wife to be paid the compensation which was due to the Appellant in an upcoming injury compensation award which she intended to be paid to her in his absence. From the evidence on record, all that the Appellant said was that he had a road traffic accident case wherein he claimed damages. He did not elaborate further as to how that case was connected with the charges facing him. As regards the disagreements between him and his wife, the said wife did not even testify against him and on the day of the alleged defilement, she was not even at home having been chased away by the appellant. While one may give the Appellant the benefit of doubt as regards his wife, the medical evidence proved that the Complainant was in fact defiled. That piece of evidence emanating from a third party could not have been fabricated.

35. Dealing with similar circumstances the Court in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** expressed itself as follows:

> **"I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father."**

36. According to the Appellant, though he sought to cross-examine her on the issue, his request was declined. According to the Appellant had his requested been acceded to the doubt he raised would have been confirmed. In **David Kariuki Mutura vs. Republic [2005] eKLR** it was held that:

> **"These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001, The Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately this what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant's complain that the Learned trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case."**

37. In **Gabriel Kimuhu Kariuki vs. Republic [2003] eKLR** the court opined as follows:

> **"... It is my holding therefore that although the prosecutor in this case in hand had a discretion to decide which material witnesses to call or not to call he had an obligation to call the three witnesses hereinabove mentioned. But if he did not do so, he should have made them available to the appellant to call them if he so chose to do. On the other hand, the trial magistrate had a duty to impress upon the prosecution of such a duty and call the witnesses itself if the prosecution failed to do so. And finally, in this case, it cannot be arguable that the prosecution need not have called the mentioned witnesses because it had called adequate witnesses. In fact, without calling the said witnesses, the prosecution barely had any adequate evidence on the record upon which it could prove its case. Failure to call them therefore was motivated by a greater negative reason like the fact that if he called them, their evidence would tend to be adverse to the prosecution case. I accordingly have to hold that the prosecution failed to call the witnesses mentioned above because their evidence would possibly exonerate the appellant."**

38. In **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal opined as follows:

> **"It is, to say the least, surprising that the prosecution chose not to call the watchman or offer him for cross examination. The trial magistrate did not consider the evidence about the watchman. That was a further misdirection. The trial court would have been entitled to presume that the evidence which the watchman would have given, which was not produced, would, if produced, be unfavourable to the prosecution who withheld it: R V Urberle (1938) EACA 58."**

39. The rationale for disclosure of material collected by the prosecution in the course of investigation was explained in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, where the Court of Appeal held that:

> **"The prosecution, at the beginning of his trial, supplied the defence with all the relevant material upon which they intended to rely. That was perfectly right because that material was gathered by the police using the resources provided by tax-payers among whom is the appellant. That material is not the personal property of the police and the police are under a legal duty to gather it on behalf of the public. Of course, no busy-body would be entitled to demand to see that material, unless there be some very good reason for such a demand. But the appellant was a party directly involved in the affair and as public property directly affecting him, he was entitled to. The police were under a legal duty to pass that material to the Attorney General and the Attorney General, who is, in all criminal cases, the prosecuting authority was bound to disclose it to the appellant before his trial and throughout the trial. If the Attorney General received any new information during the trial the Attorney General was bound by law to disclose it. This is because the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused."**

40. However, in this case, it was explained that though the Complainant's evidence was initially keen in coming to court, after the Appellant was released on bond, the couple disagreed and she was nolonger keen to testify and she could not be traced. In those circumstances, the prosecution cannot be accused of having failed to avail her or tender her to the defence.

41. On my part I have reconsidered the evidence tendered before the trial court and I find no reason to fault the finding by the trial court as regards the main charge. The night of the incident the Appellant was with the Complainant. This is not denied. The Appellant therefore had an opportunity to commit the offence. The Complainant stated that she was beaten and this was confirmed by the medical evidence. The same evidence confirmed penetration of her genital organs. Being related to the Appellant who was her father, there was no possibility of mistaken identity. The Court found that the Complainant was a truthful witness and it has not been shown that the said finding was contrary to the evidence.

42. However, the Appellant was charged with the offence of incest and an alternative count of indecent act. The learned trial magistrate clearly appreciated this in her judgement. However, she proceeded to convict the Appellant on both the main count and the alternative count. As was held in **I E vs. Republic [2016] eKLR**;

> **"The trial magistrate having found him guilty of the offences in the main count should not have made a finding in respect of the alternative counts. Alternative counts stand in only when the main count fails. He, therefore, erred in law in doing so."**

43. The Court of Appeal in **David Kiragu Thuo & 5 Others vs. Republic [2008] eKLR** restated that in law a person cannot be convicted on both the principal and alternative counts at the same time.

44. Accordingly, I set aside the sentence imposed on the Appellant on the alternative count of indecent act and quash the sentence thereon. I however affirm his conviction of the main count of incest as well as the sentence imposed thereon.

45. In computing the sentence, the period between his arrest on 14th January, 2017 and 17th July, 2018 when he was released on bond and from 8th January, 2020 todate is to be taken into account pursuant to section 333(2) of the **Criminal Procedure Code**.

46. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 16th day of December, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant present online

Mr Musyimi for Mrs Nyaata for the Appellant

Mr Ngetich for the Respondent

CA Geoffrey