REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 78 OF 2015

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 534 of 2014, **I M Kahuya, SRM** on 16th January, 2015)

JNM……..…..……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGEMENT

Introduction

1. The appellant, **JNM**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No 534 of 2014 with the three counts. The first count incest by male contrary to section 20(1) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on unknown day of March, 2014 at unknown time at [Particulars Withheld] village Yatta District within Machakos County, committed an indecent act by causing his penis to penetrate the vagina of **MN**, a girl under the age of 18 years whom to his knowledge, is his daughter. In the alternative, the appellant was charged with the offence indecent act contrary to section 11(1) of the same Act, the facts being that during the same period at the said place, he unlawfully and indecently touched the private part, vagina, of **MP**, using his penis, a girl aged 12 years.

2. The second count was that of creating disturbance and causing a breach of the peace contrary to section 95(1)(b) of the ***Penal Code***. The facts of this count were that the appellant on the 4th of April, 2014 at [Particulars Withheld] Village in Yatta District within Machakos County, created a disturbance and caused a breach of the peace by threatening to stub **WM**, after making a crime report at Katangi Police Patrol Base.

3. After hearing the appellant was found guilty of indecent act contrary to section 11(c) of the ***Sexual Offences Act*** and creating disturbances in a manner likely to cause breach of the peace contrary to section 95(1)(b) of the ***Penal Code.*** In respect of the alternative count he was sentenced to 20 years while in respect of count II he was sentenced to three months.

4. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1. That the appellant was convicted on an incurably defective charge sheet.**
>
> **2. That the Learned Trial Magistrate erred in law and fact by convicting him without considering section 214 of the Criminal Procedure Code.**
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> **3. That there was no medical evidence produced in support of the allegations against him before the court.**
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> **4. That the learned trial magistrate erred in law and fact by convicting him without the evidence of vital witnesses.**

5. In support of the prosecution's case the prosecution called 6 witnesses.

6. The first witness, PW1, was the complainant who after *voir dire* examination, gave evidence on oath. According to her, the appellant was her father and when she returned from school on the material day, the appellant told her other siblings, **M** and **M**, to go and fetch water. He then asked the complainant to get inside and remove her clothes but the complainant refused. The appellant then forcefully removed all the complainant's clothes, placed them on his bed, applied oil on both his and the complainant's private parts and lay on the complainant before getting up and dressing up. The appellant then washed the complainant as well as the complainant's blood-stained clothes, put them on the hanging line for them to dry. According to the complainant she felt pain in her private part.

7. According to the complainant, her mother, whom she identified as **JAW**, had gone to work. It was her evidence that her siblings returned at around 3.00pm after the incident and that the appellant had defiled her on three consecutive days and she had reported to her mother twice. After the incident they went to Katani Police Station where they reported the matter and she sought treatment at Katangi. According to the complainant she was not in good terms with the appellant who used to shout at her and her mother always.

8. WM, a casual labourer, testified as PW2. According to her the complainant was her daughter and on 28th March, 2014 at 5.00pm when she arrived home, the complainant informed, on condition that PW2 would not disclose the information, when she returns from school, the appellant used to send her siblings to fetch water after which he would strip her naked, place her on the bed, oil himself, before inserting his penis into her vagina which he had assured her would not be painful. Afterwards, the appellant would wash her clothes and bathe her. According to PW2, the complainant told her that the appellant had threatened to beat her up.

9. It was PW2's evidence that the complainant had informed her that the events had occurred a week earlier and on three occasions. PW2 then checked the complainant's private parts but did not notice anything suspicious. However the following week the complainant informed PW2 that the head teacher had summoned PW2 to school since the complainant had shown signs of sickness such as fatigue and lack of appetite. However instead of going to school, PW2 reported to the sub-chief, **Stephen Kisavi**, who promised that the appellant would be arrested since the appellant was not at home at that time. PW2 was then advised by the sub-chief to take the complainant to the hospital which PW2 did on 3rd at Katangi Health Centre, after reporting the incident to Katangi Police Post from where she was given a document to take with her to the Hospital. She was further advised to take the complainant to Machakos Hospital for further treatment which she did but the doctor informed her that nothing unusual could be detected due to the lapse of time.

10. It was PW2's evidence that the complainant was born on 7th December, 2003 and that the appellant was her husband and the complainant's father, who was the eldest amongst her 4 children. According to PW2, they had never quarrelled before with the appellant and upon asking the appellant about the allegations, the appellant denied and accused another child of the same. As a result of the matter, PW2 testified that she was thrown away by her mother in law and was putting up at her sister's place. However when the appellant realised that she had reported the matter, he threatened to beat up PW2. PW2 identified p3 form, clinic card and age assessment report which were marked for identification as PMFI 1, 2 and 3 respectively.

11. In cross-examination, PW2 disclosed that she is also known **WM**, the latter being her father's name and that J was her baptismal name. She however stated that she had not changed her ID to include the appellant's name and that they had not as yet gotten married according to the customary law. She however confirmed that the complainant was their daughter.

12. PW3, **Mutunga Ngumbi**, testified that he was the chairman of the local youth exhibition. In March, 2014, he received a call from their sub chief, **Stephen Kisavi**, that there was a suspect, the appellant, whom they believed had defiled his daughter, the complainant, and had fled the area. They kept watch over the appellant's home and in 2014, they spotted the appellant in his home. According to him, even the appellant's grandmother and his wife contacted them on the issue. It was his evidence that in the company of about 20 people, they arrested the appellant from his home at around 11.00pm on 3rd April, 2014 while the appellant was sleeping in his bed with a *panga* besides him. According to him since they feared that the appellant would become violent, some of his members restrained him and the sub chief advised them to take him to Katangi Police Post. According to PW3, the appellant was his cousin and a neighbour but they had never quarrelled.

13. In cross-examination, PW3 disclosed that the appellant fled a week after the offence.

14. PW3's evidence was corroborated by PW4, **Alphonse Wambua**.

15. PW5, **PC Kiplangat**, testified that on 2nd April, 2014, he was at Katangi Police Post when PW2 took her daughter, the complainant, with allegations that the father, **JN**, had defiled the complainant. PW5 then recorded their statements and issued them with a P3 form. On 4th April, 2014 at 1.00 am members of the public took the appellant to the Post, where PW5 received the appellant and charged him with the offences. By that time PW5 had recorded statements from the witnesses including PW2 who had reported that the appellant had threatened to stab her if she informed the police about the incident. PW5 however stated that the appellant did not stab PW2 and that he did not interrogate the appellant and only took the statements from the complainant and PW2.

16. PW6, **Michael Munyau**, was a doctor at Kitui District Hospital, who examined the complainant on 4th June, 2014 for the purposes of determining her age. From his assessment, she was 12 years old and produced the assessment report as PExh2.

17. Upon being placed on his defence, the appellant opted to give sworn evidence. According to him, during the material period, he was in Kombe area working and when he returned home he, as usual went to sleep. The following day he decided to saw logs in the nearby forest which he did and took them home, chopped the same into wood and went to bathe. As he was leaving the bathroom, he saw 7 men approaching him and they suddenly arrested him, took him to Katangi Police Post though along the way they sought bribe from him in order to set him free. According to the appellant all this time he was not aware of the reason for his arrest. He was later transferred to Masii Police Post and later charged before the court.

18. According to the appellant he was innocent and that the whole matter was fabrication by his wife due to bad blood between PW2 and the appellant's mother.

19. In cross examination, the appellant stated that on the material day he did not go to work because he had no materials and was alone in the house as his children had gone to school and his wife had gone to the river. According to him his wife is called **JW** and that he had no issues with her daughter and his wife hence they had no reason for them to lie in court.

20. In her judgement the Learned Trial Magistrate found that the appellant was the complainant's father hence they were in the category of prohibited degree as the issue was not contradicted by the appellant.

21. On the issue of penetration, the Learned Trial Magistrate found that there had been contact between the appellant's private parts and PW1's based on the complainant's credible evidence as corroborated by PW2 which evidence was not materially challenged by the appellant in cross-examination. However as the P3 form was not produced, the Trial Court found that it had been denied medical evidence that would conclusively determine whether there was penetration or not.

22. As regards the issue whether the appellant threatened to stab PW2, the court found based on the appellant's apprehension that he would be arrested, that this was the position. This position was based on the fact that it took some time for the appellant to be arrested hence explaining why PW2 was thrown out of her matrimonial home by the appellant's mother and also why they could not trace her thereafter to appear before the court. According to the Learned Trial magistrate, PW2 was fortunate to be alive.

23. As regards the defence, the Learned Trial magistrate found that the same was untrue and a scheme to escape liability since by denying the offence yet failing to cross-examine crucial witnesses over serious allegations made against him, the appellant placed himself at the scene of the crimes. It was due to this that the court found the appellant guilty.

