E.K.J……………………………………………………..APPELLANT

VERSUS

REPUBLIC....……………………………..……………RESPONDENT

JUDGMENT

1. **E.K.J,** the appellant herein was charged in the Lower Court with the offence of Incest contrary to section 20(1) of the Sexual Offences Act. Particulars to the charge were that on 10th August 2008 at in K[...] sub-location being a male person, he had sexual intercourse with one L.E. who to his knowledge was his daughter. The accused denied the charge.

2. Following a full trial, the accused was convicted and imprisoned for 15 years. He has now appealed against both conviction and sentence.

3. He has raised five amended grounds of appeal which can be summarized as follows:

(i) The charge sheet was incurably defective.

(ii) The court erred in failure to detect that he was framed through contradictory evidence

(iii) The trial magistrate erred by convicting the appellant in spite of the fact that "essential" witnesses were not called to testify, in violation of Section 125 and 150 of the Criminal Procedure Code.

(iv) The trial court erred by convicting him without medical evidence connecting him with the offence.

(v) The trial magistrate erred by basing her judgment on "assumptions and imaginations."

4. These grounds are extensively amplified in the appellant's written submissions. In court he orally submitted that the record of appeal did not contain an age assessment report or P3 form.

5. The state, through Mr. Naulikha opposed the appeal.

6. As required to do on a first appeal, I have re-evaluated the evidence adduced in the Lower Court with a view to drawing my own conclusions.

7. Briefly, the prosecution's case was that the appellant, his wife R.L. (PW2) and their two children, H and L.E. aged 13 years lived in N[…] in the material period. The family house was comprised of two rooms. The children slept in one room while their parents shared the other.

8. On the material night the appellant had not returned home by the time the family retired to bed at about 8.00pm.

9. At about 10.00pm the appellant returned home and crept into the children's room and defiled the L.E. (PW1). L.E. woke up and screamed for help. Her mother heard the scream and screamed while running to

the children's room where she confronted the appellant lying on top of L.E. defiling her, naked but for a shirt.

10. The appellant ordered PW2 to be quiet but she got outside and screamed some more attracting neighbours. The appellant then started assaulting her but neighbors intervened. PW2 left with her children.

11. On examining PW1's private parts she saw some fluid oozing. She took her to the police station to make a report. Thereafter the girl was treated overnight at Malindi hospital.

12. PW2 did not return to the matrimonial home but went to to live with her parents.

13. About 19th January 2009 the appellant approached Albert Kazungu Menza (PW6) area chief and sought his assistance to be reconciled with his wife. When PW2 was summoned by the chief, she showed him the P3 form in respect of the minor, whereupon the chief ordered the appellant arrested.

14. The appellant's sworn defence was that he is a driver. He said that in March 2008 two relatives called S and B brought poison to PW2 to go poison her father because he was a witch but the appellant discouraged PW2. She threatened the appellant but his report to Malindi Police station was not acted on due to the crisis of the post election violence.

15. PW2 according to the appellant framed him up for the defilement charge. According to the appellant's witness M.K.K (DW 2), he and the appellant reported to the chief on 7th November 2008 concerning PW2's intention to poison her father.

16. It is the prosecution case that the appellant was caught by his wife (PW2) in the act of defiling their daughter in their home. A report of the incident was made to Malindi police station on the same night. Later at 1.00am the complainant was seen by the doctor at Malindi hospital.

17. The initial treatment notes produced alongside the P3 form (exh.1, 2 respectively) actually record the circumstances of the offence, I presume as narrated by the mother." The record states in part:

"of having been defiled by her father – at 10.00pm in the house. Wife alleges that her father's child was drunk"

- *Mother (reports) that he(she) got (the) husband in the act…the child screamed for help… bruises, hymen broken (impression defilement"*

This record prepared three hours after the alleged offence is in my view strong corroboration of the evidence of PW1 and PW2. More so because it was, like the P3 form recorded by an independent party.

18. The doctor who completed the p3 form (PW3) confirmed that there were bruises on the vagina orifice of the complainant and her hymen was broken.

19. The appellant had sought in the trial and on this appeal to portray himself as a victim of a conspiracy between his wife (PW2) and the daughter (PW1). The medical officers were clearly not part of the conspiracy. Neither was there any plausible motive for them to conspire with PW1 and her mother.

Secondly, the alleged motive for the conspiracy between PW1 and PW2 was that the accused had warned his wife against plotting with her relatives to poison her father. He allegedly reported her to the police. The motive appears contrived and cannot explain the alleged conspiracy.

20. During the trial the appellant consistently asked PW1 and PW2 about the "power tab" box (poison). Each denied knowledge of such a box. So did the chief (PW6). It is significant however that the appellant in his cross-examination of PW2 did not outrightly suggest to her that there was a dispute with him as a result of her alleged plot to poison her father.

21. The appellant also raised with PW2 and PW3 the question of his virility. PW2 confirmed he was functional while PW3 said he did not know. From these divergent approaches I would agree with the conclusion made by the trial magistrate that the accused was “looking for ways to defend himself.” And I might add, inconsistent ways.

22. In his submissions before this court, the appellant has labored to demonstrate the alleged contradictions in the prosecution evidence. In my considered view only three of these are significant and deserve mention:

(a) The date of the offence

(b) The place of the offence

(c) The date of arrest of appellant

23. While PW2 asserted that the offence occurred on 10-8-08, PW1 referred to 2-8-08. When this matter was taken up with the investigating officer PW5 he conceded the error and explained that he failed to note the discrepancy while recording the witness statements. He further stated in re-examination that the child may have been mistaken s the first report was made on 10-8-08. In my view the matter is resolved by the medical treatment notes which clearly show that the offence occurred at 10.00pm on 10-8-09 and so does the p3 form. The appellant however did not raise this issue with PW1 and PW2 at the trial. Clearly the date of the offence is 10-8-08.

24. Regarding the place of offence, it is the evidence of PW1 and PW2 that at the time of the offence the family lived at N […], but subsequently PW2 went to live with her family, while PW4 joined her paternal grandparents at Kanagoni. By virtue of section 382 of the Criminal Procedure Code it is rather late in the day for the appellant to raise this issue because he did not raise it at the trial. Be that as it may, he has linked it to the charge sheet particulars to submit that the evidence on record was variance with the charge.

25. From the evidence of PW1, PW2 and even the chief PW6, the arrest of the appellant came after the family had broken up. It is possible that while preparing the charge sheet the police officers made reference to the statement of PW1 recorded on 29-1-09 which would show she was then residing at Kanagoni. Certainly the offence did not occur at Kanagoni where the complainant lived with her grandparents but while she lived with her family. This finding is reinforced by this court’s finding that the offence occurred on 10-8-08, because after that date PW2 never set foot in the matrimonial home again.

26. Hence the accused’s attempts have the chief PW6 intervene. Pw 2 left with her children to go to her parents after spending the night at a neighbor’s home on the night of the offence.

27. I do now turn to the question of the arrest of the appellant. PW2 said she had no money to have the p3 form completed and it took a while. I believe the appellant was arrested because of the duty-conscious chief (PW6) after the appellant approached him to be reconciled with his wife. The officer who arrested the appellant (PW4) referred to the date of arrest as 29-1-09 while the chief talked of 19-1-09. The latter may have been mistaken. At any rate he did not record a statement with police and was summoned by the court, presumably under section 150 of the Criminal Procedure Code.

28. According to PW5 Pc Nyakako the appellant was brought to the Malindi Police Station on 29-1-09 by Administration Police officers from Matsangoni AP Post. It would appear that was the day the statement of PW2 was recorded. Again during the trial, the appellant did not make much of the issue of his arrest. Whether he was arrested on 19-1-09 or 29-1-09 does not change the fact that he was arrested. That does not render the charge sheet defective nor is it material to the case.

29. The discrepancy on the place and date of offence have in my opinion not prejudiced the appellant in any way. Neither do these matters detract from the main issue at hand. The defilement of the minor, which was established beyond doubt by the evidence of Pw 1, Pw 2 and the medical records.

30. In my considered view, the appellant is stretching matters unreasonably by asserting that the evidence on record does not accord with the charge sheet. Such small discrepancies are bound to arise and sometimes are evidence of the candor of witnesses.

31. Under the provision of section 124 of the Evidence Act, the trial court was entitled to convict on the evidence of PW1 alone if it believed she told the truth. The court clearly believed these witnesses on the core issues of the case and I can find no reason to fault its conclusions. And contrary to the appellant's submissions, no essential witness was left out.

32. The appellant was in my considered view properly convicted and there is no merit in his grounds of appeal. The conviction is upheld and sentence confirmed.

Delivered and Signed this 17th February, 2012 at Malindi.

C. W. Meoli
JUDGE