



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2013

M M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence of the Resident Magistrate's Court at Eldoret (Hon. C.M. Wattimah) delivered on the 21 May 2013 in Eldoret Chief Magistrate's Court Criminal Case No.3596 of 2012)

JUDGMENT

[1] The Appellant herein, **M M**, lodged this appeal herein on **4 June 2013** against the Judgment of the Learned Resident Magistrate, **Hon. C.M. Wattimah** dated **21 May 2013**. The Appellant had been charged before the lower court in **Eldoret Chief Magistrate's Criminal Case No. 3596 of 2012** with the offence of Incest by a Male Person contrary to **Section 20(1)** of the **Sexual Offences Act, No. 3 of 2006**. He was charged in the alternative with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The Appellant denied the charges and, following his trial, was found guilty of the principal charge by the Learned Trial Magistrate. He was accordingly convicted and sentenced to life imprisonment.

[2] Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal on the following grounds:

[a] The Learned Magistrate erred in law and fact by admitting the evidence of the doctor who contradicted the evidence of the mother of the complainant, thereby causing doubts in the Prosecution Case;

[b] The Learned Magistrate erred in law and in fact by convicting and sentencing him yet the case against him was not proved beyond reasonable doubt, as there was no proof of penetration.

[c] The Learned Magistrate erred in law and in fact by convicting and sentencing him without observing that he was not at home at the time the Complainant claimed she was defiled.

[d] That the Learned Magistrate erred both in law and in fact by convicting and sentencing him to life imprisonment on uncorroborated evidence;

[e] That the Learned Magistrate erred both in law and in fact by convicting him without considering his defence as provided for in **Section 169** of the **Criminal Procedure Code**.

[3] Accordingly, it was the Appellant's prayer that his appeal be allowed and the conviction quashed. He subsequently filed Amended Grounds of Appeal reiterating the foregoing grounds and adding that the Trial Court erred both in law and in fact in the following respects:

[a] In convicting him without being satisfied that he was properly identified on the night of the incident by the Complainant;

[b] In ignoring his defence that the complaint was grudge-based and had been fabricated by the Complainant's mother;

[c] In denying him an opportunity to cross-examine the Complainant as required by **Sections 208(2)(3), 302(1), 308** of the **Criminal Procedure Code** and **Sections 145(2), 146(1)(2)(4), 148, 151, 153, 154** and **155** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**.

[d] In failing to appreciate that crucial witnesses were not called to testify to shed more light on the matter;

[e] In failing to inform him of his right to legal representation;

[f] In failing to notice the variance between the particulars of the charge and the evidence tendered.

[g] In denying him an opportunity to sum up his case; and

[h] In rejecting his defence without cogent reasons.

[4] The Appellant relied on the written submissions filed herein by him along with his Amended Grounds of Appeal. He took issue with the evidence adduced before the lower court on the question of identification at night and relied on the cases of Turnbull vs. Republic [1976] EA 549, Maitanyi vs. Republic [1986] KLR 198, Kiarie vs. Republic [1984] KLR 739 and Elizabeth Kabura vs. Republic [2013] eKLR 75. The Appellant also contended that the evidence adduced by the Prosecution before the lower court was poor, contradictory and inconsistent. He singled out the contradictions in the evidence of **PW1**, **PW2**, **PW3** and **PW4** with regard to the exact place of the offence, whether or not the Complainant screamed and whether or not her petticoat had some discharge on it. The Appellant relied on Richard Apeya vs. Republic [1981] CRA 945 and Feliz L. Ngozi vs. Republic [2006] eKLR.

[5] On penetration, the Appellant urged the Court to take note of the evidence of **PW4** that what had occurred, in her expert opinion, was an attempted defilement; and that the Complainant had no injuries in her genitalia at the time of examination. According to him, there was no proof of penetration and therefore the Main Count ought to have been amended accordingly, pursuant to **Section 214** of the **Criminal Procedure Code** to rectify the anomaly. He added that by failing to correct the anomaly, he was put at a disadvantage and therefore suffered prejudice as he was misled by the particulars of the charge. He relied on Joseph Njiru Kithaka vs. Republic [2013] App. No. 14 in support of his assertions in this connection.

[6] In support of his contention that the complaint before the lower court was motivated by bad blood that existed between him and his wife, the Complainant's mother (**PW2**), the Appellant submitted that **PW2** made a calculated move to leave the matrimonial home without notifying him, with the intention of framing him with the offence. He accordingly urged the Court to find that this was a planned and carefully crafted frame-up in which **PW2** used the Complainant as the guinea pig; and that this was why key witnesses were not called to testify before the lower court, such as neighbours and their other children. Citing the case of Sawe vs. Republic [2003] KLR 364, the Appellant urged the Court to find that the circumstantial evidence that was adduced against him before the lower court was insufficient to sustain a conviction for this serious charge. He thus prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[7] In response to the Appellant's written submissions **Ms. Kegehi** for the State opposed the appeal, contending that the Prosecution had called 4 witnesses before the lower court who were able to link the Appellant with the Charge of which he was convicted; and that the ingredients of that offence were well proved. She pointed out that the Appellant, as the Complainant's father, was well known to her and that the Child Health Card as well as the Baptismal Card, which were produced before the lower court, both had the Appellant's name as the father of the Complainant. Regarding the age of the Complainant, **Ms. Kegehi** referred the Court to the *voir dire* examination that was conducted by the Learned Trial Magistrate, in which the Complainant gave her age as 7 years; and that her evidence was supported by the evidence of her mother, **PW2**. Counsel also pointed out that the Child Health Card and the Baptismal Card also bear the date of birth of the Complainant as **2 January 2005**.

[8] On the element of penetration, it was the submission of **Ms. Kegehi** that the Complainant gave cogent evidence as to how the Appellant defiled her on the night of **13 August 2012**; and that on being informed of what had happened, her mother, **PW2**, promptly escorted her to the hospital for treatment; and that the Clinical Officer who treated the Complainant confirmed that the membrane of her vagina had been perforated. It was thus the submission of **Ms. Kegehi** that penetration had been proved. She accordingly urged the Court to uphold the conviction and the lawful sentence that was meted out by the Learned Trial Magistrate.

[9] This being a first appeal, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. Hence, in Okeno vs. Republic [1972] EA 32 the Court of Appeal for East Africa held that:

"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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 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..."

[10] The Appellant had been charged with Incest by a Male Person Contrary to **Section 20(1)** of the **Sexual Offences Act**. It was alleged that on **13 August 2012** at in Lugari District within Western Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of the complainant, a child then aged 7 years who, was to his knowledge, his daughter. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the Alternative Charge were that, on the **13 August 2012** in Lugari District within Western Province, he intentionally touched the vagina of the Complainant, a child aged 7 years, with his penis.

[11] The Appellant denied those allegations before the lower court and the trial opened on **22 October 2012** and closed on **15 April 2013**. The Prosecution called 4 witnesses to prove the particulars of the charges; and in that regard, the Complainant testified as **PW1**. In an unsworn statement, she told the lower court that the Appellant is her father and that he did "bad manners with her". She added that she was in the house when the Appellant carried her and took her to his bed. He then removed her pants and had sexual intercourse with her. That she felt pain in her private parts but did not scream. She also identified the petticoat she was wearing on that day, which was before the lower court and it was appropriately marked for identification.

[12] **PW2** before the lower court was the Complainant's mother, **D. I**. She identified the Appellant in the dock as her husband; and confirmed

that the Complainant is her daughter, and that she was then aged 7 years and 8 months, having been born on **2 January 2005**. She presented the Complainant's Child Health Card and Baptismal Card to support her evidence. Regarding the events of **13 August 2012**, it was the testimony of **PW2** that she left the matrimonial home at 3.00 p.m. on that day and went to see her parents and returned on **15 August 2012**; and that on inquiring on the condition of the children, whom she had left under the care of the Appellant, the Complainant herein reported to her that the Appellant had carried her and put her on the bed and had done "bad manners" to her by inserting his penis in her vagina; and that this was not the first time the father did this.

[13] It was further the evidence of **PW2** that, upon receiving that report, she took the Complainant to **Mahabuni Hospital** and thereafter to **Matunda Hospital**, having noted that she was walking with difficulty. She later reported the matter to **Matunda Police Station** and was issued with a P3 Form. She was also given by the Complainant a petticoat that she was wearing when the incident took place, which she handed over to the police, having noted that it had some discharge on it.

[14] The third witness before the lower court was **CPL Martha Mwapaga**, a Police Officer based at **Matunda Police Station**, who was the Investigating Officer. Her evidence was that, while on duty on **20 August 2012**, she received a complaint of incest from **PW2**, who was accompanied by the Complainant, **JK (PW1)**. She issued the Complainant with a P3 Form, which was filled and returned. She produced the Complainant's petticoat that she received from **PW2** as an exhibit before the lower court.

[15] **PW4, Joan Chemtai Ndiema**, told the lower court that she was on duty at **Matunda Sub-District Hospital** on **23 August 2012** when **PW2** escorted the Complainant to her for examination and the filling of a P3 Form. The child presented a history of sexual violation, and on examination she found that there was attempted defilement as the girl had no injuries to her private parts, though the hymen was not there. She filled the P3 Form which she produced as an exhibit.

[16] In his defence, the Appellant gave a sworn testimony and provided a chronology of the activities he was engaged in on **13 August 2012** from 6.00 a.m. in the morning to **14 August 2012** at 5.00 p.m., contending that he spent the night of **13 August 2012** at his mother's home. He confirmed that his wife, **PW2**, had left home without his permission on **13 August 2012** to go and visit her parents. She returned on **15 April 2012** and they had no major issues until **25 August 2012** when he was arrested and taken to **Matunda Police Station** on allegations that he had defiled his daughter, **JK**. In effect therefore, the Appellant's was an alibi defence, namely, that he was not at the scene of the alleged crime on the night of **13 August 2012**.

[17] In the light of the foregoing, the Learned Trial Magistrate framed the following issues for determination:

- [a] What was the relationship between the Appellant and the Complainant?
- [b] What was the age of the Complainant?
- [c] Whether there was penetration.
- [d] Identification of the Accused Person.

[18] A re-evaluation of the evidence does confirm that the Appellant is the father of the Complainant. Both **PW1** and **PW2** testified before the lower court on this and their evidence was not challenged in any way. Moreover, the child's Health Card and Baptismal Card were produced as exhibits and marked the **Prosecution's Exhibit No. 2 and 3**. Both documents bear the Appellant's name as the father of the child. Accordingly, there was credible evidence before the lower court to prove that the Complainant is the indeed the daughter of the Appellant and that he had no doubts about this.

[19] Similarly, there was credible evidence before the lower court to prove beyond reasonable doubt that the Complainant was, as at **13 August 2012**, aged 7 years and about 8 months as stated by **PW2**, having been born on **2 January 2005**. Again the evidence of **PW1** and **PW2** in this connection was augmented by the Child Health Card and the Baptismal Card, both of which bear the Complainant's date of birth. The Clinical Officer, also observed and noted in the P3 Form that the child was 7 years 8 months at the time.

[20] It is instructive to remember that the months following the last birthday do not count for purposes of determining the age of a child so long as they are less than one year. This was reiterated by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** as hereunder:

"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."

[21] Hence, evidence that was adduced before the lower court was sufficient to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2 and 20(1)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**. I note too that in this respect, the Learned Trial Magistrate was well guided by the decision of **Mwilu J.** (as she then was) in **Eldoret High Court Criminal Appeal No. 129 of 2009** in holding that it is not a requirement that formal age assessment report be availed by the Prosecution.

[22] Thus the two key issues that fall for re-evaluation by this Court are whether penetration was proved and whether the same was perpetrated by the Appellant. In this regard, the evidence adduced before the lower court was principally that of the Complainant. She stated that the Appellant did "bad manners with her". She added that she was in the house when the Appellant carried her and took her to bed. He then removed her pants, lay on her and had sex with her; and that although she felt pain in her private parts but did not scream. **PW2** augmented her evidence and told the lower court that upon being informed by **PW1** of what had happened, she immediately escorted her to the Hospital for examination and treatment. Granted the evidence of **PW4** that she examined the child and noted that her vaginal hymen was

broken; and that she complained of pain on both thighs, there was good reason for the lower court to conclude that penetration had taken place.

[23] It is noteworthy however that in her evidence **PW4** expressed the opinion that this was a case of attempted defilement, given the child's account that the father would insert his penis in between her thighs. On the basis of this conclusion by **PW4**, and her concession that the Complainant had no injuries in her genitalia, the Appellant submitted that the Prosecution ought to have made an application under **Section 214** of the **Criminal Procedure Code** for substitution of the charge to Attempted Incest contrary to **Section 20(2)** of the **Sexual Offences Act**. He relied on the case of **Joseph Njiru Kithaka vs. Republic [2013] App. No. 14**. The Appellant, in essence raised the question as to whether the lower court was bound by the opinion of **PW4**, an expert witness.

[24] In **Choge & Others vs. Republic [1985] eKLR** the Court of Appeal had occasion to express the following view regarding the role of expert witnesses:

"The function of the expert witness was succinctly stated by Lord President Cooper in Davis vs. Edinburgh Magistrates [1953] SC 34 at 40 when he said:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence..."

[25] Accordingly, it was not the remit of **PW4** to make conclusions as to the exact nature of the offence that had been committed in the circumstances. That was the duty of the Trial Magistrate. By declaring that this was a case of attempted defilement, **PW4** clearly overstepped her mandate in my respectful view; and therefore the lower court was not bound to accept that conclusion if, as was the case, the totality of the evidence adduced before her led her to a different conclusion. I would accordingly agree with the expressions of **Mativo, J.** (though in a different context) in **Stephen Kinini Wang'ondu vs. The Ark Limited [2016]** that:

"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less...the weight to be given to expert evidence will derive from how that evidence assesses the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess... expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision."

[26] In the premises, the lower court correctly weighed the entirety of evidence presented before her to come to the conclusion that penetration had been proved. She was not bound to accept the opinion of **PW4** as to whether or not there was defilement. As was rightly pointed out by the lower court, the duty of **PW4** was to conduct an examination and present her findings. It was up to the Court to determine whether or not those findings disclosed the offence with which the Appellant was charged, an offence whose particulars have been prescribed in law and therefore requires legal expertise to decipher. Needless to add that it was the duty of the court to ensure the facts disclosed the offence charged. The Learned Trial Magistrate cannot therefore be faulted in her partial disregard of **PW4's** evidence.

[27] Moreover, when it comes to credibility, this Court, as an appellate court, is duty bound to defer to and be guided by the impression formed on the trial court by the trial court. Accordingly, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570**, it was held thus:

"On first appeal from a conviction by a judge or magistrate ... 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...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses..."

[28] It is also instructive that in **Section 2** of the **Sexual Offences Act**, "penetration" is defined as follows:

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

And there appears to be no dispute that the Complainant had certainly lost her hymen and was complaining of pain on her thighs; and that, one week after the occurrence, she was still in pain and was walking with difficulty when she was escorted by her mother to **PW4** for examination. Accordingly, the Learned Trial Magistrate cannot be faulted for coming to the conclusion that:

"On whether there was penetration, PW1 stated that she had been defiled by her father the accused person. She clearly described how the accused did this and that she felt pain at her private parts. PW2 stated that her daughter was walking with difficulty. The medic who examined PW1 and filled a P3 form that was PW4, she stated that PW1 had pains on both thighs and that though the *labia minora* was intact, the vaginal hymen was broken this opined that there was penetration. PW4 has further opined that there could have been an attempt to defile the complainant. With this detail, the court is of the view that PW4 was only to establish the injuries sustained by the victim and establish whether there was penetration. It is not PW4's duty to state whether there was defilement or attempted defilement or the offence that was committed. I therefore consider PW4's evidence to the extent that PW1 had lost her hymen and this proved penetration more so, PW2 stated that PW1 had indicated that the accused had been defiling her on several occasions thus that day was not the first time."

[29] Moreover, in **Mark Oiruri Mose vs. Republic [2012] eKLR** it was acknowledged that:

"...Many times the attacker does not fully complete the sexual act during commission of the offence...So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ."

[30] I therefore find no merit in the Appellants contention that the seemingly contradictory evidence of **PW4** sounded the death knell for the Prosecution Case against him before the lower court; or that the Learned Trial Magistrate erred in failing to find that penetration was not proved by medical evidence. There is similarly no merit in the Appellant's contention that there was a variance between the evidence adduced before the lower court and the charges as laid.

[31] On the identification of the offender, there is no gainsaying that a 7 year old is old enough to know and identify their parents. It would be no different in the case of **PW1**. It is a matter for judicial notice that she had lived with the Appellant for the entire 7 years and 8 months or so of her life, there being no indication to the contrary. She was categorical that it was her father, the Appellant who caused the penetration aforementioned. She reported the incident to her mother at the first opportunity. The Appellant however pointed out the fact that the incident occurred at night and referred the Court to the cases of **Turnbull vs. Republic [1976] EA 549**, **Maitanyi vs. Republic [1986] KLR 198**, **Kiarie vs. Republic [1984] KLR 739** and **Elizabeth Kabura vs. Republic [2013] eKLR 75** and submitted that evidence of identification ought to be watertight to found a conviction; which in his view was not the case.

[32] In **R. vs. Turnbull & Others [1973] 3 AllER 549**, it was held that:

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[33] Likewise, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

[34] However, this was not a case of a fleeting glance by the Complainant of a stranger at night, but of a father she had known all her life. It was not a case of recognition of a person she had seen only intermittently. They were staying together in the same house. Clearly, the cases cited by the Appellant, are distinguishable. It is noteworthy too that in cross-examination of **PW2**, the Appellant unwittingly disclosed his *mens rea* by asking the poignant question **"Is it not true that you denied me conjugal rights that is why I did that?"** There was therefore cogent evidence upon which the lower court based its findings.

[35] In arriving at the foregoing conclusion, I have taken into account the submissions of the accused that he was misunderstood by the lower court and that the Learned Magistrate did not have to single out that question for verbatim recording. Hence, it was the Appellant's contention that by so doing, the lower court contravened **Section 197(1)(b) of the Criminal Procedure Code** which requires that evidence be recorded in a narrative form. However, the proviso to that provision also recognizes that:

"...the magistrate may take down or cause to be taken down any particular question and answer."

And therefore the Appellant's argument is clearly untenable.

[36] The Appellant also took issue with the decision of the lower court on the ground that he was not permitted by the Learned Trial Magistrate to cross-examine **PW1**. He thus submitted that this amounted to a contravention of **Sections 208(2)(3), 302, 308** of the **Criminal Procedure Code**; and therefore renders his prosecution a nullity. **Sections 302** and **308** fall under **Part 1X** of the **Criminal Procedure Code**, which basically sets out the procedure in trials before the High Court. They are therefore inapplicable to this appeal. In any case **Section 302** is a replication of **Section 208** of the **Criminal Procedure Code**, which is the provision applicable to subordinate courts. **Section 208** provides that:

- (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witness and other witnesses (if any).**
- (2) The accused person or his advocate may put questions to each witness produced against him.**
- (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.**

[37] A perusal of the lower court record reveals that although *voir dire* examination was conducted by the Learned Trial Magistrate in respect of **PW1** as mandated by **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15** of the **Laws of Kenya**; and that at the conclusion thereof, she ruled that **PW1** would give an unsworn statement, she did not provide an opportunity to the Appellant to cross-examine **PW1**. Clearly, the procedure adopted by the lower court was wrong given the clear guidance provided in **Section 208** aforesaid; and there is a long line of authorities to confirm the Appellant's posturing that he had the right to cross-examine **PW1**, notwithstanding that

she gave an unsworn statement. For instance, in Sula V. Uganda (2001) 2 E.A., the **Supreme Court of Uganda** expressed itself thus on the issue:

“Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.”

[38] The same position was taken in by the Court of Appeal in the case of Nicholas Mutula Wambua vs. Republic, Mombasa Criminal Appeal No. 373 of 2006 wherein it was held thus:

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined...It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

[39] Having so found, the question to pose is whether that omission is fatal to the proceedings of the lower court. Having given the matter careful thought, I would subscribe to the view that an appellate court is still required to give consideration to the entire body of evidence adduced before the lower court and, if it is sufficient to sustain a conviction then the trial ought not to be vitiated by the omission. In find succour in the position taken by **Hon. Chitembwe, J.** in IKK vs Republic [2017] eKLR, in which the Learned Judge had the following to say:

The Court has to evaluate the other evidence independently and make a finding as to whether it is sufficient to sustain a conviction. A case is not based on the evidence of a single witness. Even in sexual offences cases, even if the Court can convict on the evidence of the complainant if it finds such evidence truthful, it will not be the evidence of the victim only. There are situations where the victim of the sexual offence may not testify. This can be due to mental illness or being extremely young. It is not expected that a two year old child can be expected to testify in Court. We have experienced sexual offences being committed to children as young as one year old. Such a child cannot be expected to testify and be cross examined. There are those who are mentally unstable to the extent that even the presence of an intermediary may not help them testify. The mere fact that such victims may not testify does not make the prosecution case weak or lost. The evidence of the other prosecution witness has to be evaluated. Each case has to be determined on its own merit."

[40] Accordingly, having found that the Prosecution proved the three pertinent elements of the offence charged in the Main Count, of which the Appellant was convicted, I would be of the view that the failure to accord the Appellant an opportunity to cross-examine **PW1** is not fatal to the lower court proceedings.

[41] In Ground 6 of the Appellant's Amended Grounds of Appeal, he raised the issue that essential witnesses, who were mentioned by **PW2**, were not called by the Prosecution to testify before the lower court. They included their 11 year old daughter named **M** and son **N**. The Appellant accordingly submitted that out of their 5 other children, none was called to testify on the allegations levelled against him. He also raised the question why no neighbour was involved; and urged the Court to find that that this was enough confirmation that the case was a fabrication.

[42] The rule of the thumb, when it comes to the number of witnesses to be called in proof of a matter in issue, is that which is set out in **Section 143 of the Evidence Act, Chapter 80** of the Laws of Kenya, namely 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."

Accordingly, in Keter vs. Republic [2007] 1 EA 135, it was held, *inter alia*, that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

[43] Thus, the obligation of the Prosecution is to only avail such witnesses as are sufficient to establish the charge beyond reasonable doubt as underscored by the Court of Appeal in the case of Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR) as hereunder:

“The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:

“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

[44] There is no indication that any neighbour of the Appellant witnessed the offensive act. Similarly, there is no indication that the attention of the Complainant's siblings were drawn to the incident at the time of its occurrence. Thus, what they would have told the Court, in all probability, would be what the Complainant told PW2, granted the evidence of PW2 that the children were sleeping in the kitchen. Accordingly, not much turns on this Ground of Appeal.

[45] On the right to representation, the Appellant relied on **Article 50(2)(g) and (h)** of the Constitution which provides that:

"Every accused person has the right to a fair trial, which includes the right:-

...

(g) to choose and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[46] The Appellant complained that his rights under the aforesaid provisions of the law were neither explained to him by the Learned Trial Magistrate nor catered for before the lower court. He accordingly submitted that that failure occasioned substantial miscarriage of justice and had a bearing in his conviction and life imprisonment. He therefore urged this ground as one of the reasons why his appeal ought to be allowed. There can be no doubt that the Appellant raised a valid point. However, it has since been recognized that the State is under no obligation to provide legal aid to every accused person. Hence in David Njoroge Macharia vs Republic [2011] eKLR the Court of Appeal expressed the view that:

“Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence... We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

[47] To my mind, the Court of Appeal made it clear that other than capital offences, the right to legal representation at the expense of the State would only be considered and granted in cases involving complex issues of law or fact present, or in situations where the accused is unable to conduct his own defence, or where public interest requires that legal aid be provided. It is also instructive that the legal framework for the implementation of **Article 50(2)(g) and (h)** of the **Constitution** was not in place at the time; and that the **Legal Aid Act No. 6 of 2016**, an Act of Parliament to, inter alia, give effect to the aforementioned provision of the Constitution, only came into effect on **10 May 2016**. There was therefore no legal or institutional framework for ascertaining who would be entitled to legal representation at the material time that the Appellant was charged and prosecuted. Accordingly, I find no merit in that ground as well.

[48] Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of Incest by a Male contrary to **Section 20(1)** of the **Sexual Offences Act** were proved against the Appellant beyond reasonable doubt; and that the so called contradictions and inconsistencies singled out by the Appellant are not material enough to invalidate the sound findings arrived at by the lower court. There was no evidence to indicate that the complaint was prompted by the differences that the Appellant had with his PW2. Indeed according to PW2, they had not differed with the Appellant either over her pregnancy or for any other cause. In the premises, I would uphold the Appellant's conviction as it was based on sound evidence. He was sentenced to life imprisonment in accordance with the proviso to **Section 20(1)** of the **Sexual Offences Act**. That sentence is therefore lawful.

[49] In the result, I find no merit in the appeal either on conviction or sentence, and would accordingly dismiss the same in its entirety.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2018

OLGA SEWE

JUDGE