



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 229 OF 2017

WC ALIAS WT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 111 of 2016 delivered on the 17th day of November, 2016 by Hon. R. Yator, SRM)

JUDGMENT

1. The appellant who was convicted and sentenced to imprisonment for life for the offence of incest by a male under section 20 (1) of the Sexual Offences Act on the 17/11/2016, appeals to this Court on the ground set out in the Amended Petition of Appeal dated 29/12/2017, as follows:

- 1. The learned trial Magistrate erred in law and fact in convicting the appellant on the fatally and incurable defective main charge of incest when it was not made clear from the time off plea taking whether it was under section 20 (1) of the SEXUAL OFFENCES ACT (say incest rape) or under the proviso thereto (say incest defilement) where both carries two separate and distinct sentences on conviction and thus the plea to such a charge was unequivocal and the appellant lost an opportunity or right to benefit from a lesser sentence of up to 10 years as opposed to life imprisonment as guaranteed by the Constitution.*
- 2. The learned trial Magistrate erred in law and fact in convicting the appellant on the main charge of incest notwithstanding the none strict compliance with Article 50 of the Constitution during plea and during trial which has occasioned a miscarriage of justice.*
- 3. The learned trial Magistrate erred in law and fact in convicting the appellant on the main charge of incest notwithstanding the fatally and incurable defective manner or conducting voire dire on a minor, the reception of the unsworn statement by the minor and allowing the minor to be cross-examined by the appellant.*
- 4. The learned trial Magistrate erred in law and fact in convicting the appellant on the main charge of incest in the absence of any reliable, authentic or verifiable medical evidence in proof of penetration or anything to connect the appellant with the offence or in corroboration of the unsworn statement of the minor beyond any reasonable doubt in that the medical chit and the P3 form were contradictory of each other; the person who filed the P3 form was not qualified, not registered and he filled the P3 form with the offence of grievous harm as count 2 with incest in mind as a consequence of the same.*
- 5. The learned trial Magistrate erred in law and fact in convicting the appellant on the main charge of incest yet no certificate of birth of the minor was exhibit or any DNA done or conducted to proof the relationship of the appellant and the minor especially because as per the appellant's sworn evidence he and the mother of PW1 was born on 17/11/2002; over two years later.*
- 6. The learned trial Magistrate erred in law and fact in convicting the appellant on the main charge of incest despite the none compliance with part (a) or part (b; the proviso) of section 20 (1) of the SEXUAL OFFENCES ACT as the charging section and more so when the age of PW1 was not proved beyond any reasonable doubt in that the P3 FORM indicated estimated age of the victim as 40 years, PRC FORM as 40 years, the age assessment report which was never produced by the maker stated age as 13 years and yet the charge sheet stated age of PW1 as 11 years and lastly from 17/11/2002 the alleged date of birth up to 8/7/2014 the alleged date of offence, the likely age of PW1 was 11 years 7 months and 21 days.*
- 7. The learned trial Magistrate erred in law and fact in convicting the appellant notwithstanding the uncorroborated evidence as to the place, date and time of the offence bearing in mind that the evidence of PW2 the mother was contradictory, inconsistent and totally unreliable and thus could not be used to corroborate the unsworn evidence of PW1 and indeed the trial Magistrate totally ignored and made no mention of PW2's and PW4's evidence throughout the judgment.*

8. The learned trial Magistrate erred in law and fact in convicting the appellant notwithstanding his sworn evidence which raised an alibi defence that he was not at home at the time PW1 alleges she was defiled and the duty to dislodge the alibi defence lies on the prosecution.

9. The learned trial Magistrate erred in law and fact in convicting the appellant by totally disregarding and/or making no reference whatsoever to the appellant's sworn evidence which was never challenged on cross-examination.

10. The learned trial Magistrate erred in law and fact in convicting the appellant notwithstanding the appellant's allegation on oath that his estranged wife who had separated with him since 2000, whose husband died in 2014, whose attempts to come back as eldest wife of the appellant were rejected, was not given land or a place to build a house, had been refused to use PW1 as a maid of her child and had threatened to have the appellant locked up and further his sworn allegations that PW1 was couched or pressured or bribed to tell a lie or testify falsely against him which if true would render the entire trial a travesty of justice and a trumped up charge.

11. The learned trial Magistrate erred in law and fact in convicting the appellant and sentenced him to life imprisonment without strictly stating which section he used to render such a charge because the charge of grievous harm which carries a life sentence had been dismissed and section 20 (1) of the SEXUAL OFFENCES ACT provides for up to 10 years and life imprisonment.

12. The whole judgment had no issues for determination or reasons and the conviction was against the weight of evidence.

The appellant faced an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act and a 2nd count of grievous harm contrary to section 274 of the Penal Code.

2. Counsel for the appellant then filed submission on the appeal dated 9/11/2018, which he highlighted at the hearing of the appeal. The DPP opposed the appeal in oral submission in response to appellant's Counsel's submission as follows:

Mr. sigilai

I pray that the judgement and sentence be set aside count I and II s. 20 (1) the conviction.

Article 50 (2) of Constitution benefit of a lesser sentence incest was not proved. The sentence under the proviso will not stand.

Accused gave sworn evidence which was not challenged. The child having been 2002, the child may not have been a child of the appellant.

Ground 2

Article 50 not complied with Language of the Court. No interpreter, as bail was denied, the court fail to comply with Article 50.

Ground 3, 4, 5 and 6

The offence was not committed.

Pw1 at page 13 line 3-7 child states that she was sleeping sideways in the act of penetration cannot occur.

"Bad manners "not graphically described. It is not enough to prove the penetration.

Date of offence. P3 and treatment chits indicate offence on 8/7/14 at 6.00pm. Pw1 said it was either 2 or 3 pm, pw2 said at 3pm the child was with her having come from school. Pw4 stated that it was 8/7/14. The complainant could not have been at the two places at same time.

Medical evidence

The evidence was contradictory, no bruises or physical injuries as chits show p3 contradicts the evidence and could not afford any corroboration to the testimony of the complainant.

Pw3 clinical officer states he saw the child on 10/7/14 and the treatment chits show 18/7/14 on rubberstamp. It would appear the child was examined on 10 days after incident.

Outer vulva expanded could not support the penetration. It is not evidence of penetration. The treatment chit is silent on hymen. Both treatment chit and P3 were filled by the same person Pw3.

Age of the victim is shown as around 40 years. The victim under the charge sheet was shown as 11 years. Pw2 testified that p3 was filled on 10/7/14 yet the one produced is shown to have been filled on 18/7/14. It is likely the P3 which Pw2 was referring to was never exhibited in this case.

I pray that the appeal be allowed.

Ms Macharia

Appeal is opposed.

Offence of incest under contrary to section 20 (1) of Sexual Offence Act. Penalty is 10 years with proviso for life imprisonment if the victim is shown to be under 18 years.

The victim was shown to have been 11 years and 13 years when the case was being heard.

Particular of the offence. The complainant is shown as 11 years.

Language used during plea is clear as Kiswahili while appellant understood at p. 5 of proceedings.

Pw1 was clear. In her evidence, the appellant who was her father defiled her.

*Complainant used the word **tabia mbaya** a common term for a child aged 11 years. It was not clearly explained by the same as it was mentioned to be the type of injury suffered as testified by Pw3 that the patient had no bruises but the outer vulva had wide opening with foul smell. The Clinical Officer as an expert and he stated that there was defilement. Widening of vulva is a medical term and by an expert.*

Pw3 said that urine had leucocytes and epithelial cells and presence of blood due to injury.

Page 19 line 10-11 Pw3 concluded that after the analysis the complainant had been defiled.

Age at page 3 of P3 form, Pw3 at page 19 line 24 explained that the age of 40 years was erroneous as it was mentioned to be the age of the assailant. It was an error which appellant could take advantage of. It is clear that the complainant was 11 years. At page 20 line pw3 on reexamination stated that the age 40 years in the age of the accused. It was clarified in the lower court.

