TMM v Republic (Criminal Appeal E41B of 2022)
[2024] KEHC 11895 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11895 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E41B OF 2022

RC RUTTO, J

OCTOBER 4, 2024

BETWEEN

TMM ..... APPELLANT

AND

REPUBLIC ..... DEFENDANT

(Being an Appeal against the judgment in the Chief Magistrate Court at Nyeri by Honourable F. Muguongo, in criminal Sexual Offence Case No.48 of 2019 on 26th October 2021)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*, Cap 63A Laws of Kenya, has lodged this appeal against his conviction and sentence to serve life imprisonment.

2. The appeal is premised on the following six grounds, that: -

    a. The learned trial magistrate erred in both fact and law in passing judgement convicting the appellant when the prosecution had not proved its case by discharging the required burden;

    b. The learned trial magistrate erred in law and in fact on the uncorroborated and/or insufficiently corroborated evidence of a minor;

    c. The learned trial magistrate erred both in fact and on the law in relying on the evidence of the prosecution witnesses which was insufficient and contradictory whereas crucial witnesses were not availed;

d. The learned trial magistrate erred both in fact and law in failing to acknowledge that the complaints attending to the charges and the criminal prosecution in the matter was as a result of the animosity that existed involving the accused person and the victim's sister (PW3);

e. The learned trial magistrate erred both in fact and law in failing to consider the appellant's defence;

f. The learned trial magistrate erred in fact in meting out sentence that was grave and excessive in the circumstances.

B. Background

3. The appellant was charged and convicted for the offence of incest by a male person contrary to Section 20(1) of the *Sexual Offences Act* . The particulars of the offence were that the appellant, on the 3rd day of December 2019 within Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of JWM a child aged 9 years who is his daughter. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on the 3rd day of December 2019 within Nyeri County intentionally and unlawfully touched the vagina of JWM a child aged 9 years with your penis.

4. The Appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 7 witnesses while the Appellant gave sworn evidence and called 2 witnesses. He was ultimately found guilty of the main charge and sentenced to life imprisonment.

C. The Prosecution's case

5. The court conducted voire dire examination and determined that the victim understood the duty of telling the truth but did not appreciate the nature of an oath and was therefore, not fit to give sworn evidence.

6. PW1 testified that she was 10 years old and their home is in [Particulars Withheld] where she lived with her parents and two sisters. She stated that they had two houses where her two sisters slept on a bed while the parents and herself slept on the couch. That each person slept on a separate couch. She testified that on 3/12/2019 at night, she was sleeping on a couch and her father was also sleeping on a separate couch. That she woke up at night and found her father seated next to the couch she was sleeping on. She testified that her father inserted something very strong in her vagina and when she asked him to stop, he did and went back to sleep on his couch but after sometime, he came back to where she was sleeping and then inserted something strong into her anus and when she was about to scream, her father covered her mouth with his hand. She stated that thereafter, he went back to sleep on his couch.

7. PW1 testified that at that time she was with the father alone in the house and when she told her father that she would report him to her elder sisters and mother and he warned her not to tell anyone.

8. On cross-examination, she stated that the night the alleged incident happened, she and her father slept in one house, while her sister C and her mother slept in the other house. According to PW1, her mother was sick hence the reason why she went to sleep in the other house with C in order for C to watch over her. During re-examination, she testified that her mother was taken to hospital on a Thursday by C while she was taken to hospital on a Friday by C.

9. PW2, Ms. Antoniette Wambui, a nurse at Nyeri Health Centre, testified that on 6/12/2019 at around 1700hours, PW1 was taken to Nyeri Health Centre by two ladies. She observed her and noted that

she was walking with her legs spread apart. She testified that she interrogated PW1 in the presence of a clinician who was still present at the facility and PW1 reported to them that her father had laid on top of her and inserted something hard into her anus at night as she slept on a sofa. She further testified that the clinician then physically examined PW1 and informed her that what she had seen on the child would require attention at the Gender Based Violence Centre.

10. PW2 stated that she then escorted PW1 to the Provincial General Hospital in Nyeri where she handed her over to the personnel at the casualty department then she left. On cross examination, PW2 testified that it is the clinician that physically examined the child and she only made observations on PW1.

