PNM v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 20828 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E042 OF 2022

MW MUIGAI, J

JULY 24, 2023

BETWEEN

PNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal Against Conviction And Sentence Judgment Delivered On 5/8/2022 By Hon. Khapoya S. Benson (PM) In Kithimani Sexual Offence No 21 Of 2022)

JUDGMENT

Background

1. The Appellant was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that the Appellant on the on 30th day of November 2019 in Matungulu Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of MMN, a child aged 15 years who was to his knowledge his daughter.

3. In the alternative count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars of offence were that the Appellant on the 30th day of November 2019 in Matungu Sub County within Machakos County, intentionally and unlawfully by use of your genital organ (penis) caused contact into genital organ (vagina) of MMN a child aged 15 years, your daughter.

5. The Appellant pleaded not guilty to both charges and the matter went to full trial.

Hearing In Trial Court

Prosecution Case

6. The case for the prosecution was anchored on the evidence of four (4) witnesses.

7. On 28/1/2021, the case commenced; PW1 and PW2 testified and then Prosecutor sought DNA testing of the child born to the victim and the Accused person. When the DNA Report was availed the Accused person applied in Court that the case be started de novo. The 2 witnesses testified again.

8. PW.1 MM, testified on 6/12/2021, that she was 16 years old, in Form one at [Particulars Withheld] Secondary School and in 2021 she was in Class 8. It was her testimony that 30/11/2019 she was at home alone; that she has siblings and she is the eldest. She said that her siblings were not there neither was her mother who had gone to work at another woman's home. She said at around 1000 hours, the accused person came from the farm and told her to go inside the house. She said he is called P, she knew him as her father.

9. She got surprised and refused; the accused grabbed a knife and dragged her in the house while holding the knife in the right hand. The Accused told her to go inside the bedroom and she refused. He started threatening her using a cable. The accused took her to the bedroom and ordered her to sleep on a mattress on the floor; she refused. She was tripped to the ground and fell on the mattress. He ordered her to part her legs which she refused. The Appellant took off her inner pants as she was wearing a dress.

10. She said that the accused threatened her with death that he would cut her into pieces, he forced himself into her and forcibly had sex with her. He penetrated her private parts. The ordeal lasted for about 30 minutes when he left she ran off to tell her mother. They returned home and called their grandmother A who advised them to report to the police they did not report on that date. The Accused person ordered them not to report as they would find the case having been concluded. They reported to Donyo Sabuk Police station the following day and she went to Matuu Level four (4) Hospital where she was examined and given drugs.

11. They reported in secrecy. A P3 form was filled which form is dated 15/4/20; that she was examined by the doctor and was found pregnant. She gave birth to the child who was at home and is aged one year. She said that they were taken for DNA testing and gave samples. The DNA report is dated 23/2/2021. She said the child is called BM.

12. Upon cross examination, she testified that the incident occurred on 23-11-2019 and the accused person also attempted to defile her in April 2020. She said the accused person forced her inside the house, he was armed with a knife. She said that the Accused person told them that if they reported they would find the case concluded. They don't know where he took the knife. He denied before her mother; there are neighbors close by. She also said the accused used to threaten people in the village and they fear him.

13. Upon re-examination, she testified that the Appellant had never slept with her before 30-11-2019, the other times were attempts which never succeeded.

14. PW2 PKN testified that the accused was her husband and they have four children. Her first born is PW1. She testified that on 30/11/2019 in the morning hours she left for work leaving behind the Accused person and with their four children. She was at work up to noon when PWI came at her work place crying. She told her that her father had had sex with her. She testified that she immediately went with PW1 to her home and did not find the accused, he came thereafter. He was violent, the Appellant's mother came and she reported to her. She advised her to report. His mother went towards

Donyo Sabuk and the accused person retorted that if they reported, he would find his mother having interfered with the case. She did not report.

15. She further testified that the Appellant made a 2nd and 3rd attempts on PW1and she would stay with the child till evening before going home and on the final attempt she reported at Donyo Sabuk Police Station. She was with her child and they were directed to hospital where she was examined and found to be four (4) months pregnant. They then returned home. They recorded their statement, M was treated and a P3 form was filled and signed. She testified further that PW1 gave birth on 17-7-2020. They went for DNA testing in Nairobi, DNA report confirmed that the Appellant was the father of the child. That the Appellant was arrested in her presence. He was looking for them armed with a panga. She had no grudge.

16. Upon cross examination, she gave her testimony that the subject victim went to her crying. She did not find her grandmother; that the neighbors are not their close relatives. She said she feared the Accused person. The Accused threw her clothes out of the house after she reported the matter to police. The Appellant's mother was not found to record her statement.

17. PW3 Benjamin Maingi Senior Clinical Officer based at Matuu Level 4 hospital testified that he had two P3 forms; for PW1 and the accused. He said that PW1 was 15 years old at the time of examination and that she was brought to the hospital by her mother and a police officer for examination after she was defiled by the father on 30-11-2019 at their home. He testified further that on examination she was found to be approximately 20 weeks gestation and hymen was torn and was not fresh. She did a pregnancy test which was positive and also did syphilis and HIV test which were negative. He concluded that the subject victim had been defiled and filled P3 form and signed on 15-4-2020 which he produced as exhibit. He also produced the lab investigations form and treatment notes. He produced the post rape care form with similar details in P3 form and that pregnancy is at 20 weeks as exhibits in Court.

18. He further testified that he had the P3 Form for the Accused who was 32 years old. He was taken for examination on 13-5-2020 by a police officer on allegations of defilement of a minor on diverse dates in November 2019 and on examination he was in fair general condition with no injuries; they carried out HIV test which was negative and the urine test showed no infection. Test for syphilis was negative. He signed the P3 Form on 13-5-2020 which he produced as exhibit and that he recommended DNA to be conducted on the subject victim.

19. Upon cross-examination, he said that the Post Rape Care Form indicated the subject's date of birth as 4.10.04. He traced the age on history pf the subject provided and information given to him by the patient. He said that he examined the subject victim's vagina and found no injuries, hymen was torn and not fresh; that he did a pregnancy test which was positive.

20. In re-examination, he testified that subject victim was 15 years old at time of examination.

21. PW4 No 60219 CPL. Esther Njoroge, based at Ol Donyo Sabuk police station testified that she did her investigations and took the subject victim to the hospital at Matuu Level 4 hospital where the doctor examined her and established that the subject victim was pregnant. She recorded the statement of the victim. On 23/2/2021 they went to Nairobi Government Chemist with the Accused person, the victim and the child born by the victim; samples were taken for examination and the findings returned to court. DNA finding established 99% the accused was the father of the child born by the victim. She produced the DNA report dated 23/2/2021 as exhibit.

22. She said the mother brought her the document and went with the original. She left her with the subject immunization card which shows the victim was born on 11-10-04. The subject at the time of the

incident was 14 years old. The subject is the accused person's daughter she produced the immunization card.

23. Upon cross-examination, she testified that the girl was 14 years old. The statement was done by her colleague SM which shows that the subject victim was 15 years old and that the investigation diary showed that the child was 15 years.

24. The prosecution closed their case and vide a ruling dated and signed on 13/6/2022, the learned Principal Magistrate found that a prima facie case had been established against the Appellant and he was put on his defense.

Defence Case

25. DW1 (Appellant), gave his unsworn evidence and testified that on the date of the alleged incident on 30-11-2019, he was on his ordinary chores in which his neighbor had accompanied him to water tomatoes. He finished at 1800 hours. At about 2030 hours he differed with his wife in the house on his Christmas budget. She asked him how he would support her for the year. She told him that children are his and he should cater for them hence the genesis of their differences. His wife threatened leave behind the children and go to their home.

26. On 12-5-2020 he was at Thika Makongeni as a mason when at 0800hours police officers went and arrested him. He testified further that he was in his father's house and he was told that child had been defiled. He said he was not the one who committed the act. On 3-5-2019 he again differed with his wife when he claimed that their daughter was pregnant, his wife claimed that he was responsible. She informed her parents who advised her to report, she did not. That on 13th he was taken to Matuu hospital and on 14th he was arraigned in court and charges read to him.

27. Vide a judgment dated 5/8/2022, the Appellant was found guilty and convicted as charged under Section 215 of the Criminal Procedure Code.

The Appeal

28. Dissatisfied with the judgment the Appellant vide amended petition of Appeal filed on 28th March, 2023 in which he sought to have the conviction and sentence imposed be set aside. The Grounds of appeal are as follows:

    a. That the trial magistrate erred in law and fact while convicting the Appellant herein in reliance with the evidence of the complainant and PW2, PW3 and filed to consider the evidence of the alleged DNA was left in doubt which same weaken the penetration against the victim.

    b. That, the trial court lost direction in evidence while basing the Appellant's conviction without considering the credibility of witnesses which left a lot to be desired in their testimonies.

    c. That, the trial magistrate erred in law and fact in rejecting the appellant's alibi defence which was not displaced by the prosecution side as per Section 212 of the *Criminal Procedure Code* Cap 75 laws of Kenya.

29. The Appeal was canvassed by way of written submissions

Submissions

Appellant's Submissions

30. Vide written submissions filed on 28th March, 2023, the Appellant submitted that the complainant testified that she was removed her pants but tried to keep her feet and thigh tightly together and was threatened to be stabbed with the knife and the intruder had sex with her by force and after he was done he left her alone. He opined that those are the main factors in the case that impressed the Trial Magistrate and concluded that the complainant was defiled by the Appellant without considering the act of penetration which was not adequately proved. Hi position was that the prosecution had not proved the Appellant guilty beyond any reasonable doubt as required in law.

31. He submitted that it was doubtful as to how PW1 wanted the court to believe that she reported the matter to her mother immediately and there is no evidence of what action was taken after, only that they were persuaded not to report to the police. Further the complainant was silent on the date and year she had again been threatened to be raped and the date they reported to the police.

32. It was the Appellant's submission that PW2 who only gave evidence of the incident of 30-11-2019 that the Appellant made two other attempts of raping the complainant without mentioning the date when the said two attempts occurred and in which year.

33. On the issue of penetration, it was submitted that the medical evidence suggested that the complainant's hymen was torn and was not fresh which renders a question as to whether the alleged hymen was broken by the Appellant or somebody else by the partial or complete insertion of the genital organs of the Appellant as to amount to penetration. Reliance was made on the evidence of clinical officer which revealed that: -

> "She was brought on 15/4/2020 to the hospital by her mother and a police officer for examination and she was defiled by the father on 30/11/2018 at their home"

34. It was submitted that the first time the complainant was taken to hospital as per the upshot of evidence was on 15/4/2020 while the alleged offence was committed on 30/11/2019 without explanation given for the delay of 1 year 4 ½ months with samples of both the victim and the Appellant were taken for examination on 23/2/2021 by PW4 the investigating officer reference was made to (page 56 lines 4-7 of the record) urging that this really created doubts as to how long the pregnancy of PW 1 lasted according to the adduced evidence and in regards the charges against the appellant as were being based.

35. It was the Appellant's contention that PW4 took responsibilities of DNA where she testified that: -

> "On 20/2/2021 we went to Nairobi government chemist I was with the accused person and the victim herein and the child born by the victim" (vide page 56 lines 4-6)

36. While relying on Section 36 (5) of *Sexual Offences Act*, PW4 never at all mentioned a medical practitioner who was involved with the exercise of taking samples of the Appellant neither is there anywhere in the record the medical practitioner testified about the result of the alleged samples. Submitting that only PW4 was involved and further stated the following: -

> "samples were taken for examination. We returned the findings of examination to court. DNA finding is that it was established at 99% that PNM is the father of the child M an issue born by M" (vide page 56 lines 7-10)

37. It was the case of the Appellant that a plausible question here is why was the person who made the analysis of DNA not a witness in the present case. He questioned whether exhibited DNA report belonged to the Appellant. He contended that the DNA evidence was not satisfactory safe to base a conviction of the Appellant given that Section 150 of the *Penal Code* was violated due to the

prosecution failure to call the medical practitioner to testify. Reliance was made on the case of *Bukenya & Others –V- Uganda* (1972) 549.

38. It was urged that the evidence of PW4 did not reveal whether the alleged samples of the Appellant were blood, urine or other tissue or substance as may be determined by the medical practitioner as described in Section 36 (5) (a) of the *Sexual Offences Act* No. 3 of 2006. Opining that testimony of PW3 the clinical officer and PW4 police officer who played central role of the DNA, none ever gave the date the when the victim's child was born for the prosecution to compare the date of the alleged offence to prove the Appellant was responsible since the DNA results were left in the realm of speculations but not proof.

39. It was the Appellant's case that evidence adduced against him was not full proof hence fell short of the mandatory threshold of proof beyond reasonable doubt as the DNA results could be of somebody else other than the Appellant herein. The court was urged to find that the Appellant had been charged with the alleged offence committed on 30-11-2019 and not 23-11-2019, therefore the charge sheet is defective which does not match with the date of birth which was given by PW2 mother of the complainant.

40. On the issue of credibility of witnesses, it was the Appellant's submission that PW1 had contradicted herself in the first and second testimony when she stated that: -

> " it was on 30/11/2019 but we reported last year to police."

41. It was the contention of the Appellant that both PW1 and PW2 were mentioning the mother of the Appellant that she knew what transpired but was not a witness in the present case hence prosecution failed on their duty to summon witnesses, thus a violation of Section 150 of the Criminal Procedure Code.

42. The Appellant contends that PW3 during cross examination left a lot to be desired when he said the following: -

> " in the post rape care form the subject date of birth is not indicated. Sorry it is indicated 4/10/2004. I traced the age on history of subject provided. Information given to me by the patient".

43. Stating cross examination of PW3 created a reasonable doubt as to when the alleged offence was committed and when the subject's child was born, since for him indicating 4-10-2004 did not prove the charges laid down against him. That PW4 (investigating officer) casts doubts as regards the age of the victim when she said that: -

> " the girl was 14 years old. The statement was done by my colleagues SM. Shows she was 15 years old" (vide page 57 lines 5-6)

44. It was submitted that the prosecution violated Section 77 of the *Evidence Act* which could allow PW4 to testify on behalf of her colleague SM as the evidence clearly revealed that age of the victim should be proven the same way penetration is proved.

45. It was finally submitted that after the Appellant gave his alibi defense, record reveals that the prosecution never made any rebut of the same contrary to section 212 of the *Criminal Procedure Code*. It was urged that this Honorable Court allows the appeal, conviction and sentence imposed be set aside.

Respondent's Submissions

46. Vide Respondents submissions dated 1st February,2023 and filed on 28th March,2023, respondent opposed the appeal on the following grounds: -

47. As regards the ground that the Appellant was not represented during the trial, reliance was placed on Article 50 (2) (g) of the *Constitution* to choose, and be represented by an advocate and to be informed of this right promptly. It was submitted that the Appellant opted to proceed in person without any legal representation. The Appellant was not informed by the Trial Court of his constitutional right to legal representation and no injustice was suffered by the Appellant by not being informed of this constitutional right. Respondent quoted the case of *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecution & Another (interested parties)* (2021) e KLR, Mrima J stated;

> "Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the *Constitution* in the circumstances of this case?
>
> 35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.
>
> 36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of the *Constitution*. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the *Constitution* then it remains the unwavering duty of this Court to enforce the provisions of the *Constitution*.
>
> 37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the *Constitution* then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the *Constitution* will be tantamount to amending the *Constitution* through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the *Constitution* as it is the intentions of the People of Kenya as expressed in the *Constitution* will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law."

48. On the ground of review on the sentence imposed by the trial court, it was submitted that the Trial Court imposed a sentence of life imprisonment. The Appellant willfully and intentionally defiled his

daughter, and impregnated her. The DNA report confirmed this Monstrous act. Reliance was made on S. 20 (1) of the *Sexual Offences Act* No. 3 of 2006, provides that:

> 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.

49. Submitting that the Trial court was right in sentencing the Appellant to life imprisonment. Reliance was put on the case of *R v Scott* (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed... one of the purposes of punishment is "to ensure that an offender is adequately punished... further purpose of punishment is "to denounce the conduct of the offender"

50. Urging that Trial Court imposed an appropriate sentence to the Appellant on the incestuous offence, committed by the Appellant.

51. As regards proof beyond reasonable doubt, reliance was further made to Section 20 (1) of the *Sexual Offences Act*, under which the appellant was convicted and sentenced,

52. As regards penetration, it was contended that PW3 testified that on physical examination the victim hymen was torn and was not fresh. He conducted a pregnancy test which was positive concluding that the victim was defiled.

53. It was the Respondent's submission that the main ingredient of incest which is penetration was proved beyond reasonable doubt evident from the P3 Form, post rape care form and lab form that the victim was defiled. Opining that DNA report sealed the Appellant's fate indicating that 99.99% the Appellant is the father to the victim's child. Reliance was made in the case of *F O D v Republic* (2014) e KLR Majanja J held that;

> " While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

54. It was the Respondent position that the appellant was properly identified by the victim, proof of penetration proved appropriately, proof of age was adequately and the relationship between the Appellant and victim also proved completely. Urging the court to uphold the conviction and sentence imposed by the trial court.

Determination

55. The Court considered the Trial Court record and the submissions of the parties herein. The issues for determination that ;

a. Whether the elements of penetration is an ingredient for the crime of incest to be proven

b. Whether the defence evidence was considered

56. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by considering the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno v. Republic* (1927)E.A 32 where it was stated 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 (*Pandya v. R*, [1957] E. A. 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 conclusions. (*Shantilal M. Ruwala v. R*., [1957] E.A. 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] E. A. 424."

57. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

58. In *Bakare v. State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria stated as follows:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

59. The Appellant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 which provides as follows;

> (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. [emphasis added]

60. The *Act* in Section 2 defines an indecent act as;

> " means an unlawful intentional act which causes;
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) exposure or display of any phornographic material to any person against his or her will;

61. The ingredients that need to be established in a crime of incest are;

a. proof of the minority age of the victim,

b. knowledge by the Appellant/accused that the victim is his relative,

c. evidence of penetration on the victim's genitalia or indecent act.

62. In this case it is not contested that the Appellant is the father of the victim. This was confirmed by all the witnesses before the court including the Appellant who in his testimony referred and stated that;

> " on 3.5.19 I again differed with my wife when I claimed our daughter was pregnant"

63. The Appellant was well aware that the victim was his daughter. The issue of knowledge is therefore settled.

64. The age of the victim as per the charge sheet is said to be 15 years. The Victim stated that she was 16 years as at 6-12-2021 when she was testifying. PW3 stated that the victim was 15 years at the time of examination which was on 15-4-2020. PW4 stated that the victim was 15 years old and produced an immunization card to support her testimony. The Appellant did not object to the production of the immunization card. The said card is a copy of a child called M born on 4-10-04.

65. In cross examination, she clarified that the victim was aged 15 years and not 14 years old. From 4-10-04 when the victim is said to have been born to 30-11-2019 when the incident occurred is 15 years, 1 month, 26 days. This confirms that the victim was indeed 15 years at the time the heinous act was done to her.

66. Rule 4 of the *Sexual Offences Rules*, 2014 provides that:-

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

67. The issue of proof of age has been discussed in a number of cases. The Court of Appeal in *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

68. Under the circumstances, I find that the information in the P3 Form dated 13-4-2020, the Post Rape Care Form of PW1 the victim depict 'Hymen torn not fresh', the immunization card that confirmed the victim's age as it indicates date of birth as 4/10/2004 and was 15 years in 2019 when the offence took place, coupled with the oral evidence of the prosecution witnesses PW1 PW2 & PW3 & PW4, especially the victim was credible as proof of age of the victim as 15 years at the time of the incident and that the Appellant committed the offence of incest to PW1, his daughter.

69. The third element is evidence of penetration of the victim's genitalia or proof of an indecent act. Penetration and an indecent act are defined in Section 2 of the *Sexual Offences Act* which provides as follows;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person"
>
> "indecent act" means an unlawful intentional act which causes
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) exposure or display of any phornographic material to any person against his or her will;

70. In this case, the P3 Form and PRC Form indicate that the hymen is torn. This corroborated the evidence of PW3. Despite the same not being fresh, it was contended that the victim was 4 months pregnant at the time of examination and the DNA results dated 23-02-2021 produced in Court confirm that the child she bore was fathered by the Appellant. A fact that he has not denied with evidence, he only denied paternity vide a testimony but did not counter with tangible evidence that he is the father of his grandson.

71. The conclusion and opinion of the Government Analyst is as follows;

> " based on the DNA profiles generated from the above listed items, there is a 99.99+ % more chances that PNM is the biological father to MM child"

72. The Appellant contends that the person/Government Analyst who examined them at the Government Chemist ought to have been called as a witness, however this comes late in the day as he should have raised this issue during trial. The Appellant did not oppose the production of the said document and neither did he refute the claims that he is the one who fathered the victim's child.

73. Section 77 of *Evidence Act* provides;

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.

74. Under Section 36 (5) of *Sexual Offences Act*, the Trial Court on 28/1/2021 granted the Prosecution's application to have DNA testing conducted on PW1 the Appellant and the child. PW4 confirmed that she escorted the victim, Appellant and child to Government Chemist on 23/2/2021 and blood samples were taken and she filled the Exhibit Memo Form, When the DNA Report was produced, the Trial Court had a copy availed to the Appellant and on his own request to start the trial de novo, the Trial Court obliged.

75. Section 77 of *Evidence Act* & Section 36 (5) of *Sexual Offences Act* do not make it mandatory in law that the Government Analyst is called as a witness to testify in Court.It is not fatal to the case, if the Government Analyst Report is produced and the Government Analyst is not called to testify as long as the Report is duly filled in, signed dated and stamped and if the Court deems it fit may summon the Government Analyst to testify. From the above, sequence of events, the DNA Report was produced by Investigation Officer PW4 who took the parties to Government Laboratories, their samples were taken, she filled and produced the Exhibit Memo form and the Report done by Government Analyst Okworo. E. dated 23/2/2021 and duly stamped Government Chemist. The appellant was/is not prejudiced as the taking of blood samples, examination and filing report was by the Government Analyst whose Report was produced, he cross examined the witnesses and specifically sought and was granted a retrial. The law does make it mandatory for the Government Analyst to testify unless summoned by the Court.

76. In order to avoid any injustice, this court will consider the series of events in this case. The offence was committed on 30-11-2019, the victim gave birth on 17-7.2020 according to PW2's testimony. At the time of physical examination on 15-4-2020 by PW3, she was approximately 20 weeks pregnant. The period between 30-11-2019 and 14-4-2020 is about 137 days equivalent to 4 months, 17 days. As at 2-02-2021 when the DNA samples were received, the victim's child was 1year or so old.

77. In *Kariuki Karanja v. R* (1986) KLR 190, the Court of Appeal considered circumstantial evidence held that:

> " In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts: *Rex v. Kipkering Arap Koske*, 16 EACA 135. An aggregation of separate facts inconclusive because they are as consistent with innocence as with guilt is not good enough evidence."

74. As regards consideration of the Appellant's evidence, I find that the defense being an unsworn statement did not cast doubt on the prosecution case. The victim and Appellant knew each other, members of the same family. PW1 was consistent in her testimony as per the Trial Court record as she testified twice and was subjected to cross examination. The medical evidence as produced by P3 Form & PCR Form and the DNA Report proves the case beyond reasonable doubt that the Appellant

committed incest to PW1 his daughter. The alibi was raised as an afterthought it ought to have been raised early enough to allow sufficient time and opportunity for the Prosecution to adduce evidence to confirm or deny and/or prove the said alibi.

75. With regard the sentence, the Appellant was sentenced to life imprisonment. In considering whether or not to exercise the discretion on reduction of the sentence, I am guided by the law and court decisions. In this case, the Appellant, the father of the victim used violence before assaulting the child and threats thereafter. From the record, the Appellant asked to be forgiven in mitigation.

76. The Court of Appeal in *M K v Republic* [2015] eKLR stated:

> 17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?
>
> 18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
>
> 19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death." The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:
>
> > "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".
> >
> > We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".
>
> 20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.
>
> 21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in

Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

77. Faced with a similar situation, Aburili LJ. in the case of *SOO v Republic* [2021] eKLR made the following observation and found the sentence to be lawful in the circumstances;

> " This Court cannot and would not condone sexual offences and especially if it is committed against minors and more so, members of the family who have no alternative abode. In *Yasmin v Mohammed* [1973] EA 370, Madan J stated:
>
> "The High Court is especially endowed with the jurisdiction to safeguard the interests of infants as the court is the parent of all infants. The Welfare of the infants is paramount and is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe and sect fall within the purview of the Guardianship of infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."
>
> .....
>
> The question is, does such a person who is not in control of his actions and who has an insatiable violent appetite for his own blood and flesh (daughter) deserve leniency, since he is a danger to society? The children he claimed were alone are the same children that he preyed on. Can he be trusted with their custody and care even if he is their father? What appropriate sentence should the court mete out in such circumstances?
>
> .....
>
> Taking into account all the above stated factors and guidelines, I note that the appellant offender herein was the biological father to the complainant minor and is now the grandfather to his own daughter's child, a son. The complainant was aged about 14 years when she was violated. As a child, she is carrying the burden of raising another child whose father is also her father and who is in jail for life for the heinous offence.
>
> .....
>
> The offence was no doubt a gender-based violence offence where the offender used his power to control the feeble innocent child.
>
> 46. Albeit the offender/appellant pleaded for forgiveness and says he is remorseful, that must be due to his incarceration now that he has no liberty to do what he was doing. There is however no guarantee that he will not repeat the same offence to his own children or to other children who are not related to him by blood, given a chance to get back into the society.
>
> 47. From the horrifying evidence on record, the Appellant is a dangerous person. He is worse than a murderer. He deserved long prison sentence to keep him away from the society where is a risk to many women and children."

78. From the Pre-bail Report on record, the Appellant was not a first offender. The victim had objected to his release due to him threatening her with death. The threats extended to the mother and grandmother.

79. The sentence imposed is for protection of society against predators like the Appellant. It is my finding and holding that the sentence imposed was lawful, appropriate and justified in the circumstances.

80. This Court upholds the sentence of life imprisonment imposed on the appellant by the trial court. In the end, the Appeal fails and is dismissed.

81. It is so ordered.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 24TH JULY 2023 (PHYSICAL/VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

In The Presence Of:

No Appearance -for The Appellant

No Appearance - For The Respondent

Patrick - Court Assistant