Paternity of complainant is on in dispute. In cross-examination of appellant, page 29 line 12 appellant stated that pw2 who was the mother of the complainant was his first wife and the complainant was the biological child.

The fact that he stated that they separated in 2010 and the complainant was born in 2002 does not mean the child is not his daughter.

Pw2 at page 15 line 21 stated that she separated with the appellant in 2003 and not 2000. There is a discrepancy in the evidence of the appellant and that of Pw2 on the year of separation.

The appellant was a daughter of the complainant and the appellant defiled his own daughter.

Bond by trial Court

Breach of constitutional right. There were compelling reasons because the complainant was the daughter of appellant and the appellant could have interfered with her witness.

The prosecution need to secure the evidence before granting bail. The right of the appellant and more of the complainant need to be balanced.

The complainant stated that the appellant had defiled her before and threaten to kill her if she told anyone. It was therefore impossible to hold the appellant.

Defence of appellant

Alibi was raised late in proceedings, denying the prosecution to cross-examination on the same. The defence was sworn testimony.

We urge the court to dismiss appeal.

Mr Sigilai in reply

The P3 is clear on what is to be examined. The term vulva is not captured on the P3 form.

The Hymen is said to be broken long standing. The conclusion is faulty. Leucocytes in urine indicating infection and whether infection could be linked to the appellant.

Alibi defence can be raised at any stage of the trial. Prosecution had ample time to dispute it or put it aside.

It is upon the prosecution to disapprove the alibi once raised by the appellant.

On 8/7/14 the child could not have been at 2 different places if the offence to be omitted.

Issue for Determination

3. The issues before the Court are, therefore, whether the offences of incest or the alternative charge of indecent act were proved against the appellant beyond reasonable doubt. The appellant raised issues of relationship between the appellant and the complainant, the language used by the Court and provision of witness statements within time for someone to translate them for the appellant, the procedure used in the *voire dire* examination and in allowing cross-examination of the child who gave unsworn testimony, and the consideration of the appellant's alibi defence.

Determination

4. The appellant prayed for witness's statement on 18/4/16 saying he needed "*time for someone to translate them to me as I do not know English*". The record shows that the trial court considered that statement be supplied to the accused and the hearing date was set for 5/5/16, when the case proceeded to hearing. It has not been shown that the period of over two weeks allowed for the statements and translation for the appellant was not adequate for preparation of his defence. Article 50 (2) (c) and (m) of the Constitution provides for the accused person "*I have adequate and facilities to prepare a defence*" and "*to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial*".

There is no evidence on the record of the trial court that evidence was taken in Kiswahili and that English which the appellant denied not to understand. I do not find a basis for holding that the appellant's Article 50 (2) (c) and (m) rights were violated.

Indeed, on 5/5/2016, the accused confirmed he was ready to proceed with the trial.

5. The court properly undertook a *voire dire* examination for the complainant who according to the charge was 11 years old at the time of the offence. On 8th July 2014. Upon the *voire dire* the court find that "the child is no aware of oath taking but however reminded of telling the truth hence to give unsworn evidence". Counsel for the appellant, with respect improperly objects that the appellant was allowed to cross-examine the child complainant who urged that the trial was defective. It is trite that the trial the evidence of a child pursuant to section 19 of the oaths and statutory Act and Section 124 of the Evidence is subject to cross examination whether give on oath or unsworn. See Kaya Judiciary Bench Book on Criminal Procedure 2018, paragraph 96 at page 84.