11. PW3, EWW, a sister to PW1, testified that on the night of 5-6/12/2019, she went to see her mother and took her to the hospital. On returning home she found her sister, PW1 in a dull mood, she was walking with her legs spread out and was not talking. That when she sought to know what was wrong, PW1 reported that there was pain in her vagina and anus. She then asked PW1 to lie down so she could examine her private parts.

12. PW3 testified that she noticed blood stains around PW1's vagina and anus, as well as whitish substance around the anus. She then took PW1 to Nyeri Health Centre and handed her over to the nurse. The nurse went inside the facility with the child and after some time, the nurse came and told her what PW1 had told them that it is her father who had defiled her. PW1 was then taken to Provincial General Hospital in Nyeri by the nurse and herself.

13. PW4, PC Koech of No. 116651 testified that on 13/12/2019 at around 7:30 p.m, he received a phone call from CPL Judith Chepngetich the investigating officer in this matter. She requested to be assisted to make an arrest in relation to a defilement case. He stated that they went to arrest the accused and escorted him to Nyeri Police station. On cross examination, he stated that the accused was pointed out to them and that they found him drinking outside a bar and that before the arrest was made, the accused was explained for the reason for the arrest.

14. PW5, Dr. Joyce Mackenzie who was to testify on behalf of Dr. William Muriuki was stood down, due to an objection raised by the Appellant who stated that he had a special question he intended to ask Dr. Muriuki PW6. PW6, Dr. William Muriuki, a medical doctor attached at Nyeri Provincial General Hospital testified that he examined PW1 on 9/12/2021. He produced the P3 form together with PRC Form that had been filled by one Simon Waweru, a clinician. PW6 testified that upon examination of PW1, he saw a broken hymen, bruises and inflammation on the labia and a whitish discharge. That PW1 also had complained of pain in her anus. PW6 stated that a high vaginal swab was done to check the presence of spermatozoa but they did not see any. He further explained that being that it was three days after the sexual act, it is possible that the spermatozoa were dispelled by the body. However, PW6 stated that noting the freshly broken hymen and bruises around the vagina, the conclusion is that PW1 was defiled. On cross examination, he stated that PW1 informed them that when the sexual intercourse happened, she did not have a panty. He further stated that the injuries that PW1 sustained were caused by a blunt object of which a penis falls into that category of a blunt object.

15. PW7, CPL Judith Chepngetich No. 75238 testified that on 6/12/2019 at around 1900hrs, she was at work when PW1 and her sisters went to the station and told her that PW1 was not feeling well and so they took her to Nyeri Town Health Centre. Thereafter, PW1 was escorted by a nurse, Antonina to Nyeri Provincial Hospital where she was treated and then sent back to the Police station to record a complaint. PW7 testified that upon the case being reported, she was assigned the matter to investigate. She produced PW1's birth certificate which confirmed that PW1 was 9 years old. Upon cross examination, she stated that the accused sexually violated PW1 on 3/12/2019 at night and that

by the time PW1 went to the police station, it was two days after the incident and so already clothes had been changed and it was difficult to get any clothes as exhibits.

D. Defence case

16. The accused, DW1, gave sworn evidence and called 2 other witnesses. He testified that on 3/12/2019, he was at his work place when he received a phone call from his wife informing him that PW1 had gone to her aunt (DW3). He stated that later, he was arrested by the police on 6/12/2019 and only came to learn about the reason for his arrest from court. He further testified that he did not commit the offence that he was being charged with but due to the in-differences between him and PW3, that PW3 and her husband that cooked up the story of defilement.

17. DW2, JMM, the brother to the accused, testified that on 3/12/2019, his sister (DW3) took PW1 from their home and she later returned PW1 on 12/12/2019. He further testified that DW3 and PW1 passed by his work place at Ruringu. That on 7/12/2019, PW3 had passed by his work place and told him that her mother and her would do something to the accused person that he would never forget.

18. DW3, the sister to the accused person, testified that on 3/12/2019, she went with PW1 to her home where they stayed until 12/12/2019 when she returned back home. She stated that the same day that she returned PW1 home, is the same day that DW1 was arrested.

19. The trial court evaluated the entire evidence on record and in a judgment delivered on 26th October 2021 found that the prosecution had proved its case and convicted the appellant of the main offence. It sentenced him to life imprisonment.It is this trial court's decision that aggrieved the appellant and he lodged this appeal.

E. The Appeal

20. The appeal is as set out in the earlier paragraphs of this judgment. By consent of the parties, they agreed to dispose of the appeal by way of written submissions.

a. Appellant's Submissions

21. The appellant relies on Section 20(1) of the *Sexual Offences Act* as well as the decision in Republic vs Ismail Hussein Ibrahim [2018] eKLR and submits that the prosecution did not prove all the ingredients of the offence of incest beyond reasonable doubt. He confirms that he and PW1 are related and that PW1 was 9 years when the offence was allegedly committed. He submits that the prosecution did not prove that he was the perpetrator neither did the evidence of penetration link him to the offence.

22. The appellant further submits that though PW1 testified that the incident occurred on 3/12/2019, she did not indicate the time. He refers to Pw1's testimony that "she woke up and saw the appellant seated on the couch where she was sleeping and the appellant inserted a strong thing into her vagina but she could not see what it was since the lights were off" and submits that the identification was flawed as there was no visual recognition and/or identification of the perpetrator. He contends that PW1 did not describe how she was able to tell that the person seated next to her was the appellant and not anyone else considering that they lived in a plot as per PW3`s testimony.

23. The appellant submits that the evidence of penetration does not link him to the offence given his testimony on defence. He further contends that the elements of defilement were not conclusively proved to warrant a conviction. He relies on the decision of Omari Ismael Mazzha v [2017] eKLR and submits that penetration was not proven and that a broken hymen is not sufficient proof of penetration.

24. The appellant further submits that the prosecution's case was not sufficiently corroborated. The evidence of PW2 was based on hearsay as she did not observe the complainant and as such her evidence ought to be disregarded. The evidence of PW3 contradicted that of PW1. That while PW1 stated that they all lived together, PW3 testified that she lived in Karatina but would visit her mother from time to time. She further testified that their mother lived in a plot and that she did not mention any events relating to 3/12/2019 or 4/12/2019 but she stated that she took her mother to hospital on 5/12/2019 but she did not clarify what time she took her to hospital.

25. The appellant contends that no material evidence was tendered to prove that the mother was hospitalized as this would discharge the evidence of DW2 who testified that the appellant's wife was in good health. That PW2 further testified that PW1 was at home the night of 3/12/2019 and that the other sister had attended a funeral contrary to the evidence of PW1 who stated that both her sisters were sleeping in the other room in the night she was allegedly defiled.

26. As such, the appellant contends that these are material contradictions going to the root of the prosecution`s case. That the evidence of PW1`s mother was significant to establish that it was indeed the appellant who defiled PW1 on the alleged date, especially he raised a defence of alibi. Further, that her evidence would also not establish whether or not the appellant slept at home on the material date.

27. The appellant submits that PW1 and PW2 were explaining something that they allegedly witnessed. The critical factor that they disagree on which is the day and the time of the offence is crucial in determining the appellant's guilt. As such, the appellant submits that the prosecution's case fell short of the standard required to establish the allegations of incest.

28. The appellant contends that the court ought to have drawn an adverse presumption against the prosecution for failure to call PW1's mother and other sister who were adversely mentioned throughout the trial. The appellant submits that his wife was the best person to confirm whether he was in the house on the day the offence is alleged to have been committed. The appellant makes reference to the decision of Bukenya v Uganda [1972] E.A 549 to support his contention. The appellant further contends that the evidence of PW2 and PW6 was fabricated and skewed in favour of getting a conviction and sentence of life imprisonment.

29. The appellant submits that he was at work on the alleged date when the offence was committed. That he testified that he was informed by PW1`s mother that PW1 had been taken by her aunt, DW2, who confirmed the same. That he also testified that there was bad blood between him and PW3 and that DW2 and DW3 affirmed the same. That DW3 testified that after the appellant was arrested, the appellant`s wife, PW1`s mother disappeared and upon speaking with PW3 she told her that since they had refused to pick their brother, they would do an unforgettable action to him.

30. The appellant relies on the cases of *Patrick Muriuki Kinyua & Another v Republic Nyeri Criminal Appeal No.11 of 2013* (UR) and Victor Mwendwa Mulinge v Republic [2014] eKLR and submits that the onus is upon the prosecution to displace the defence of alibi after the defence raises it, which the prosecution did not do in this case.

31. The appellant submits that the mandatory nature of the life sentence that was passed by the trial court is unconstitutional. The appellant makes reference to the cases of Christopher Ochieng v R [2018] eKLR, Jared Koita Injiri v Republic Kisumu Criminal Appeal No. 93 of 2014 and Francis Karioki *Muruatetu & Another v Republic SC Petition No. 16 of 2015* to support his contention.

32. As such, the appellant prays that the appeal be allowed and the conviction and sentence be quashed and/or set aside.

b. The Respondent`s Submissions

33. The respondent submits that it is not in dispute that the victim was a relative of the appellant and that the appellant in his submissions concedes that the victim was his daughter. That the appellant also conceded to this during his defence at the trial.

34. On the age of the victim, the respondent submits that PW1 testified in court that she was 9 years old when the incident occurred. PW3, her sister, told the court that PW1 was born on 12th June 2010 and she identified a birth certificate as proof of age, the birth certificate was produced as an exhibit during trial. That as such, the prosecution was able to prove beyond reasonable doubt that PW1 was indeed a minor when the incident occurred.

35. The respondent relies on Section 2 of the *Sexual Offences Act* and submits that PW1 testimony was clear on what happened on the material day which was corroborated by PW2, a nurse working at Nyeri Health Centre, who testified that on 6th December 2019 when she observed PW1 she noted some blood stains around the vagina and the anus. She then called an ambulance and referred the victim to the Gender Based Violence Clinic at the Provincial General Hospital. The respondent further submits that it called PW6, Dr. William Muriuki who produced the P3 Form and PRC Form. The medical documents confirmed that the victim had a freshly broken hymen, bruises and inflammation on the labia. PW6 also indicated that the victim complained of pain in her anus. He confirmed that it was not normal for a 9 year old to have a broken hymen and that the major cause of the broken hymen was sexual intercourse.

36. The Respondent submits that the absence of spermatozoa does not negate the fact that the victim was defiled and relies on the case of Mark Oiruri Mose v Republic [2013] eKLR to support its contention. Hence, submits that, the element of penetration was proved beyond reasonable doubt.

37. On the element of identification of the perpetrator, the respondent submits that the victim was able to identify the appellant, her father, by the way of voice recognition, as this was a person well known to her. The respondent further submits that the victim actually spoke to the appellant during the entire ordeal when she asked him to stop. Furthermore, that from the account of PW1 on their living arrangements, the appellant was the only male adult living in that house at the time of the incident and there was no possibility of another male adult coming into that home at that time of the night. The Respondent thus submits that it is clear that the appellant was properly identified as the person who committed the sexual offence. Identification was that of voice recognition and basic recognition since the appellant was well known to her.

38. The respondent submits that it availed all its relevant witnesses to prove the charges against the appellant. It relies on Section 143 of the *Evidence Act* and submits that there is no requirement in law of a particular number of witnesses that are required to prove a particular fact. Only in situations where the evidence of the witnesses called by the prosecution is not sufficient is the court entitled to make adverse conclusions on why material witnesses were not called. To support its contention, the respondent relies on the case of Alex Lichodo v R [2006] eKLR.

39. The respondent submits that the learned trial magistrate fully complied with Section 124 of the *Evidence Act*. That the trial magistrate assessed the evidence of PW1 and found her to be believable. That PW1's evidence was corroborated by PW3 who told the court that the victim had reported to her that she was feeling unwell and that prompted her to take the victim to hospital for examination. That the doctors were able to confirm the complainant's narrative of something being inserted in her vagina and anus. The respondent thus submits that PW1's evidence did not require corroboration as she was clear and consistent in her evidence which was confirmed by the medical evidence adduced

during trial. To support its contention, the respondent relies on the cases of J.W.A vs Republic [2014] eKLR and Mohammed v Republic [2006] 2 KLR 138.

40. The respondent further submitted that the appellant has not pointed out any material contradictions and inconsistencies. Moreover, the respondent contends that there are no contradictions or inconsistencies and even if they were, they are minor and do not go to the root of the prosecution case.

41. The respondent contends that although the appellant states that the charges against him were framed by PW3, these allegations were never raised during the trial. That the trial court found that the appellant did not substantiate the allegations of a grudge and he did not place any evidence before the court to support this allegation. It submits that the prosecution's case was supported by 3 formal witnesses who did not know the appellant and the victim prior to the case. That PW3 was not the only witness who testified in the case and that the appellant never cross-examined PW1 to lay a basis for coaching and influence by PW3 and thus the defence was an afterthought.

42. The respondent submits that the appellant gave sworn evidence when placed on his defence and he called two witnesses. That the appellant`s defence was considered by the trial court but was dismissed by dint of being unbelievable and that it was a mere denial. That defence did not dislodge the evidence on record to show that indeed such a grudge existed.

43. The respondent then submits that there is indeed evidence that a sexual offence was committed against PW1 by the appellant, the medical evidence adduced by PW6 confirmed that PW1 had been sexually assaulted in both the vagina and the anus. That the medical evidence corroborates the fact that there was penetration as narrated by PW1. That it is quite clear that the appellant caused an object to penetrate the vagina of the victim.

44. The Respondent then submits that from the evidence, what the appellant is alleged to have done may constitute sexual assault which is an offence under Section 5 (1) (a) (ii) of the *Sexual Offences Act*. In addition, that it was difficult for the victim to properly describe the object since the incident occurred in the dark and she could not see what the appellant was using to assault her.

45. The respondent thus urged the court to exercise its discretion under Section 179 (2) and 186 of the Criminal Procedure Code and convict the appellant for the lesser offence that was proved and proceed to sentence him accordingly. As such, the respondent prays that the appeal be dismissed.

F. Analysis and determination

46. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R [1957] EA 336; Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> "the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

47. Having considered the record of appeal as well as the rival submissions by parties, I delimit the following issues for determination: -

    a. Whether the offence of incest was proved beyond reasonable doubt?

    b. Whether the prosecution's evidence was riddled with material contradictions?

    c. Whether the prosecution failed to call crucial witnesses?

    d. Whether the trial court considered the defence evidence?

    e. Whether the sentence was harsh and excessive?

a. Whether the offence of incest was proved beyond reasonable doubt

48. Section 20 (1) of the *Sexual Offences Act* provides for the offence of incest by male persons. It sets out the ingredients for the offence of incest are: proof that the offender is a relative of the victim, proof of penetration or indecent act, identification of the perpetrator and proof of the age of the victim.

49. On proof that the offender is a relative of the victim, this is not in contention. The victim stated that the appellant was her father. The appellant also conceded to that fact during his testimony in his defence during the trial when he stated that the victim was his daughter.

50. On proof of penetration or indecent act, Section 2 (1) of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organ of another person."

51. PW1 testified that on the night of 3/12/2019 she was sleeping on the couch when she woke up and found the appellant seated next to her on the couch. That the appellant inserted something strong in her private parts and she pointed to her vaginal area to demonstrate the same. She stated that she asked the appellant to stop or she would report him to her mother and sister. The minor further told the trial court that the appellant stopped but returned later and inserted the strong thing in her anus and that the appellant closed her mouth when she was about to scream and threatened to beat her if she told anyone what had transpired. The medical evidence of PW6 confirmed that upon examination on 9/12/2019, the victim had a fresh broken hymen and bruises and inflammation on the labia. Also, the PRC Form confirmed penetration.

52. This court notes that the credibility of the victim was not impeached by the trial court, hence no reason to disrepute her evidence.

53. The evidence of PW1 is corroborated by PW2 who stated that she observed PW1 was walking with legs apart and when she sought to find out why, PW1 reported that her father had laid on top of her and inserted something hard into her anus at night as she slept on a sofa. This was further corroborated by PW6 who stated that he saw a freshly broken hymen, bruises and inflammation on the labia and a whitish discharge. He noted that the freshly broken hymen and bruises around the vagina, was conclusive that PW1 was defiled. He further stated that the injuries that PW1 sustained were caused by a blunt object of which a penis falls into that category of a blunt object.

54. The medical evidence corroborates what the complainant stated. In the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

55. Consequently, I am persuaded by the evidence of the victim and PW6 that the minor was defiled. I find no reason to disturb the finding of the trial court on the proof of the ingredient of penetration.

56. This notwithstanding, I note the respondent's submissions that the appellant ought to have been charged with the offence of sexual assault under the Section 5 (1) (a) (ii) of *Sexual Offences Act* on the basis that the weapon of penetration was either finger or an object or the appellant's penis. He urges the court to exercise discretion and re-sentence the Appellant.

57. This court underscores that judicial discretion is at the sole repose of the court and it is the court to determine when to exercise it. In all sense it should be exercised judicially and not whimsically. It cannot be exercised to perpetrate an injustice or commit an illegality.

58. I find it very curious that the prosecution at this time of an appeal by the appellant, urges that the Appellant ought to have been charged with the offence of sexual assault under Section 5 (1) (a) (ii) and not the offence of incest by male persons under section 20(1) of the *Sexual Offences Act* yet, the decision to charge is a discretion that was purely vested on them. Further, the prosecution reserves the right to amend a charge sheet during trial, a duty that was never invoked during the hearing of this case. I therefore find the invitation suspect and decline the invite to exercise the discretion under Section 179 (2) and 186 of the Criminal Procedure Code.

59. It is also worth noting that in the Petition, the appellant has not urged for the substitution of the offence. The appellant has not prayed that in the alternative or otherwise, he be convicted for sexual assault for the respondent to pragmatically inform this court that "it is conceeding" that ground. Further, the respondent did not file a cross-appeal for it to have a basis upon which to seek a substantive prayer in this matter, like the one being sought.

60. In that regard, I rely on the evidence by the key persons (PW1, PW2 and PW6) in proving penetration and find that the prosecution proved the element of penetration.

61. Turning to identification of the perpetrator, the Appellant contends that there was no visual recognition and or identification of the perpetrator. The Appellant argues that PW1 did not describe how she was able to tell that the person seated next to her was the appellant and not anyone else considering they lived in a plot. PW1 testified that it was her father who did the indecent act to her and that she was able to identify her father by way of voice recognition as this was a person well known to her. PW1 testified that at that time she was with the father alone in the house and when she told her father that she would report him to her elder sisters and mother he warned her not to tell anyone. She also gave a brief description of how they live at home and in her description, which was not refuted by the appellant, I find that the Appellant is the only male adult living in the house more particularly on the time of the incident.

62. I need not to emphasis that the Appellant's identification was by way of voice and basic recognition. He was well known to PW1 as a father. I hasten to add that the appellant does not dispute the fact that the victim knew him.

63. On the age of the victim which is paramount in view of the sentence as prescribed under Section 20 (1) of the *Sexual Offences Act*, this was not in contention and was also confirmed by the production of a Birth certificate and also the Appellant confirming that the victim was 9 years old at the time of the ordeal.

64. Flowing from the foregoing I find that the prosecution proved all the ingredients of incest. I find no reason to disturb the finding of the trial court.

b. Whether the prosecution's evidence was riddled with material contradictions.

65. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) while making reference to the case of Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1993, the court held that:

> " In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

66. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

67. The appellant alleges the following contradictions; that the evidence of PW3 contradicted that of PW1, in that while PW1 stated that they all lived together, her sisters, mother and the appellant, PW3 testified that she lived in Karatina but she would visit from time to time. The Appellant further submits that PW3 testified that she took her mother to hospital on 5/12/2019 but she did not state what time or day they went to hospital. Further, the appellant argues that the two witnesses PW1 and PW2 disagree on which day and time the offence took place which is crucial in determining guilt.

68. From the evidence before Court, I note that PW1 stated that they lived together with her mum, her 2 sisters and dad. That they had 2 houses where her mum, dad and herself slept on the couch, each on a separate couch. PW3 stated that she was living in Karatina with her husband and child and would frequently visit her parents at Ngangarithi as her mother was sick. I note that the contradictions mentioned by the appellant all touch on where PW3 lived which is not a material issue for determination in this matter.

69. Consequently, guided by the dictum in the Court of Appeal case of Phillip Nzaka Watu v Republic [2016] eKLR and having perused the court record in its entirety, I find that there are no glaring contradictions prejudicial to the Appellant and therefore dismiss this ground of appeal.

c. Whether the prosecution failed to call crucial witnesses.

70. The Appellant contends that crucial witnesses, that is, the mother of the victim and the sister were not called and them being called would have settled the contradictions mentioned by the Appellant.

71. Section 143 of the *Evidence Act* provides that: -

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact."

72. In the case of Keter v Republic [2007] 1 EA 135 the court held inter alia that: -

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

73. Guided by the above caselaw, the prosecution is required to avail all relevant evidence and witnesses for the court to make an informed decision on the charge against an accused person. In relation to this case, the prosecution did in fact call all material witnesses whose evidence as a whole was sufficient to find a conviction for the offence of incest.

74. The ingredients for the offence of incest were all proved beyond reasonable doubt by the witness called. Notably, when the victim was defiled, the unrebutted evidence is that she was alone with the appellant. Consequently, calling the alleged said witness would not have proved to the contrary the testimony of PW1 and the medical evidence on penetration. Identification of appellant was by recognition, which the appellant himself confirms that the victim is his daughter. Lastly, the alleged witnesses not called would not have contradicted the proof of the victim's age. Consequently, I find this ground as a red herring in this appeal and dismiss this ground of appeal.

d. Whether the trial court considered the defence evidence

75. The Appellant submits that he was at work on the alleged date when the offence was committed and that he was informed by PW1's mother that PW1 had been taken by her aunt DW2. The Appellant further testified that there was bad blood between him and PW3, a fact affirmed by DW2 and DW3. He submits that he was framed by PW3. His case before this Court is that this defence was not considered.

76. I have perused the court record and noted that the issue of DW3 taking PW1 to her home to meet her children was only raised at the defence stage. The Appellant never questioned PW1 on cross examination during the prosecution case. On the issue of bad blood between PW3 and the appellant, I find that the appellant's allegations baseless. Assuming that PW3 sought to frame the appellant, how would one explain the injuries sustained by PW1. Moreover, the medical records show that PW1 visited hospital on 6/12/2019 and was seen by a doctor and she reported the matter at Nyeri Police station. Notably, PW2, PW4, PW5, PW6 and PW7 are not known to the victim or the appellant. How then did they participate in framing the appellant? I find that the appellant's defence not believable and the trial court in making its determination took into consideration the appellant's defence but dismissed it. I find no reason to hold otherwise. This ground of appeal also fails.

e. Whether the sentence was harsh and excessive

77. The appellant was sentenced to life imprisonment. Section 20 (1) of the *Sexual Offences Act* is clear on the sentence for incest with a female person under the age of eighteen years. It states that the accused shall be liable to imprisonment for life.

78. This court also notes the recent decision of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where the apex Court affirmed the mandatory sentences in the *Sexual Offences Act*. It therefore follows that the mandatory life sentence in section 20(1) of the *Sexual Offences Act* that the appellant was sentenced to is a legal sentence and it is for upholding.

79. The above notwithstanding, the Court of Appeal in the case of Evans Nyamari Ayako vs Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, held as follows regarding what amounts to life sentence in Kenya:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

80. This decision was the followed in the case of *Akhonya v Republic (Criminal Appeal 269 of 2019)* [2024] KECA 327 (KLR) [15 March 2024] at Kisumu (Unreported) where the Court allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement.

81. I have considered the above superior court decisions, by which I am duly bound. I find the holding in Akhonya v Republic particularly applicable in this case. Consequently, the life sentence imposed by the trial court is affirmed with a rider that it amounts to 30 years imprisonment.

82. Ultimately, this court makes the following orders;

    i. The Appeal on conviction is dismissed and the trial court decision is upheld.

    ii. The Appeal on sentence is upheld with a rider that the same life imprisonment amounts to 30 years of imprisonment to run from the date of his conviction, factoring in any period spend in remand custody in accordance with Section 333 (2) of the Criminal Procedure Code.

    Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant: