VMA v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 3907 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E007 OF 2022

HM NYAGA, J

MAY 4, 2023

BETWEEN

VMA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(An Appeal from Judgment, Conviction and sentence delivered on 8.12.2021 in Molo Chief Magistrate's Criminal (SO) Case No. E035 of 2020 by Hon. E. Soita, Resident Magistrate)

JUDGMENT

1. The appellant, VMA, was originally charged with of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006 but the charge sheet was amended by the prosecution and he was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the offence were that on December 16, 2020 in Rongai sub county within Nakuru county, being a male person, caused his penis to penetrate the vagina of RK a female who was to his knowledge his daughter aged 6 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* particulars being that on December 16, 2020 in Rongai sub county within Nakuru County, intentionally touched the vagina of RK a child aged 6 years with his penis.

3. The appellant pleaded not guilty to the charges and the case went to full trial in which 8 (eight) witnesses testified in support of the prosecution's case. At the close of the prosecution's case, the court found that the appellant had a case to answer and put him on his defence under section 211 of the *Criminal Procedure Code*. The appellant opted to give a sworn statement and called 2 witnesses.

4. By judgment delivered on December 8, 2020, the appellant was convicted and sentenced to serve life imprisonment.

5. Being dissatisfied with the decision of the trial court, the appellant instituted this appeal against the conviction and sentence on 9 grounds reproduced verbatim as follows: -

    1. That the trial magistrate erred both in law and fact in convicting the appellant based on contradictory and unsatisfactory evidence rendering both the conviction and sentence unsafe and wholly untenable.

    2. That the trial magistrate erred both in law and fact in completely failing to fully evaluate, appreciate and find that the nature and import of the evidence adduced on the part of PW2 clearly absolved the appellant from the alleged offence.

    3. That the trial magistrate erred both in law and fact in failing to appreciate and hold that the age of the alleged victim remained contradictory and, further, that the terminologies or words used in evidence and in the judgement did not properly and satisfactorily describe the alleged offence.

    4. That the trial magistrate erred both in law and fact in failing to find and hold that the complainant's own brief testimony contained no level or amount of satisfactory evidence capable of linking the appellant to the offence in question.

    5. That the trial magistrate erred both in law and fact in holding that the prosecution proved its case against the appellant beyond any reasonable doubt such holding being fully and entirely repugnant to the contradictory nature of the evidence on record.

    6. That the trial magistrate misdirected himself in failing to appreciate the fact that the charges levelled against the appellant were malicious and the result of unhealthy and toxic relationship between PW1 and the appellant herein.

    7. That the trial magistrate erred both in law and fact by failing to find and hold that there was no conclusive evidence on record on the nature of the alleged infection and no evidence at all was adduced to link the appellant to the said infection.

    8. That the trial magistrate erred in law in pronouncing a conviction under provisions of law completely different from the provisions under which the appellant was charged

    9. That in totality, the prosecution completely failed to prove its case against the appellant to the satisfactory standards as by law required thereby rendering both the conviction and the sentence imposed herein both legally and factually unsustainable.

6. The appellant seeks that the conviction be quashed and sentence set aside. He also seeks that the he be released forthwith unless lawfully held.

7. The appeal was canvassed through written submissions. The appellants' submissions were filed on March 20, 2023 while the respondent filed its submission on March 28, 2023.

The Appellant's Submissions

8. In regards to grounds 1,2 and 5 of the appeal, the appellant submitted that based on the evidence of PW1 and PW2 the alleged offence was not committed and the trial court erred by ignoring this fact and convicting the appellant ostensibly on PW3's evidence.

9. He argued that the evidence of PW1, PW2 & PW3 put together materially and significantly varied in content and veracity and hence left serious doubts as to the actual occurrence of the alleged offence which doubt could have been resolved in favour of the appellant.

10. With respect to ground 8 of the appeal, the counsel argued that the appellant was convicted of incest contrary to section 20(1) of the *Sexual Offences Act* which was an offence he was not charged with.

11. With regard to grounds 6 and 9 of the appeal, the appellant submitted that investigating officer failed to explore and tender credible evidence to discount the accused's position that the witness who was adversely mentioned and summoned by the court pursuant to section 155 of the *Criminal Procedure Code* enjoyed an unhealthy relationship with his wife hence his intention was to see the appellant out of the way. He submitted that the prosecution failed to adduce sufficient evidence to completely displace the appellant's contention that the summoned Maasai witness harboured ill intentions when he went about announcing occurrence of the alleged incident without the investigating officer visiting the scene to take first hand evidence of the scene to be able to ascertain beyond any doubt whether it was, in the first place, possible for the appellant to commit the said offence at the time and place alleged in the circumstances obtaining.

12. He submitted that the factual circumstances as to the actual occurrence of the alleged offence remain in serious doubts in terms and place of the offence considering the fact that all other victim's siblings and, possibly, PW1 were all in the same house when the appellant is alleged to have committed the offence.

13. In regards to the sentence passed by the trial court, the appellant submitted that as held by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR the infliction of punishment is a matter for the discretion of the trial court.

14. The appellant further invited this court to be guided by the persuasive decision of *SOO v Republic* [2021] eKLR

Respondent's Submissions

15. The respondent submitted that at the hearing the prosecution had a duty to prove the following ingredients of incest charge: -

    1. Age of the victim
    2. The relationship between the accused and the victim
    3. The act of penetration
    4. The identity of the perpetrator

16. In regards to the first ingredient, the respondent cited the Court of Appeal stated in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR that: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...."

17. The prosecution then submitted that the age assessment conducted established that the victim was aged 12 years' old which is an age below 18 years as per the provisions of section 20(1) of the *sexual offences Act*. He submitted that this ingredient was thus proved beyond reasonable doubt by the evidence of PW1 and the age assessment report.

18. In regards to the second ingredient, the respondent relied on section 20(1) of the *Sexual Offences Act* and submitted that there is no dispute that the appellant was a father of the victim.

19. In regards to the third ingredient, the respondent submitted that the evidence of the PW3 established that there was penetration, that at the time of examination the victim's hymen was fresh and bleeding and the P3 form produced indicated the victim had torn hymen.

20. On the last issue, the respondent submitted PW1 testified that there was allegation that the victim had been defiled by her father but since she couldn't believe she decided to check her daughter but she did not see anything. It was submitted that PW1 lied to court as she wanted this matter resolved at home or if she said the truth then she had no expertise to examine the victim.

21. The prosecution argued that immediately after the act the victim was able to categorically state what had happened to her and the person responsible, to PW1 and PW3. The respondent contended that PW1 was trying to conceal the issue and that the victim did not mention any other perpetrator other that the appellant and as such identification was proved.

22. The respondent prayed that the court upholds the conviction by the trial court.

23. On the sentence, the respondent left it to the discretion of court in light of the case of *Philip Mueke Maingi v Republic* [2017] eKLR.

Duty Of The Court

24. Having considered this appeal; submissions by parties and the authorities relied on. I have also considered the trial court's record and the impugned judgment.

25. The first issue that the court has to address is the argument that the appellant was convicted on an offence that he had not been charged with. This position is misplaced. The record shows that on May 21, 2021, the charge sheet was amended whereupon the charge of defilement was substituted with the offence of incest. The accused pleaded not guilty to the amended charges. Therefore the conviction was on the charges properly in court.

26. Having disposed of the first issue, I will now deal with the other grounds of appeal.

27. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate, re-analyze and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and given due allowance for that.

28. In *Okeno v Republic* [1973] EA 32. The court stated:

> " An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v Republic* [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v Sunday Post* [1958] EA 424.)"

29. Further in *Kiilu v Republic* [2005]1 KLR 174, the Court of Appeal 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

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 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."

30. In view of the above, it is imperative to set out the evidence as presented before the trial's court. 8 witnesses testified for the prosecution while 2 witnesses testified for the defence.

31. PW1 was RB, the victim's mother. She testified that the victim was 7 years old although she was unsure. She stated that on December 16, 2020 she left for a burial at Kisii leaving behind F, the victim, S and the appellant at home. She returned home at 9pm, tired and she proceeded to sleep. On December 17, 2020 the victim told her that the appellant had slept with her and she did look down there but did not find anything and she decided to keep quiet. She said that she was living with so many people in their plot and the caretaker one Maasai learned about the issue and came with other people and took the victim to Salgaa police station. She also went to the police station and she was apprised that the victim had been taken for safety. She confirmed that the appellant was the victim's father.

32. In cross examination, she said the appellant did not commit the offence before court. She said it was Maasai who told her that the appellant did something to the child when she was away and when she checked the child she found she was okay. She did not see any blood or sperms and her under pant was clean. She also said the victims did not sustain any injury. She said the victim and her sister F usually sleep on the floor and that F confirmed nothing happened. She said the victim informed her that Maasai advised her to lie. She stated that Maasai called Nyumba kumi and they came with other people to her house to check on the victim. It was her testimony that she was taken to the police station and advised to stay outside. She was not allowed to accompany the victim to the hospital. That the police told her to go home and the following day the appellant was arrested. She said she had been married to the appellant for over 10 years and he loved all his children and that this was the first incident he was being accused of. She said she knows the appellant could not touch the victim.

33. PW2, was the victim. She testified that she did not know why the accused was in court. She stated that on the material date she was at home with F, their young baby F, S and the appellant. She said her mother had travelled to Kisii but she returned at night. She stated that she did not tell her mother anything. It was her further testimony that her mother and the appellant sleep in the bed while she and F sleep on the floor in a single room house. She said people from their plot came alleging that she had been raped by the appellant. She confirmed she was taken to the police station where she was interrogated by the police officer regarding the issue herein and she told him the same was untrue. She also confirmed that she was taken to the hospital where she was examined and thereafter she stayed with a police woman at her home for days she couldn't remember.

34. PW3 was Anne Kibbe, the chairwoman of Nyumba Kumi. She testified that on December 17, 2020 in the evening the caretaker of the plot one Maasai called her and informed her that there was a victim who had slept with her father. She went to the scene and found the appellant, PW1 and their four children. She introduced herself to them and upon interrogating the victim, she told her that her father had slept with her. That she placed her on the ground and did bad manners. She said PW1 also confirmed the victim had told her as much. She also interrogated victim's siblings who confirmed that they witnessed the victim sleeping with the appellant. She then asked the appellant about the issue but he did not respond. She said PW1 requested her not to take the appellant to the police station since he will be arrested but she accompanied the victim to the police station to report the issue. She positively identified the appellant before the trial court.

35. In cross examination, she stated that the victim's sister who witnessed the incident told her it occurred at the sitting room. She did not see any clothes with blood. She said she had known Maasai for a long time and she did not know whether he used to go to the victim's house or take food there. She also did not know whether Maasai wanted to have a relationship with PW1.

36. PW4 was Dr Nyomose Ruth from Nairobi Hospital in Nakuru. She confirmed the victim was examined at their facility on December 17, 2020 and examination showed that the hymen was freshly broken. She stated that there were also lacerations on the hymen and it was confirmed there was penetration. It was her further evidence that urine test showed there was an infection. The victim was given STI treatment to clear the infection. She produced the PRC form and the P3 as exhibits before the trial court.

37. In cross examination she stated that there were no blood stains in the clothes and on the victim's legs. She said the examination showed that the hymen had been broken in less than 48 hours and was oozing blood. She confirmed the appellant was not examined.

38. PW5 was PC Joseph Muchimo stationed at Salgaa Police Station. He recalled that on December 17, 2020 while at the station PW3 came in company of the victim and reported that the victim had been defiled by her father. He booked the report and as he was recording the victim's statement, the appellant and PW1 arrived at the station. He asked the child who her father was and she pointed at the appellant and he placed him in a cell. He said PW1 became furious and demanded for release of the appellant. He advised her that investigation had to be done. He escorted the victim and the appellant to Nakuru women's hospital where examination was done and thereafter he commenced investigations. He said PW1 declined to record her statement saying that her husband did not commit the offence. He said on December 18, 2020 a woman police officer was able to record PW1's statement in which she stated that the appellant did bad manners to the victim. He said he was unable to trace other witnesses as PW1 was unsupportive of the case.

39. This witness on being recalled, attended court and produced the age assessment reports of the victim from Molo Sub County Hospital and Provincial General Hospital which indicated that the victim was 12 years old. The witness also produced the statements of PW1 and PW2 as exhibits before court.

40. PW6 was Janet Rono, a counsellor and volunteer at children's home. She said on December 17, 2020 she was called by the police from Salgaa station to assist in a defilement matter. She instructed her colleague, one Margaret to proceed to the said station and later she joined her. She said at the station she met the victim who told her that her father had hurt her. She said the victim appeared frightened and she did not talk much. She said she took the victim to Nairobi Women's hospital where she was examined and confirmed she had been defiled. She said the children officer said the child needed protection and since she could not be accepted in the children's home due to Covid outbreak she opted to stay with her. She stayed with the victim for 4 days and during that period she noted the victim was urinating with pain. When she asked her what happened she would either cry or not speak. After four days she returned the child to the police station where she was reunited with her mother.

41. PW7 was Margaret Muturi. A volunteer member for GBV. She confirmed on December 17, 2020 she went to the Police station where she found the victim, PW1 and the appellant. She interrogated the accused regarding the offence and he denied committing the same. She also interrogated PW1 who told her that she was also informed about the same since when it happened she was away in Kisii. She said PWI stated that the issue should be resolved at home. She confirmed she also accompanied the victim to the hospital.

42. In accordance to section 155 of *CPC* one Lemishe Daudi a.ka.a Maasai who had been mentioned by all witnesses was summoned by the trial court. He testified that he was a caretaker of the plot in which the appellant and his family resided. That on the fateful day at around 12 pm he received a phone call from PW1, who informed him that when she was away from home, the appellant did bad manners to the victim. At 1800hrs he went to PW1's house where he found her and the victim. He said the victim told him her father had done bad manners to her. He said PW1 said the matter should be resolved traditionally at home. He told Shosho E about the incident and she came to the scene and interviewed the victim who also confirmed to her that her father did bad manners to her. He said shosho E advised that PW3 should be informed. He informed PW3 and she came in company of Mwaniki and they all went to PW1's house. On reaching there, they found PW1 and her children sleeping. He said PW3 introduced herself to them and she interviewed the victim who confirmed the Appellant did bad manners to her. He said PW3 also interviewed faith and she confirmed the incident occurred.

43. In cross examination, he disputed going to the appellant's house in his absence. He said he only talked with PW1 on payment of rent since she was the one paying it.

44. DW1 was the appellant. He confirmed the victim was his daughter. He denied committing the offence. He said Maasai had a grudge with him, wanted to have a relationship with his wife and he used to go to his house in his absence. He said the victim was 7 years old and he was born when he was 16 years old when she was born.

45. DW2, was FK, a daughter of the appellant. She also disputed that the appellant committed the offence herein. It was her further testimony that Maasai used to come to their home daily to visit PW1 while the appellant was away at work.

Issues For Determination

46. The issues arising for determination based on the appeal grounds are as follows:

    1. Whether incest was proved in the instant case?

    2. Whether the sentence was lawful and proportionate

Analysis

47. Section 20 of the *Sexual Offences Act* deals with incest by males. This section creates the offence and ingredients of incest and also prescribes punishment. It provides as follows:

> " incest by male persons
>
> 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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period."

48. "Indecent act" under section 2 of the *Sexual Offences Act* means:

> " any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."

49. Under section 5 of the *Sexual Offences Act* the offence of "sexual assault" arises when:

> "
>
> "(1) Any person unlawfully penetrates the genital organs of another person with any part of the body of another or that person; or with an object object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes."
>
> "genital organs" are defined in the *Sexual Offences Act* to include:
>
> "the whole part of the female or male genital organs and includes the anus" and;

50. "Penetration" is defined as:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

51. With the above background, I will now proceed to analyse the 1st issue. The first element to be proved by the prosecution was the relationship of the appellant and the alleged victim. The evidence both for the prosecution and the defence is that the appellant is the father of the victim. Thus the relationship between the victim and the appellant has the capacity to be an incestuous relationship under the *Sexual Offences Act*. The relationship was proved by the prosecution beyond any reasonable doubt.

52. The second element, to be proved was the age of the victim who was said to be 6 years of age. In the case of *Hilary Nyongesa v Republic* (2010) eKLR where Mwilu J (as she then was) stated as follows:

> " Age is such a critical aspect in sexual offences that it has to be conclusively proved...
>
> And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim"

53. The birth certificate of the victim was not available. Age assessment was done and it established that the victim was 12 years old. The same was produced in evidence.

54. In the case of in *Musyoki Mwakavi v Republic* [2014] eKLR it was held that: _

> "...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...".

55. In the case of *Francis Omuroni v Uganda* Court of Appeal; criminal appeal No 2 of 2000, it was held that:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

56. It is clear from the above authorities that the evidence of age can also be established by the age assessment report. The same was produced in evidence without any objection from the appellant. In addition, the appellant did not question the age of the victim during cross examination. It is therefore prudent not to disturb the finding of the trial magistrate.

57. With regard to sexual penetration, the medical evidence was that the hymen of the victim was freshly broken and there was blood oozing therefrom. That in my view is sufficient evidence to prove penetration of a sexual nature on the victim.

58. The fourth element of the offence was the identity of the perpetrator. It is not in dispute that the appellant is a person known to the victim. All the prosecution witnesses also positively identified him before the trial court.

59. PW1 was not a credible witness in my view. During examination in chief she confirmed that the victim told her that the appellant slept with her when she was away in Kisii. She said she checked the victim down there and confirmed nothing happened. In cross examination she contradicted herself by stating that it was one Maasai who told her that the appellant slept with the victim when she was away and that he also advised the victim to lie. PW3 told the court that PW1 did not want the matter reported but to be resolved at home. At the police station, PW5 was able to tell that PW1 was being protective of her husband. PW3, PW5, PW6, PW7 & PW8 confirmed they interrogated the minor regarding the issue herein and she told them that the appellant did tabia mbaya to her. PW6 stayed with the victim for four days and she observed that the victim felt pain while urinating. The victim was examined and it was confirmed that she was sexually assaulted.

60. The appellant contends that the terminologies used to describe the offence was not satisfactory. It was imperative for the trial court to verify during hearing what witnesses meant by "the appellant slept with the victim" and the appellant did "tabia mbaya" to the victim. That notwithstanding, given the surrounding circumstances of this case, this court should take judicial notice that the above terminologies meant the act of sexual intercourse. A child of the victim's age cannot be expected to go into the gory details of describing an act of sexual intercourse. The trial court was entitled to accept that tabia mbaya, in the circumstances meant sexual intercourse. The testimonies of the prosecution witness buttress the fact that the victim had been sexually assaulted by the appellant.

61. As was correctly pointed out by the trial court, there were elaborate attempts to sweep the case under the carpet. PW 1 was at pains to explain why she was examining the victim's genitalia if there were no allegations of sexual violence against the victim. It is also on record that the victim was moved from her home by her own parents, including the accused, and it took the intervention of the court to have her availed, albeit months later.

62. Maasai, was summoned by the court under section 150 of the *Criminal Procedure Code*(CPC) and was examined under section155 thereof. The court took the precautionary step of calling the witness as he had been mentioned by other witnesses but had not been lined up as a prosecution witness.

63. This was a peculiar case where those who ought to have been protecting the victim appear to have tried to hush up the incident. These acts seem to have extended to include the victim who disowned her initial reports, and the victim's own sister.

64. The undisputed fact remains that there were scientific evidence in the shape and form of the PRC Form and the P3 Form which clearly show that there was sexual violation of the victim.

65. As to who committed the offence, the trial court, faced with recalcitrant witnesses, had to look at the circumstances surrounding the incident. Of course, there was no eye witness, save for the victim who had already been compromised by her own parents. It is also very possible that Faith (DW2) was also compromised with the sole intention of scuttling the case.

66. With key witnesses appearing to have been compromised in order to vindicate the appellant, the trial court was well entitled to look at the circumstantial evidence surrounding the alleged offence.

67. On circumstantial evidence, I will rely heavily on the decision in *Kipkering Arap Koske and another v Republic* (1949) EACA 135 PAGE 136, where the Court of Appeal stated as follows;

> "As said in Wills on '*Circumstantial Evidence*' 6th Edition P. 341 in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."

68. Further in *Philip Muiruri v Republic* criminal appeal No 76 of 2012,the learned judge referred to the South African case of *Ricky Ganda v The State* (2012) Zafshc 59,free State High Court, Bloemfontein, which stated as follows;

> "…….the proper approach is to weigh up all of the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

69. The circumstantial evidence points to no one else other than the accused person. He was with the victim at the material time, when her mother was away. The other people who went to attend to the victim were categorical on what was reported to them by the victim then.

70. The alleged incident was committed while the appellant was left with the children when PW 1 travelled to Kisii. Therefore the appellant was with the victim at the material time. There is no evidence of a 3rd party being with the victim.

71. After analysing the evidence, I come to the same conclusion as the trial court that the appellant is the one who violated the victim. I therefore uphold the trial court's conviction of the appellant.

72. Regarding sentence, the appellant contended that the same was legally and factually unsustainable.

73. Sentencing is governed by the *Constitution*, the relevant statutes, the Judiciary Sentencing Policy Guidelines 2016. The guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

> " Sentences are imposed to meet the following objectives:
>
> 1. Retribution: to punish the offender for his/her criminal conduct in a just manner.
> 2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
> 3. Rehabilitation: to enable the offender reform from his criminal disposition and become a law abiding person.
> 4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
> 5. Community protection: to protect the community by incapacitating the offender.
> 6. Denunciation: to communicate the community's condemnation of the criminal conduct.

74. The appellant faced a charge of incest. The child was under 18 years of age. Under the proviso to section 20 (1) of the *Sexual Offences Act*, the appellant was liable to a life imprisonment term, which the trial court found fit to mete out. There is nothing unconstitutional or illegal about the sentence as it was within the powers of the court to impose it.

75. In mitigation the appellant told the trial court that he was remorseful and a first time offender. That he is a father of 7 children and a sole breadwinner. He urged the court to consider a non-custodial sentence for the sake of his children.

76. There is no justification for the appellant to have preyed on a minor, who was his own daughter. He deserves severe punishment so that others like him will also fear committing such an offence.

77. In my view the life imprisonment was proper given the age of the victim, and the fact that this was the appellant's own child. Even if I was of the opinion that I could have meted out a different sentence, I cannot fault the trial magistrate on the term he imposed upon the appellant. I choose not to disturb that sentence.

78. The upshot of it all is that I find the appeal wanting in merit and it is dismissed. Both findings on the conviction and sentence in the lower court are upheld.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Ms Murunga for state

C/A Jeniffer

Mr. Ochang for appellant

Appellant present