6. The evidence of the prosecution witnesses before the trial court was as follows:

"PW1

I come from [particulars withheld] where I live with gogo and guka (grandparent) only. I go to school at [particulars withheld] and I am in class five. Early I was schooling at [particulars withheld] Primary and at that time I was living with my step mother and my father. On 8th July, 2014 I was at my stepmother's place one C and it was during school period. I had gone home for lunch when I met father at home while sleeping in his bedroom and I was going to change clothes as I was in class three and will not return to school. I was changing clothes in father's bedroom with my young brother K1 whom my father sent him to go fetch water and K1 left and I remained with father. Father then (Court notes she hesitates to talk and is in fear) and he told me to climb to the bed and I refused and he forced me to get to bed saying I go there or he kills me and I climbed to the bed (cries) with him lifting me to the bed. He then removed my pant and he removed his trouser (hesitates) and he slept on me and I was sleeping sideways and he was on top of me he did bad manners on my private parts using his private parts for urinating and I felt pain and he said if I tell anyone he will kill me. I then left and went to wash clothes. My stepmother had gone to sell milk at the dairy and she arrived at night while I was asleep and I told her what father had done and said she will ask him in the morning. In the morning my stepmother asked him and father told me once I come from school go to my biological mother in Mogotio and I left to Mogotio after school and since I knew the place I went to biological and I told her father had done bad things to me and said I go there and she took me to hospital in Mogotio where I was treated and we also went to the Police. He had ever defiled me before date of offence for ground four times in his bedroom when stepmother used to be away and I never told anyone as he said if I tell he will kill or beat me. The accused is my father and he is here in chambers.

Cross examination by accused

I had come from school and he took lunch at the dairy and come home at 2:00 or 3:00. You used to come home in the evening but that day you came early. At times you used to come with step mother at night but at times you came early.

That day you defiled me after I came from dairy. You were at home when I arrived and not in the dairy. I do not recall exact dates you defiled me earlier. No one had told me to frame you as it's what happened and it's the truth. It was lunch time when we left for home and we ate at dairy then went home. I do not recall exact date I went to hospital. I am going to 13 years

PW2

I come from Mogotio. I am a housewife. PW1 is my biological daughter and currently lives at [particulars withheld] with my mother in-law (mother to my current husband). Accused was my first husband and we separated and we sired together the complainant who is her biological daughter. She is born on 17th November, 2002. In 2014 she was residing with the father and step mother one C in Mogotio. She was then schooling at [particulars withheld] and currently she schools at [particulars withheld] in class five. On 8th

July, 2014 I was at my home the child came from school and she was living with step mother and on arriving at my home at 3:00 pm from school she came and cried and after she kept quiet she said father did bad manners to her and that if she told anyone he would kill her. I then took her to the hospital the same day. She explained that he defiled her at his home. After hospital at Mogotio I took her to the Police the following day. I then on 10th July, 2014 took P3 form which was filled. Accused then disappeared for two years and when he returned he came while threatening he will kill me for I preferred charges and that he will kill me so the case ends and I went to report hence was arrested at his home and I personally identified him to the Police. The child said the father had defiled him three times and that she had been threatened with death hence could not tell me. I never met him once I prepared charges. I do not know home to read but I can identify the treatment chit (MFI-1) and P3 form – MFI – 2 and in names of the child. The child clinic card is with the accused who retained it and he refused to give me saying it's with the sister one Susan. I had never disagreed with accused nor the other wife.

Cross examination by accused

The child is 13 years old. We separated with you in 2003 and not 2000. He sent elders that we go talk at his home and we went and he said we complete the case at home and we never met him anywhere when he disappeared or returned threatening to kill me. I took child twice to hospital for examination. We have never disagreed but I ever told you that you were mistreating the child by overworking her like an adult and you told me I come for the child. Your second wife and yourself used to deny the child to come visit me and yet you never used to provide for her many items hence I used to buy for her e.g books. You found me at a shop buying cigarettes for my husband and you slapped me I did not demand for share of lands as I am married to someone else.

On material date child had come from school saying you had defiled her he previous day. Before date of offence we did not argue with your younger wife. On material date you were around and not away at the reserve. I recorded my statements when I made report on 9th July, 2014 (statement reads 8th July, 2014) and filled P3 form on 10th July, 2014. I did record statement over your threats.

Re-examination

I separated with accused in the year 2003 and child born in the year 2002. Child came to see me following after offence on 9th July 2014. I placed P3 form on 10th July, 2014 when it was filled. I recorded statement of threat on 18th April, 2016. Before offence I had not disagreed with the second wife and the evidence on record is the truth.

PW3

Clinical Officer Mogotio Sub-County hospital where I have been since 2014 and have around five years' experience. I have a P3 form which I personally prepared and saw the patient a minor aged 11 years who came on 10th July, 2014 at 7:00 pm and I have a medical chit – MFI – 1 and history of having defiled by the father severally and last time on 8th July, 2014 at 6:00 pm.

On examination patient of fair general condition and no physical injuries and on presentation vaginal examination patient had no bruises/lacerate but outer (vulva) had wide opening and foul smell and I made impression of defilement. On lab examination on HIV which was negative and syphilis negative, urine had leucocytes which indicate infection and epithelial cells which are due injuries and presence of blood due to injuries and no spermatozoa. High vaginal swab showed pus cells indicating infection and red blood cells showing injury and many epithelial cells showing injury and patient was to come back following day for medication and gave her drugs to prevent HIV transmission, antibiotics among other drugs and advised she reports to the Police wish to produce MFI 1as pexb 1.

I filled the PRC form for same patient on 10th July, 2014 OP No. 3649/2014 and with same history and shows muscle relaxation on picture of PRC form and wish to produce as pexb 3. I have P3 form filled at our facility same OP number and patient and no torn clothing nor blood stained and same history of sexual offence and no physical injuries and put on treatment and conclusion was grievous harm as patient was psychological tortured and injuries will last a long time without recovering and concluded child had been defiled and approximate age of perpetrator or accused was around 40 years as said by patient.

Widening of opening of vulva, broken hymen which was long standing and blood stains at cervix and no discharge but presence of blood at genitalia and same lab results on additional results there was widening of vulva confirming entry and signed it on 18th July, 2014.

The age indicated on P3 form indicated 40 years was far assailant but actually meant of victim as PRC forms requires child to tell age of assailant. I wish to produce P3 form as pexb 2.

Cross examination by accused

Complainant reported to be defiled severally by the father and lastly on 8th July, 2014. The age of 40 years in P3 form was erroneous as it was meant to be in PRC form indicating age of assailant which also reads 40 years. I do not know owner of dairy next to our facility and I never know you as guard at our facility unless you came before I reported. We only examine you if brought by Police. There were no spermatozoa so to trace as yours. We only wanted to confirm if she was injured and there was widening on vulva. The complainant was 11 years old at time of offence. Last date of offence was 8th July, 2014 at 6:00 pm.

The widening of vulva in a child confirms defilement and injuries. Treatment chit is filled first and it indicates all injuries and dated 10th July, 2016 but stamped on 18th July, 2016 when patient came back and P3 form filled.

Re-examination

The age of 40 years indicated in P3 form and its mean to be age of accused. I do not know accused herein and as for investigation child was defiled and hymen long standing and widening not normal for a child. Information in P3 form treatment chit are related child first seen on 10th July, 2014 at 7:00 pm and to return on 11th July, 2014 and further 18th July, 2014.

PW4

Attached Mogotio Police Station and I am the Investigating Officer herein. On 10th July, 2014 there was a minor who came with the mother and reported she had been defiled by the father after which it was requested and I was to investigate it and I took the child to our office and interrogated her and told me the father had been defiling her on different dates and testify she had told the mother on 8th July, 2014 and I took P3 form and wrote for her and accompanied her to Mogotio Health Centre where she was examined and treated and I asked her to return so to record their statement upon which I went to look for the suspect and was not able to trace him saying elders had been summoned to try resolve out of Court. The accused went into hiding for two years and on 5th February, 2016 I heard he had resurfaced and I immediately went to arrest him that night and prepared charges before Court. The accused is before Court (points out) I established he was biological father to victim.

The child at that time was said to be 11 years and was in class three and I asked mother for birth documents and did not have them and I sought Court orders of 2nd March, 2016 to escort child for age assessment.

-MFI 4 and I took her to Eldama Ravine District Hospital where she was assessed to be 13 years in 2016 and means at time of offence she was 11 years and signed by Dr. Kamau on 7th March, 2016 and has rubber stamp of the hospital and wish to produce the same as pexb.4.

I established before offence the accused had separated with mother of the child and had been defiling her severally previously and latest 8th July, 2014. I used to know accused before offence and I have never disagreed with him.

Cross examination by accused

I came to your residence after filling of P3 form and investigations but could not trace you as had escaped to Kamundu. Report was made on 10th July, 2014 and issued OB number and which I later used to arrest you. OB number is OB 23/10/7/2014 and charge sheet No. 2/6/2/2016 which is date I arraigned him in Court and its date of arrest I went to scene when I was coming to arrest you but you were not around and scene was not important in determining offence. Child said she was from school and was in class 3 and could not go back in the afternoon and that she changed uniform and you send the brother to fetch water and you remained with her. I indicated she came for lunch from school.

The child said she found you at home that day. I am not aware of any Land dispute but brought it up saying he would give a share of Land to mother of the child so the case is withdrawn. I did not trace him for examination as it was also after two years that I arrested you.

Re-examination

I went to accused's home and did not find him and told me had escaped to Kamundu. Report is OB 23/10/7/2014 and was arrested after two years and charge sheet is OB 2/6/2/2016. The said she had come from school when offence happened.

That on 8th July, 2014 the father was at home and she found him inside the house and he was arrested after two years hence no reason to take him for examination due to period he had been away.

Before offence there was no Land Dispute. Accused wanted to give mother piece of Land so the case does not come to Court. I have not collided with mother of victim to frame accused and its complainant who personally made report.”

7. When put on his defence, the appellant testified as follows:

“DW1

I come from Mogotio and I am a milk vendor. I recall I had married mother to the victim and had separated for 14 years i.e separated in February 2000 and when she left and remarried and gave birth to other children and her second husband died in 2014 and she came and found me saying she was the eldest wife and I agreed to it and that she wanted to come and construct at my shamba and I told her that since she left I married two women and one of them was from her clan and that I had divided the shambas between mama K2 and mama K1 and after three days she told me I was boasting and no longer receiving greetings and I asked why and said she will ensure I am locked up and I did not bother about the same.

When I took in the child while she was two years old she went to live with my mother and I educated her and when my mother died I went to take the child and took her to Mogotio as she was been with my other wife and decided we live with her together with my youngest wife and the mother of victim (PW2) came to rent and leave next to where we lived and I discovered she wanted the child and she had not told me and when I had come from hospital to Mogotio on 3rd July 2014 on a Thursday I found my wife mama K1 who residing with PW1 and told me PW2 had come to reside next to our home and whenever child arrived from school in the

evening PW2 will leave her with a younger child to take care till around 10:00 pm and that in fact one day she had left PW1 with Kshs.300 she had stolen and beat her and took her to school where she was beaten by teachers and asked of the money and said the money was for one A a fellow student and mama K1 told PW2 what the child had done and she did not bother about it and I then called the child and mama K1 and I asked why she stole the money and I told her to stop taking care of the child being left to her by her mother PW2 and when PW2 learnt of what I told PW1 she decided to frustrate me for those reasons and considering she had left the child while young and in fact I personally took care of the child and I lived with her after my mother died. When I went back to hospital, 11 kilometres from Mogotio and returned on a Tuesday on 8th July, 2014 I arrived and went to where I worked in a hotel and I found mama K1 who I stayed with and closed shop at 8:00 pm and went home and following day around 2:00 pm while at [particulars withheld] I was called by mama K1 telling me she had seen PW1 with her mother and had gone to hospital and I inquired if she was sick and she said the child had said I had defiled her and I learnt that was how she wanted to frustrate me. I then came to hospital and shortly Police arrived and I decided to wait for them as I knew the allegations were false and in fact the treatment chits indicate negative results. I in fact ask the doctor if P3 form is first filled before treatment chit and said form were treatment chits showed separate results yet P3 form indicate blood stains in the cervix. In P3 form she said the victim was 40 years old and not 11 years as indicated in the treatment chit and as such the same must be false.

In the statement of the child she alleged the last incident was on 8th July, 2016 (referred) meaning same was false as offence was said to be in the year 2014 meaning it's false as t at 2016 I had already been arrested.

When the Investigating Officer testified I asked her why they did not arrest me when they examined child at the hospital and she said she could not arrest me before being issued with P3 form and the same was not convincing as report had already been made. The Investigating Officer also said the child had gone home for lunch as per statement when she was defiled yet complainant said when she leaves school she comes for lunch at the milk bar shop then goes home in the evening as they usually help mama K1 up to 5:00 pm and also I do not go home earlier in the day. Complainant also told Court that I never go home during day time. Complainant was not being sincere as she was forced to do so and on that day it was alleged there were women who told complainant that if she ensures her father is sentenced she will be cursed. Court ordered the women be arrested and I said one woman come to Court and when asked if she knew the child she said she resided with her and yet child was said to stay with her grandmother yet it was that mother. On the hearing date the child was hesitant to tell Court if she was defiled as she knew it was false and in fact she was crying as he was to tell lies of not having defiled and it took several minutes before she testified and in fact consulted to take break for lunch or go back to school then she continues to testify and in fact she was told that she testifies so she be bought a soda or that's the time she testified. The same evidence was thus false as when Investigating Officer arrested me on 5th February, 2016 she booked me and I told her in fact I had engaged elders who discussed the issue and in fact also women were involved and said the allegations were false. I asked why she had not arrested me immediately even when child was being examined as she alleged I had fled away. In fact I do not deny the child is my daughter and both of my wives have sons and she was my beloved daughter who I had raised and I could not defile her. It was indicated that the child had spermatozoa yet I was not examiner to proof if the same was mine and she said it was not necessary I be examined and that in fact I had defiled the child severally and I wondered how justice will be done if I was not examined nor child's clothes brought to Court and that she never visited the scene and infact the accused has no problem as it was her mother who coached her as she wanted to be leaving PW1 to baby sit yet I refused.

PW2 when testifying she said the child came from home while crying and told her she had been defiled and yet the child had gone to the hotel and not home and in fact they never went to report to Police first but started with hospital. She went to Court I had fled as she could have arrested me the day child was examined in the hospital and I pray Court considers evidence carefully.

Cross examination by Prosecution

PW2 was my first wife and the complainant is my biological daughter. I separated with PW2 in February 2000 and she was born in the year 2001 after which she brought PW1 when she was two years and went to reside with my mother who passed away in 2012 and I took her to live with my wife in Mogotio. In the year 2014 I was residing with the child. The charges have generated from a land dispute and is registered in my names and I do not have the title deed in Court. There was a time the child stole money and was beaten by Mama K1 who took her to school for disciplining and I have not called my teacher as a witness. The doctor said the treatment chit did not show any blood yet P3 form says there was blood stains. I did cross examine the doctor and said the 40 years meant it was the defiler though he indicated it was estimated age of person examined. In the child's statement its recorded 8th July, 2016 (referred) "8/7/2014" reads it was 8th July, 2014. I was arrested in 2016 and offence was in July 2014 and Investigating Officer said she could not arrest me immediately alleging I had fled away. After my arrest close to two years after offence it was necessary that I be examined. The child did not say her evidence was false.

Re-examination

Nil

Accused

I send out for two witnesses and did not have."

Although the appellant had indicated that he had 2 witnesses, he did not despite 2 adjournments for that purpose, he prayed to close his case on 7/9/16, and judgment was rendered.

Analysis on evidence

8. Medical evidence of Pw3 in presenting P3 form which recorded that examination of genitalia revealed "muscles to the vulva relaxed, (widened vulva opening), long standing broken hymen. Blood stain at the cervix" supports allegation of sexual intercourse on the

complainant and must now establish whether the appellant was responsible for the sexual assault on the complainant, as alleged.

Proof of defilement

9. The evidence of Pw1 that the appellant had defiled her on 8/7/2014 while at her step mother's house where she lived and later chased away to go to her biological mother at Mogotio is confirmed by the evidence of the biological mother Pw2 who testified that the complainant who had been living with the step mother and father had on that date arrived at her home at 3.00pm and told her that the father had done "*bad manners to her and [told] her that if she told anyone he would kill her*". There was medical evidence of defilement upon examination on the same day when Pw2 took her to hospital, "*the widening of opening of vulva, broken hymen which was long standing and blood stains at cervix and no discharge but presence of blood at genitalia and some lab results on additional results there was widening of vulva confirming entry*".

10. When put on his defence the appellant admitted living with the complainant and his wife but raised an alibi that he had been at his place of work at a hotel on the material date 8/7/2014 closing shop and going home at 8.00pm. He also confirmed that the complainant was his biological daughter, when in cross-examination said:

"Pw2 was my first wife and the complainant is my biological daughter. I separated with Pw2 in February 2000 and she was born in the year 2001 after which she brought Pw1 since she was two years and went to reside with my mother who passed away in 2012 and I took her to live with my wife and myself in Mogotio".

11. The allegation of a land dispute with the complainant's mother does not explain the evidence of the complainant Pw1 that the appellant had defiled her repeatedly "*before the date of offence for around four times in his bedroom when stepmother used to be away*". I would find that the prosecution's case that the appellant had sexually assaulted the complainant Pw1 proved.

Proof of incest

12. Pw2, the mother of the complainant said:

"Accused is my husband and we separated and we sired together the complainant who is her biological daughter. She was born on 17th November 2002."

She said the accused had retained the child's clinic card and that they had separated with the appellant "*in 2003 and not 2000*". The appellant in examination in chief and on cross examination before the trial court accepted that he was the biological father of the complainant. On appeal, however, submission are made to the effect that he may not be the father of the complainant as they had separated with the mother on 2000 and she was born in 2002, and suggested that DNA testing should have been done to prove paternity of the complainant.

13. Having already admitted that the complainant was his biological daughter and therefore locking out the prosecution for any possibility of rebutting a denial pursuant to section 212 of the Criminal Procedure Code, the appellant cannot be allowed on appeal to raise the issue of paternity of the complainant as an afterthought.

Proof of age of complainant

14. The child did not have a Birth certificate but her age assessment by DR. Kamau P.ex.4 indicated that she was 11 years in 2014 as charged. Even if the year of birth asserted by the appellant as 2001, or 2002 is taken the complainant would still be a child as at the time of the offence in 2014. Indeed, the trial court found in *voire dire* examination as follows:

"I do note that the child is not aware of oath taking....."

15. I find it proved despite lack of birth certificate or other documentation on the age of the complainant that the victim of the sexual assault charged herein was a child within the meaning of Sexual Offences Act and the children Act.

Conviction and sentence

16. I would therefore convict the appellant for the offence of incest by a male under section 20 (1) of the Sexual Offences Act.

17. The Proviso to section 20 (1) of the Sexual Offences Act provides that:

"Provided, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person".

18. In this case the trial court in sentencing the appellant treated the matter as one deserving of the maximum sentence of life imprisonment holding that:

"Accused's mitigation is noted, however, I do note the kind of barbaric act his own daughter and the kind of offence has become rampant and ought to be deterrent and as such the accused is hereby sentenced to life imprisonment with a right of appeal".

19. If it had been the case of defilement without the incestuous relationship, the appellant would according to the age of the child been liable to imprisonment for life. The relationship of the appellant to the complainant be aggravate rather than ameliorate, as sought by the appellant, the sentence.

Orders

20. Accordingly for the reasons set out above, I do not find merit in the appellant's appeal herein and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Sigilai for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.