24. In his submissions, the appellant contended that the charge sheet was defective and that he was convicted of an offence that did not appear anywhere in the charge sheet or the law. It was submitted that despite the defect in the charge sheet section 214(1) of the ***Criminal Procedure Code*** was not fully complied with. It was submitted that after the substitution of the charge sheet, the prosecution failed to recall PW1 and PW2 to give their evidence afresh in compliance with section 214(ii) hence the appellant's rights to a fair trial as guaranteed under Articles.

25. It was further submitted that section 124 of the Evidence Act was also violated since he was convicted without the evidence of PW1.

26. The appellant submitted hat in the absence of the medical evidence in support of the allegations against him in both the main charge and the alternative charge, there was no corroboration of the complainant's evidence.

27. It was further submitted that vital witnesses were not called to prove the prosecution's case. According to the appellant these were PW1, PW2, medical officer and the investigating officer. It was therefore submitted that the prosecution did not prove the charge against the appellant beyond reasonable doubt and it was therefore unsafe for the learned trial magistrate to convict the appellant.

28. On behalf of the Respondent, it was submitted by **Ms Mogoi**, learned prosecution counsel, that the evidence was sufficient to find the appellant guilty of the offence he was convicted of since the said offence did not require medical evidence for it to be proved. It was further submitted that the relationship between the appellant and the complaint was proved and that the appellant's defence was mere denial. As regards section 214, it was submitted that by the time of the amendment of the charge sheet PW1 and PW2 had testified in relation to the main charge of defilement and the appellant had been given opportunity to cross-examine them. The charge only introduced the alternative to the main charge and the reasons the two witnesses could not be recalled was explained satisfactorily. According to the Respondent there was therefore no prejudice occasioned to the appellant in view of section 179(1) of the ***Criminal Procedure Code***.

29. As regards the sentence, it was submitted that 20 years was sufficient despite the fact that the minimum sentence was 10 years taking into account the fact that the appellant was the complainant's father who was expected to offer protection and care to the complainant.

30. The Court was therefore urged to uphold the appellant's conviction and conform the sentence.

Determination

31. 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."**

32. 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."**

33. 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.**

34. 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.**

35. 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."**

36. 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.***

37. "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.**

38. The second ingredient of the offence of incest is that the accused ought to have the knowledge that the complainant is his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

39. The last condition is that it must be proved that the indecent act or an act which causes penetration was caused by the accused.

40. In this case, the Learned Trial Magistrate found that from the evidence adduced there was no concrete evidence of penetration. This finding in my view cannot be faulted since even from the evidence of the complainant, what comes out is simply that after removing the complainant's pants, the appellant placed her on his bed, applied oil on both his and her private parts and lay on top of her. There was clearly no evidence of penetration which could have been proved by the medical evidence. However no such medical evidence was adduced. Therefore I agree that the learned trial magistrate was justified in finding that indecent act was proved.

41. The appellant however contended that section 214 of the ***Criminal Procedure Code*** was not complied with. The said section provides as hereunder:

> **(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

42. In this case, it is true that the amendment was allowed after PW1 and PW2 had given evidence. The appellant, as he was entitled to, demanded for the recall of PW1 and PW2, a demand which was granted but on the day when the two witnesses appeared the appellant was unable to cross-examine them as he was indisposed. Thereafter, according to the prosecution, the said witnesses could not be traced. As rightly submitted by the Respondent, the amendment only introduced the alternative charge which was indecent act. That was clearly a minor and cognate offence to the principal charge and under section 179 of the ***Criminal Procedure Code*** could be substituted even by the Court itself at the time of the delivery of judgement. Section 179 of the ***Criminal Procedure Code*** provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

43. This was the position of the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** when it expressed itself as hereunder:

"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294,* while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> **"Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."**

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [Underlining mine].

44. The Court proceeded:

"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged.

The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."

45. I am aware of the decision of the Court of Appeal in **Josphat Karanja Muna -vs- Republic [2009] eKLR** where the Appellant complained that he had not been given a chance to recall witnesses who had testified and the court stated:-

"On non compliance with *section 214* of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of *section 214* is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of *section 214* of the Criminal Procedure Code resulted into injustice to the appellant."

46. It is therefore my view that no prejudice was occasioned to the appellant since the trial court, even without the amendment in question could have still convicted the appellant on the alternative charge.

47. The appellant also took the view that since PW1 and PW2 were not recalled after the amendment of the charge sheet, there was no evidence connecting the appellant with the offence. In my view this was an erroneous view. The fact that a charge sheet is amended does not obliterate the evidence adduced before the said amendment was effected. As regards the alleged defect I associate myself with the case of **Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391],** in which the Supreme Court of India held that:

"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent…We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands…but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality…The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way…Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

48. As for the failure to call what the appellant termed vital witnesses, section 143 of the ***Evidence Act*** provides that:

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.*

49. I am guided by the case of **Mwangi vs. R. [1984] KLR 595** where this Court stated:

"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

50. Therefore the prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA 135** the court was categorical that:-

"

The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

51. As regards the failure to call the investigation officer, in **Kiriungi vs. Rep (2009) KLR 638**, the court said:-

"...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that he evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

52. I have also examined the circumstances of this case and it is clear that PW1 and PW2 were called as witnesses. The failure to have them recalled is not the same thing as failure to call them and I am satisfied that the inability of the prosecution to recall them after they attended for further cross-examination but due to reasons not of their own making they were unable to testify was satisfactorily explained. I am satisfied that the omission to call other alleged vital witnesses did not prejudice the prosecution's case.

53. In this case as already stated the appellant was convicted of the offence of indecent act. The Learned Trial Magistrate found that PW1 gave credible evidence as to what transpired. The law as it stands is that the evidence of the complainant, a minor, requires corroboration. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since section 124 of the ***Evidence Act*** makes it quite clear that:

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

54. Dealing with a similar issue in the case of **Mohamed vs. R. [2008] 1 KLR G&F 1175,** the Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

55. Whereas, the trial court ought as much as possible state in express terms that it is satisfied that the child is stating the truth, there are no prescribed words as long as the court is clear in its mind that it believes that the child was stating the truth. One such instance would be where, as in this case, the court states that the child's evidence was credible since credible evidence must necessarily mean that the evidence is truthful. In **Keter vs. Republic [2007] 1EA135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

56. 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."**

57. I am however perturbed by the finding by the Learned Trial Magistrate that in the absence of medical evidence, she could find that the alternative charge of indecent act was proved but not incest. As I have stated above, incest does not necessarily require penetration and where indecent act is proved, incest may well be proved as long as the other ingredients exist.

58. As regards the second count of creating disturbance and causing a breach of the peace contrary to section 95(1)(b) of the ***Penal Code*** , the said provision provides that:

> **(1) Any person who -**
>
> **(a) ……..**
>
> **(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.**

59. In the case of **Mule vs. Republic Criminal Appeal No. 873 of 1982** it was stated thus:

> **"1) The offence of creating a disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence…..**
>
> **2) It is not enough to constitute the offence of creating disturbance likely to cause a breach of the peace to show that the accused merely created a disturbance. That disturbance should have been likely to cause a breach of peace. Peace would, for instance refer to the right of wananchi to go about their daily activities without interference. The actions of the appellant interfered with people's activities and therefore caused a breach of peace."**

60. In this case the only evidence adduced was that the appellant threatened to stab PW2. It was not indicated where this threat occurred. In **Mutuku Solo vs. Republic [2017] eKLR**, **Mutende, J** was of the view, which view I agree with that:

"The facts as presented suggested that the Accused did an act that was annoying. The act of throwing stones on the roof of the Complainant, his utterances that the Complainant had no right to be there may have been disturbing. But there is no suggestion that there were people present who were likely to resort to violence. It is not even stated that the Accused was likely to cause a breach of peace. The interpretation of the facts cannot amount to a person having been guilty of the offence of creating a disturbance in a manner likely to cause a breach of peace. Therefore even if the Accused stated that facts were correct, the learned Magistrate was duty bound to interrogate whether that amounted to an admission of having committed the alleged offence."

61. In my view the offence can only be proved if there is real threat of disturbance or breach of peace and the same cannot for example be said to have been proved by words uttered by a husband to a wife in the privacy of their bedroom.

62. In the premises I find that the conviction of the appellant on count II was unsafe.

63. As regards the sentence, this Court cannot lose sight of the fact that the culprit here was the complainant's father who ought to have been in the forefront in protecting the complainant. Instead of doing so, he took it upon himself to be the instrument through which the complainant would be traumatized. While I appreciate this was and a heinous act on the part of a father against his daughter, it is my view that doubling the minimum sentence in the circumstances of this case was rather excessive.

64. In the premises the appeal against the conviction in count II succeeds and the sentence thereon is set aside. As regards the conviction on the alternative charge to Count I, the appeal fails on conviction but the sentence is reduced to 15 years. To this extent, only, does the appeal succeeds, but is otherwise dismissed.

65. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 28th day of January, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey