



## **REPUBLIC OF KENYA**

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

#### **CRIMINAL APPEAL NO 53 OF 2017**

#### **[FORMERLY ELDORET CRIMINAL APPEAL CASE NUMBER 21 OF 2015]**

V K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**[An appeal from original conviction and sentence of the Principal Magistrate's court at Kabarnet criminal case no. 186 of 2014 delivered on the 4<sup>th</sup> day of September, 2014 by Hon. E. Kigen RM]**

#### **JUDGMENT**

1. The appellant herein was charged with the offence of Incest by male person contrary to section 20(1) of the Sexual Offences Act and an alternative charge of indecent act Contrary to section 11(1) of the Sexual offences Act. The particulars of the offence in the main charge are that on the 15/3/2014 at about 0300 hours within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of C C M a child aged 16 years old to his knowledge his sister in violation of the said Act. On the alternate the accused on the 15/3/2014 at about 0300hrs within Baringo County did intentionally and unlawfully cause his penis to come into contact with the vagina of C C M in contravention of the Act.

2. The appellant was convicted, being aggrieved by the decision of the trial court appealed against the conviction and the sentence on the following grounds set out in his Amended Grounds of Appeal:

1. That the trial magistrate erred in both law and fact by convicting me without observing that penetration as an ingredient of sexual offence was not proved beyond reasonable doubt.

2. That the trial magistrate erred in law and in fact by convicting life imprisonment without considering the police officer is not competent to produce expert report as he is not expert in to reduce the sentence according to the age of the complainant.

3. That the trial court erred in both law and fact by convicting me while relying on prosecution's case while not proved beyond reasonable doubt.

3. The appellant through his written submission submitted that:

1. Ground One: Element of penetration was not proved.

It is evident that though PW1 is claiming that she was raped or defiled severally the doctor who examined her pointed out that the hymen was absent, no notable injuries on labia and minora and presence of whitish discharge.

Complainant alleges to have been raped on severally and the doctor's conclusion was that there was no penetration. The presence of whitish discharge and tenderness of genitalia is normal on pregnant women.

2. Ground Two, Three and Four:

- Police officer incompetent to produce expert report

Police officers are not entitled to produce expert report, the prosecution failed to prove the age of the complainant. PW4 did not produce the age assessment as exhibit, PW5 did not produce the same and is not an expert in the said field. A police officer is not an expert witness within the meaning of section 48(1) of the Evidence Act.

- Identification by recognition

Identification was not proved beyond reasonable doubt. Being a single witness the trial court erred in believing that there was no mistake made by the complainant by identifying the appellant.

PW1 is giving two versions of identification of the appellant, when she saw him naked and when he was wearing a blue shirt he was wearing during the day.

In **Joseph Maina Mwangi v Republic** [1993] KLR the Court of Appeal stated that:

*“in the trial there are bound to be discrepancies, the Appellate Court in considering these discrepancies must be guided by the wording of the section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant as they are inconsequential to the conviction and sentences.”*

That the appellant was not positively identified, in the evidence of recognition it is trite law that recognition is more reliable than identification of a stranger but sometimes mistakes might be made. See **Waunga v. Republic** [1989] KLR 424 and **Republic v. Turnbull and others** [1976] 3 ALL ER.

4. Prosecution Counsel Ms Kenei urged that the appeal had no merit in oral submissions as follows:

**“Miss Kenei for DPP**

*Appellant was charged with incest contrary to section 20(1) of the Sexual Offences Act. On 15/3/14 he defiled his sister PW1. At Page 18-21, PW1 stated that the appellant came to the house she was sleeping in and knocked for her to open. She peeped to check out of the window and when she saw the appellant on the door naked. She refused to open the door and the appellant forcibly opened the door as it was wooden.*

*He pushed her on to the bed while holding her neck and threatened her with a knife not to scream. He then proceeded to defile her and she managed to run and hide behind some thicket, when the accused person left after dressing up, she proceeded to report the incident to her father at Churo trading centre.*

*Pw2 who took her to hospital and later the matter reported to AP officers and the accused arrested.*

*Pw1 was taken to Marigat sub-county Referral Hospital and was examined by Pw4, a clinical officer, who testified at page 25-27 that he noted some injuries on the complainant and whitish discharge and concluded that penetration was evident. He produced the initial treatment notes and the P3 as exhibits.*

*The grounds as summarised by appellant:*

**1. Penetration not proven .**

*Pw1 testified that she was defiled and the same was corroborated by PW4 clinical officer as expert witness. Although at the time of examination Pw1 was pregnant, the same was not as a result of the defilement by the appellant.*

**Grounds 2, 3, and 4 of appeal**

*Appellant content that pw5 the Investigation officer produced age assessment at page 28 yet who testified and failed to produce the age assessment.*

*Pw4 at page 26 makes reference to the age assessment but fails to produce the same. Pw5 the investigating officer is allowed under section 77 of the Evidence Act to produce medical reports made by a government medical practitioner and the court if it deems necessary may issue summons to the Government officer to clarify on his report.*

*P3 form exhibit 5b clearly indicates that the age of the complainant is 16 years. As Pw4 after taking the history of Pw1 and upon physical examination was able to determine that she was aged 16 years. There is no question as to the age of the complainant.*

**Ground no 5 of appeal**

*Identification. P1 stated that the appellant is the brother and that when he came to the house he was naked and after defiling he managed to escape and for where he hid in a thicket she could see the appellant near his clothes before leaving his house. She had escaped from. On cross examination at page 20 she was able to give in detail the garments worn by the appellant as he left the house. There was no contradiction by Pw1 as alleged by appellant.*

*Section 124 of the evidence Act allows the trial court to convict on the evidence of a single witness if the court is of the opinion that the witness is a credible one. This was the case in this matter.*

*We pray the court to uphold the conviction and sentence.*

5. The prosecution called five witnesses who testified as follows:

1. **PW1 C M**

*I am 16 years old, in standard five at [particulars withheld] primary school. I go to full gospel church; I stay at home alone, my mother went back to her home and my father lives at the shopping centre. I live with my siblings who are younger than me, my parents separated in 2010.*

*The accused is my step brother.*

*On 15/3/2014 I was at home at around 3a.m. asleep with our children aged 8 years old, 4 years old and 1 1/2 months. The children slept at the sitting room I slept at the bedroom. I heard somebody bang the door loudly I used my torch and checked through the window, I found it was my brother; who was naked, he told me to open the door and I refused.*

*He came straight to the bedroom and told me that our respect had ended. He pushed me to the bed and held my neck; threatened me with a knife, I could not scream because he held my neck tightly. He cut my clothes using the knife, one torn red stripped pant MFI-2 and I yellow torn biker blood stained MFI-3. He raped me severally and by the time he had closed the door from inside. I struggled hard and pushed him away, I ran outside and hid in the thicket, the accused came out and looked for me but did not find me, he wore his clothes and left I hooded white jumper MFI-4.*

*I took the children and went to report to my father; we went to Churo trading centre and reported to the DO who told us to go to the hospital. We reported to the AP Churo who arrested the accused on the 16<sup>th</sup>; I later came to Loruk police station where I was issued with a P3 form.*

*I went for treatment for at Churo and later the p3 was filled at Marigat. I am 7 months pregnant with another person. I had my last menses in November, 2013. He had severally banged my door initially and I had reported to my father.*

**Cross-examination**

*The neighbouring house is where your mother lives and I knew you would follow me there. I first went to report to my father. You wore a blue shirt which you were wearing during the day. This is your knife; I have seen you with it before.*

**[Accused:** *This case is because of a grudge I have with my father because my gun that I wanted to sell.]*

*I was treated by a doctor and cleared.*

**Re-examination**

*I was able to see the accused dressing up. He left his white jumper which he was wearing during the day.*

2. **PW2 M K**

*I am from Churo; I am a retired Chief. The complainant is my daughter, her mother left to her maternal home. I live in Churo town; I take care of my children and feed them. The accused is my biological son.*

*On 15/3/2014 at 6 a.m. the complainant came complaining that she had been strangled by the accused. I called N M my other son and went to the accused's Manyatta where we found the accused quarrelling with her mother; on asking what he has done he shouted at me, he had a knife and a stick and wanted to attack me. We went back because we feared the accused would attack us.*

*We went to report at the DO's office in Churo who directed us to take the girl to hospital. The accused disappeared to the forest. We managed to arrest the accused with other members of the public. The following day we came to Loruk where we were issued with a P3 form which we took to Marigat District. The knife is before court MFI-1.*

*I do not have a grudge with my son he is my favourite son and I love him so much. Somebody else impregnated my daughter. The accused house is not far from where the complainant lives.*

**Cross-examination by accused**

*I did not see but the complainant reported to me. I have never bought a gun.*

3. **PW3 N M**

*I live in Churo, I am teacher at [particulars withheld] Primary School. The complainant is my sister, and the accused my step-brother.*

*On 15/3/2014 I was asleep at around 6a.m. when my father came and told me that the accused had attacked the complainant. I accompanied him to V K M to inquire what had happened. On asking him he became violent and even threatened to kill us, he had a*

knife and a stick. We went back to the centre where I approached the complainant whom on asking started crying and told me that the accused had broken into their house and using a knife he threatened the complainant and defiled her.

I informed my father whom together in the company of the complainant he went to report to the DO who directed us to take the girl to the dispensary.

The following day we managed to arrest the accused whom we handed over to the AP and later to Loruk police station. I was issued with a P3 Form which was fully filled at Marigat hospital. I was issued with a P3 Form which was fully filled at Marigat hospital; we later handed the same to the police station. I have no grudge.

**Cross-examined by accused.**

I went to see you to ask what you did. I went to the scene and saw the broken door.

**4. PW4 Kigen Bowen**

I am a clinical officer based at Marigat district hospital, I have worked for 6 years for the government.

On 17/3/2014 I saw a patient by the name C C M, she came with a history of sexual assault alleging she was stripped naked and forcefully penetrated without use of a condom.

Clothing was changed, no blood stains noted; history of being defiled on 15/3/2014 alleged penetration twice and attempt of strangulation.

Fair general condition and fair demeanour, tenderness of the anterior neck, bilateral thigh tenderness.

Approximate age of injury 3 days.

Pregnancy test positive about 1 month old.

There was struggle on part of the patient as there were signs of strangulation.

On whitish discharge, bilateral tenderness and allegation of penetration; I conclude that there was sexual penetration.

**Cross-examined by accused**

I did not examine you, the complainant said it was you. We used our microscope and saw sperm cells.

**5. PW5 No. 79218 PC Moses Mureithi**

I am from Loruk Police station, on 12/3/2014 I was at the station when accused was brought to the station by officers from Churo and accused for defiling C C M I recorded witness statements and asked the complainant to seek medical assistant at Marigat district hospital; I issued a P3 Form. In the cause of the investigation I recovered exhibits namely 1 biker, pant, knife and T-shirt. I also found the complainant was the accused step sister, he used his knife to cut her inner clothes.

I took the complainant for age assessment and found she was aged 16 years hence the present charge before court.

Knife – Exht 1

Red stripped pant – Exht 2

Yellow blood stained biker – Exht 3

Accused white jumper – Exht 4

**Cross-examination by accused**

I did not visit the scene.”

6. The trial court ruled that a prima facie case against the accused had been established on the prosecution evidence. The accused appellant herein gave an unsworn statement as **DW1** before the trial court and stated as follows:

“I am V K M, from Churo East Pokot, I am a farmer. The offence is not true. I recall on 17/3/2014 I had gone to plant my friends shamba then came to Churo centre where I found my father who asked me to accompany him to AP line to report a case where a person I had insulted him; on reaching there I was handcuffed. On Monday one Ngala an officer brought me to Loruk station and I

was told I had defiled; I told them it was a lie and I was brought to court.”

7. The trial magistrate found the offence of incest proved against the appellant in a judgment dated 4<sup>th</sup> of September, 2014 as follows:

*“I have looked at the evidence placed before this court by both the prosecution and defence and there are issues failing for determination by this honourable court.*

1. *Whether the offence of incest by male person has been proved?*

2. *If the said offence has been proved is there any evidence to link the accused to the said offence.*

*As to the first issue the complainant told the court that the accused was her step brother. This was confirmed by PW2 who is the brother to the accused and complainant and further by PW3 who is the biological father of both PW1, and PW2.*

*The accused is well known to the complainant who is her half-brother, she was able to identify the accused using light from her torch when she knocked her door.*

*They even conversed and the accused told the complainant that he wanted to end her respect and even threatened to kill her.*

*The complainant further described the accused by the clothes he was wearing since he had seen her during the day wearing a hooded jumper which later left behind and a blue shirt.*

*Accused being known by both the witness there would have been no mistake on the part of identification on the accused.*

*As to the 2<sup>nd</sup> issue the said offence of incest has been proved by the evidence of the witness and supported by the evidence of PW4 the clinical officer who produced the P3 and in his conclusion and basing on his findings he concluded there was sexual penetration.*

*The accused on cross-examination and his defence did not realize any serious issue to make me discredit the evidence of the clinical officer.*

*In his defence the accused talked about the events of the 17<sup>th</sup> March, 2014.*

*Having considered all the above the court finds that the prosecution indeed has proved its case beyond reasonable doubt.”*

### **Issue for determination**

8. The issues that arise for determination is whether the offence of incest was proved beyond the reason for doubt and whether the appellant was proved to have been the perpetrator.

### **Determination**

#### **Preliminary**

*Objection as to age of the complainant*

9. The age of the complainant in the case of incest is only relevant in determining the appropriate sentence under section 20 (1) of the Sexual Offences Act. Once incest is proved, the age of the complainant may only aggravate the offence and therefore increase the penalty by the term of imprisonment for life in case of a child. The objection by the appellant has no merit because the Age Assessment Report presented by the Investigation Officer (PW5) may properly be produced pursuant to section 77 of the Evidence Act, which provides as follows:

#### **“77. Reports by Government analysts and geologists**

*(1) In criminal proceedings **any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

*(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*

***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof. [Act No. 14 of 1991, Sch.]”***

10. The lawful objection to the Age assessment is that it did not demonstrate how the age assessment was arrived by disclosing the factors considered in the assessment. The clinical officer maker of the report who testified as PW4 did not testify as to the process of assessment to enable the court to determine whether any reasonable doubt arose. For the appellate court, this is particularly useful because the court, as

observed in *Okeno v. R* (1972) EA 32, has not had the benefit of seeing the complainant to be able to make a finding of fact of the age of the complainant.

### ***Incestuous Relationship***

11. Section 22 (1) and (2) of the Sexual Offences Act provides for a test of incestuous relationship as follows:

*22.(1) In cases of the offence of incest, **brother and sister includes half brother, half sister** and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.*

(2) In this Act -

(a) “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;

(b) “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;

**(c) “half-brother” means a brother who shares only one parent with another;**

**(d) “half-sister” means a sister who shares only one parent with another; and**

(e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.

Under section 22 (3) of the Act the burden of proof of want of knowledge of the incestuous relationship is on the accused as follows:–

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

12. The evidence of the complainant PW1, her father PW2 and her brother PW3 as to the half brother – half sister relationship between the appellant and the complainant was clear and unchallenged. The appellant and the complainant are in the relationship of half-brother and sister within the meaning of section 20(1) of the Sexual Offences Act. I, therefore, find that the appellant and the complainant were half brother and sister sired by the same father (PW2), and if sexual intercourse is proved the appellant is guilty of incest as charged.

### ***Evidence of a single witness***

13. Section 124 of the Evidence Act allows a court to convict on the uncorroborated evidence of the victim of a sexual offence as follows:

#### ***“124. Corroboration required in criminal cases***

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.**

*[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]”*

14. See Nyeri Criminal Appeal No. 270 of 2010 *Geoffrey Kioji v. Republic*, the Court stated that:

*“The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”*

15. Although, I find that the testimony of the complainant PW1 is corroborated by that of the father PW2, brother PW3 and examining clinical officer PW4, I also found the complainant to have been telling the truth in view of her consistency as against the evidence of the said other witnesses to whom she reported the assault.

### ***Proof of penetration***

16. PW1 the complainant testified as to the sexual assault on her as follows:

*“He pushed me to the bed and held my neck. He threatened me with a knife. I could not scream because he held my neck tightly. Knife MFI1. He cut my clothes using the knife.*

*1 torn red stripped pant MFI-2*

*1 yellow torn biker blood stained MFI-3.*

*He raped me severally and by the time he had closed the door from inside. I struggled hard and pushed him away.”*

17. PW4, Kigen Bowen, the clinical officer of Marigat Hospital who examined the complainant while presenting the Medical Examination (P3) form testified that the complainant had “tenderness on the anterior neck and bilateral thigh tenderness” and concluded that “there was struggle on the part of the patient as there were signs of strangulation.” As regards penetration, PW4 found the “Hymen was absent, no notable injury on labia [majora] and minora, [there was] whitish discharge” and concluded that “penetration did occur” and this “final conclusion was based on the whitish discharge, bilateral thigh tenderness and the allegation of penetration I do conclude there was sexual penetration.”

18. The injuries on the neck, the thighs as reported by PW4 corroborated the complainant’s testimony of a struggle and her statement “that he raped me severally” is corroborated by the whitish discharge even though the absence of hymen may be a result of previous sexual intercourse accounting for by her one month old pregnancy. I find that the medical evidence of the clinical officer corroborated the evidence of the complainant, and there need not be any reliance on exception in section 124 of the Evidence Act. I hold that that the evidence of the complainant that she had been raped by the complainant is consistent and corroborated by the evidence of PW2, PW3 and PW4.

### **Evidence of consistency**

19. By virtue of section 165 of the Evidence Act, the evidence of first reports made to the father PW2 and brother PW3 establish consistency on the part of the complainant. PW2 confirmed the report by the complainant that:

*“On 15/3/14, at 6.00am the complainant came complaining that she had been strangled by the complainant.”*

This coincided with the testimony of the complainant that after escaping from the house “I took the children and went to report to my father. We went until Churo trading centre....”

20. The complainant had also told the brother PW3 the details of the ordeal as follows:

*“On 15/3/14 I was asleep at around 6.00am when my father came and told me that the accused had attacked the complainant. I accompanied him to V K M’s house to enquire what had transpired....*

***I approached the complainant whom on asking started crying and told me that the accused had broken into their house and using a knife he threatened the complainant and defiled her.”***

21. I have no doubt that the complainant was telling the truth.

### **Identification of the appellant**

22. The complainant identified the appellant on three occasions in the incident. The complainant testified that she had after checking through her window after somebody banged loudly on the door identified her brother as follows:

*“I used my torch and checked through the window, and I found it was my brother (accused) who was naked, he told me to open the door but I refused.”*

The second time was when the appellant broke the door to the complainant’s house and went on to attack and rape her. On this occasion, he again spoke to her as reported by the complainant:

*“He came straight to the bedroom and told me that our respect had ended. He pushed me to the bed and held my neck....”*

On the third occasion, the appellant followed her after her successful escape reported by the complainant as follows:

*“I struggled hard and pushed him away. I ran outside and hid in a thicket. The accused came out and looked for me but he did not find me. He wore his clothes and left 1 hooded white jumper.”*

23. The complainant who knew her half-brother must have identified the appellant not only visually but also through his conversation with her when he asked her to open the door and she refused, and when he told her that he had lost respect for her. It was really a case of recognition rather than identification, and the reference to the white jumper as the clothing he had worn during the day was in extra caution.

24. I have no doubt that the appellant was properly identified as the perpetrator of the rape on the complainant.

25. In reaching this conclusion as to the appellant's culpability, I have kept in mind the accused appellant's defence which was barely a denial as he was in his unsworn statement absolutely silent and blank about the events on the material day the 15<sup>th</sup> March 2014 and only related events as to his arrest on 17<sup>th</sup> March 2014.

### ***Conduct of the accused***

26. The conduct of the accused when he was confronted by his father (PW2) and half brother (PW3) upon report to them by the complainant, was one of a guilty person who feared having to face the consequences of his act. He tried to attack these members of his family as "he shouted at me, he had a knife and a stick and wanted to attack me, we went back because we feared he would attack us", according to the father PW2 and "he became violent and even threatened to kill us, he had a knife and stick", according to PW3.

### ***Conclusion***

27. The Prosecution proved the case of incest by a male contrary to section 20(1) of the Sexual Offences Act against the appellant beyond reasonable doubt. However, the aggravating fact of minor age of the complainant was not proved beyond reasonable doubt because although PW5 Investigation Officer could properly produce the Age Assessment Report pursuant to section 77 of the Evidence Act, the said report did not disclose the factors considered by the maker in reaching the conclusion that the complainant was "***apparently 16 years old***", and the maker of the Report who testified as PW4 to present the medical examination P3 form did not disclose these factors.

28. On the evidence, however, the appellant being guilty of incest in the general provisions contrary to section 20 (1) of the Sexual Offences Act is liable to imprisonment for a term of not less than ten (10) years.

### ***Sentence***

29. The offence of incest under section 20 (1) of the Sexual Offences Act carries a sentence of imprisonment for a minimum ten years to life depending on the age of the victim as follows:

*"20. (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."*

30. Of course, the phrase "***shall be liable***" has been settled "to provide a maximum sentence only". See *Opoya v. R* (1967) EA 752.

31. Even with the two previous convictions for the unrelated offences of stealing stock and housebreaking and stealing, in Criminal Case No. 454 of 2012, the sentence of life imprisonment imposed on the appellant was clearly excessive.

### ***Orders***

**32. For the reasons set out above, the Court, pursuant to section 354 (3) of the Criminal Procedure Code, and taking into account in accordance with section 333(2) Proviso of Criminal Procedure Code the time the appellant has been in custody before trial since 18<sup>th</sup> March 2014, reduces the sentence of imprisonment for life to a ***sentence of imprisonment for twelve (12) years from 4<sup>th</sup> September 2014, the date of the sentence in the trial court.*****

*Order accordingly.*

**DATED AND DELIVERED ON 31<sup>ST</sup> DAY OF OCTOBER 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person

Ms. Kenei, Prosecution Counsel for the Respondent.