REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 2 OF 2018

ST.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence of Hon. M. Kesse, SRM,

delivered on 29 January 2018 in Kapsabet Senior Principal Magistrate's

Criminal Case No. 926 of 2017)

JUDGMENT

[1] The appellant was the accused person in **Kapsabet Senior Principal Magistrate's Criminal Case No. 926 of 2017: Republic vs. Simon Too**. He was charged with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on 1st day of December 2016 at [Particulars Withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of **SJ,** a child aged 16 years who to his knowledge is his daughter.

[2] In the alternative, the appellant was charged with the offence of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act.** It was alleged that on the 18th day of December 2016 at [Particular Withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to come into contact with the vagina of **SJ** a child aged 16 years who to his knowledge is his daughter.

[3] Whereas the appellant denied those allegations, he was found guilty after his trial and was convicted of the substantive charge of incest. He was consequently sentence to serve 20 years' imprisonment on **29 January 2018**. Being aggrieved by his conviction and sentence, the appellant preferred this appeal **6 February 2018,** on the following grounds:

> **[a]** That the trial magistrate erred in law and fact by convicting him and yet failed to consider the pre-existent grudge surrounding the allegation;
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> **[b]** That the trial magistrate erred in law and fact by failing to hold that medical evidence was not conclusive in linking him with the alleged offence.
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> **[c]** That the trial court failed to hold that the investigation in the case was shoddy;
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> **[d]** That the trial court erred in failing to appreciate that **PW1** was not a credible witness since she was coached to testify;
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> **[e]** That the trial magistrate failed to note that no exhibits were produced in court to corroborate the evidence of pregnancy; and,
>
> **[f]** That the trial court failed to take into consideration the defence evidence.

[4] With the leave of the Court, the appellant filed Amended Grounds of Appeal on **17 March 2021**. He refined his grounds of appeal as hereunder:

> **[a]** That the learned trial magistrate erred in law and fact by convicting him and yet failing to recognize the pre-existing grudge surrounding the allegations against him.

[b] That the trial court erred in failing to appreciate that **PW2** was not a credible witness, since she was forced and coached to testify.

[c] The learned trial magistrate erred in law and fact by failing to hold that the medical evidence adduced was inconclusive and did not link him with the alleged crime.

[d] That the trial court failed to hold that the investigation of the case against him was shoddy.

[e] That the learned trial magistrate erred in law and fact by not according him a fair trial as required by **Sections 33** and **108** of the **Criminal Procedure Code.**

[f] That the trial court erred in disregarding his defence without any cogent reason.

[5] Thus, the appellant prayed that his appeal be allowed, his conviction quashed and the sentence set aside. The appeal was urged by way of written submissions pursuant to the directions given herein on **6 May 2021;** whereupon the appellant's submissions filed on **17 March 2021** were deemed duly filed. He submitted that his wife was unhappy with him because he had neglected his responsibility to financially provide for his family; and that it was this grudge that prompted her to coach their daughter to make false allegations of incest against him.

[6] The appellant further urged the Court to find that the complainant was coached and therefore was not a reliable witness. He particularly took issue with the complainant's assertion that she was at home alone with the appellant when the alleged defilement took place, and yet she had a younger sister and cousin in the house, whose presence she did not satisfactorily account for. He urged the Court to disregard the evidence of the complainant, arguing that he could not have committed the offence in the evening of **21 December 2017** when all the other family members, including his wife, were at home.

[7] In respect of Ground 3 of his grounds of appeal, the appellant took issue with the fact that no DNA test was conducted to determine whether he had indeed impregnated the complainant. He mentioned that he personally paid the expenses for the DNA test and yet the lower court did not pursue the matter to conclusion. He accordingly submitted that subsequent allegations that the girl gave birth but that the child did not survive ought to be disbelieved as part of the conspiracy to falsely accuse him. He submitted that had this been the case then credible evidence ought to have been availed by the Prosecution to prove whether this was a normal delivery, a still-birth or a miscarriage. In his view, there was no evidence that the complainant was admitted at **Moi Teaching and Referral Hospital;** and therefore the conclusion reached by the learned trial magistrate that the baby died at that facility is contrived; as it is not supported by the evidence on record.

[8] In support of Ground 4, the appellant cited **Charles Kibara Muraya vs. Republic,** Criminal Appeal No. 33 of 2001 in urging the Court to find that the case against him was so poorly investigated that no conviction ought to have ensued therefrom. He complained that no effort was made by the investigating officer to visit the scene of the alleged crime. He also urged the Court to note that not all the witnesses whose names featured prominently in the evidence of the complainant and her mother were called to testify. He cited **John Kenga vs. Republic**, Criminal Appeal No. 1126 of 1984 and **Bukenya vs. Uganda** [1972] EA 549 to support his argument that an inference ought to have been drawn by the trial court that had they been called to testify their evidence would have been adverse to the prosecution case.

[9] The appellant also questioned the evidence of identification, contending that it is a recognized fact that mistakes do occur even where a witness purports to identify a close relative. He accordingly submitted that the lower court ought to have exercised caution in line with **Cleophas Otieno Wamunga vs. Republic** [1989] KLR and **R. vs. Turnbull** [1976] 3 AllER 549, before accepting the evidence of the complainant.

[10] In respect of the last two grounds of appeal, the appellant pointed out that he was arrested on **7 April 2017** and was not arraigned before court until **10 April 2017**. He accordingly urged the Court to find that his constitutional right to fair trial was impinged on by virtue of his prolonged detention. He further submitted that in accepting the Prosecution case as true without giving consideration to his side of the story, the learned trial magistrate exhibited partiality and therefore violated his constitutional right to equal benefit and protection of the law as enshrined in **Article 27** of the **Constitution.** He accordingly prayed that his appeal be allowed, conviction quashed and the sentence set aside.

[11] On behalf of the State, **Mr. Mugun** relied on his written submissions filed herein on **25 May 2021**. He pointed out that the ingredients of the offence of incest, which the Prosecution set out to prove before the lower court were:

[a] Penetration,

[b] Positive identification of the accused;

[c] The relationship between the accused and the complainant;

[d] The age of the complainant at the time of commission of the offence.

[12] He urged the Court to find, as did the lower court, that all these ingredients were proved beyond reasonable doubt. He submitted that penetration was satisfactorily proved by the evidence of the complainant as well as **PW1,** the clinical officer who examined the complainant on **6 April 2017** and found her to be pregnant. He also submitted that the appellant was positively identified, granted that the acts complained of were committed during the daytime. Counsel relied on **Anjononi & Others vs. Republic** [1976-1980] KLR to underscore the fact that this was, not a case of identification of a stranger, but that of a close family member.

[13] In the same vein, counsel was of the view that there was cogent proof that the complainant is indeed a child and that the appellant is her father; and that this is manifest in the evidence of the complainant, her mother and the Birth Certificate exhibited before the lower court. He

urged the Court to find that the allegation that appellant's prosecution was motivated by a pre-existing grudge between him and his wife was an afterthought as it was not raised before the lower court.

[14] Regarding the sentence imposed on the appellant by the trial court, **Mr. Mugun** took the view that the same was deserved, given the circumstances of this particular matter. He accordingly urged for the dismissal of the appeal.

[15] I have given careful consideration to the appeal and taken into account the written submissions filed herein by the appellant and learned counsel for the State. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa 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 whole 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 conclusion; 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 also **Reuben Ombura Muma & Another vs. Republic** [2018] eKLR)

[16] I have consequently perused and considered the evidence presented before the lower court. The brief summary of the evidence is that the complainant **PW2**, a standard 8 pupil at [Particulars Withheld] Primary School, was living with her parents at [Particulars Withheld], within Nandi County. Her parents, the appellant and **PW4,** were then working at [Particulars Withheld] Tea Estate as labourers. The complainant told the lower court that she was spreading her bed on **18 December 2016** at about 9.00 a.m. when the appellant budged into her bed room and held her by her throat. He proceeded to undress, caress and defile her; after which he gave her Kshs. 100/= and threatened to kill her and himself if she divulged the occurrence to anybody.

[17] It was further the evidence of **PW2** that the appellant defiled her a second time on **21 December 2016** after he sneaked into her bedroom in the evening while she was reading. He again warned her not to reveal the incident to anybody; and therefore she kept the matter to herself. She noted that she missed her menses in the month of **January 2017** but was afraid to confide in her mother about it; and that later in **April 2017** when she started getting sick, her mother took her to hospital for treatment. It was then that she was examined and found to be pregnant. When confronted over the issue of her pregnancy, she revealed to her mother that the appellant had defiled her in **December 2016**; and was therefore responsible for the pregnancy. Her mother reported the matter to the police and the appellant was arrested and charged.

[18] PW1 was then serving at Kaptumo Sub-District Hospital as a clinical officer. He confirmed that he was on duty at the hospital on **6 April 2017** when the complainant visited the facility for examination in the company of her mother. They had a P3 Form issued at Savani Police Station. He accordingly examined the complainant and filled the P3 Form. He noted the presence of a mass on the complainant's abdomen and suspected that she was pregnant. He accordingly requested for a pregnancy test which turned out to be positive. He added that the girl, who in his assessment was 16 years old, claimed to have had sexual intercourse with her father on **18th and 21st December 2016**.

[19] The third prosecution witness was **Josephat Bor (PW3),** the secretary of the Nyumba Kumi group. His testimony was that he received a report of incest on **6 April 2017** from **R.C. (PW4** before the lower court), involving her daughter and her husband, the appellant. He assured her that he would report the matter to their chairman as well as the area chief; which he did. He further stated that after the chief received a warrant of arrest for the appellant, he was one of the people who traced and arrested him. They handed him over to the police at Savani Police Station.

[20] The complainant's mother testified on **22 August 2017** as **PW4**. She confirmed that the appellant is her husband and that the complainant is their daughter; and that she was born in **2001**. She then narrated how the complainant started complaining of sickness on **3 April 2017**; and that she decided to take her to a private clinic for a second opinion after her illness persisted in spite of being given medication. She was then examined and found to be pregnant. She thereupon got to learn from the complainant that she had been defiled by her father; and that her father had warned her not to disclose the incident to anybody. She reported the incident to the deputy head teacher of [Particulars Withheld] Primary School and was advised to report the matter to the chief and the police. The police issued her with a P3 Form and advised her to take the complainant to Kaptumo Hospital for examination. She confirmed that the complainant was accordingly examined and her P3 Form duly filled at Kaptumo Hospital; after which the appellant was arrested and charged.

[21] Cpl. Kipronoh Mutai (PW5) was the last prosecution witness before the lower court. His testimony was that he was on duty at Savani Police Patrol Base when the complainant went there and complained of having been defiled by her father on **18 December 2016** and **21 December 2016.** He further confirmed that the minor told him that her father had threatened her with death if she disclosed the incidents of defilement to anybody. He accordingly issued her with a P3 Form and referred her to Kaptumo Sub-County Hospital for examination. The P3 Form was thereafter returned to him duly filled; and that it showed that the minor was pregnant. He thereupon recorded statements from the witnesses and then caused the appellant to be arrested and charged.

[22] PW5 identified and produced a Certificate of Birth that he obtained from the complainant's mother. It was marked as the **Prosecution's Exhibit 3** before the lower court. He further told the lower court that he later received a report from the mother of the complainant that she had had a still-birth.

[23] On being placed on his defence, the appellant stated how he was arrested on **7 April 2017** while at his place of work at [Particulars withheld] Tea Estate. He was taken to the police station where he was placed in cells on allegations of incest. He denied having committed incest with his daughter and contended that he had been framed at the instance of his wife, who was unhappy that he was not supporting the family financially. He expressed his embarrassment on being told of the allegations against him; and added that because he had no doubt about his innocence, he paid the requisite charges for a DNA to be conducted to determine whether or not he was responsible for the complainant's pregnancy; only to be told that the baby had passed away.

[24] The foregoing being the summary of the evidence presented before the lower court, it is imperative to ascertain whether the key elements of the main charge of incent, which the appellant was convicted of, were proved beyond reasonable doubt. The said charge was laid under **Section 20(1)** of the **Sexual Offences Act**, which stipulates 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 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."**

[25] As correctly observed by the learned trial magistrate, at pages 25 and 26 of the Record of Appeal, the offence entails 4 different elements, namely, the age of the victim; penetration; the identity of the offender and lastly, the relationship between the offender and the victim. That proof of age of a victim of defilement is imperative cannot be overemphasized. The Court of Appeal restated as much in **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** thus:

> *"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".*

[26] At to what amounts to credible evidence, **Rule 4** of the **Sexual Offences Rules of Court Rules** 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 document."**

[27] It is also trite that, in addition to the documents set out in **Rule 4** above, the age of a minor for purposes of the **Sexual Offences Act** can also be proved by the oral evidence of the minor's mother, by way of age assessment, as well as by observation and common sense. Hence, in **PMM vs. Republic** [2018] eKLR, it was held thus:

> **"…whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant…"**

[28] From the evidence adduced before the lower court, there is no gainsaying that the age of the complainant was proved beyond reasonable doubt. She testified before the lower court and the record shows that she was 16 years old as at **22 August 2017** when she testified before the lower court. She stated during *voire dire* examination that she was in class 8 at the time. Her mother, **PW4**, also testified to the fact that the complainant was born in **2001**. She availed the minor's Birth Certificate which was produced by the investigating officer, **PW5,** as the **Prosecution's Exhibit 3.** It confirms that the complainant, was born on **21 June 2001**; and therefore that she was 15 years and 6 months old as at **18 December 2016**, when the alleged incident of incest occurred. In the premises, credible evidence was presented before the lower court proving beyond reasonable doubt that the complainant herein was under the age of 18 years and therefore a child for the specific purposes of the proviso to **Section 20(1)** of the **Sexual Offences Act.**

[29] In the same vein, there was sufficient proof that the minor is the daughter of the appellant. In addition to the testimony of the complainant and her mother, the Certificate of Birth marked the **Prosecution's Exhibit 3** gives the name of the complainant's father as **SKT.** Indeed, the appellant conceded as much in his statement of defence before the lower court and stated how embarrassed he was to be accused of defiling his own daughter. He added that:

> **I have been framed. I love them and I care for them. I cannot have committed this offence...I have nothing against my family...I have nothing against my daughter.**

[30] On penetration and the identity of the offender, the complainant testified as to how the appellant went to her bedroom on **18 December 2016** and found her spreading her bed; and that he held her by her throat, such that she was unable to scream for help. She explained that the appellant then proceeded to caress and defile her; after which he gave her Kshs. 100/= to go and buy for herself a pair of slippers. She added that the appellant threatened to kill her and to kill himself as well if she revealed the incident to anybody.

[31] The evidence of the clinical officer did not reveal much by way of findings in respect of Section C of the P3 Form; which is the part specifically intended for alleged sexual offences. Thus, the only finding noted by **PW1** was in connection with the mass he felt on the complainant's abdomen which, to him, was indicative of pregnancy; and the fact that further analysis confirmed that the girl was pregnant. The P3 Form further shows that the pregnancy was about 16 weeks in terms its gestation period; thus placing the date of defilement in the month of **December 2016.**

[32] In the premises, the trial court cannot be faulted for finding that pregnancy was additional proof of penetration. Indeed, in **Wayu Omar Dololo vs. Republic** [2014] eKLR, the decision of the trial that pregnancy was one aspect of proof of penetration upheld on appeal. Here is what **Hon. Mutuku, J.** had to say, which I find apposite:

> **"The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was**

heavy with child and the pregnancy was visible as observed by the trial court. Indeed, at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being..."

[33] Likewise, in **Mbogo Raphael Chengo vs. Republic** [2019] eKLR the Court of Appeal affirmed the position that the fact of pregnancy of a complainant in a defilement case is evidence that sexual intercourse had taken place and is therefore proof of penetration. I am therefore satisfied that penetration was proved before the lower court beyond reasonable doubt.

[34] As to whether the penetration was perpetrated by the appellant, it is to be noted that this was one of the key planks of the appeal. The appellant vehemently denied having committed the offence of incest with which he was charged. He urged the Court to re-evaluate the evidence of identification and find that the lower court misdirected itself in not testing with care the complainant's evidence; which was the only evidence of identification. He particularly relied on the cases of **Cleophas Otieno Wamunga vs. Republic** [1989] eKLR and **R. vs. Turnbull** [1976] 3 AllER 549 on the issue of identification. In **R. vs. Turnbull & Others [1973] 3 AllER 549,** for instance, it was held that:

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

[35] Likewise, in **Cleophas Otieno Wamunga vs. Republic** [1989] eKLR the same principle was restated thus:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

[36] It is noteworthy however that the complainant has known the appellant all her life. There was therefore no doubt in her mind as to who defiled her; granted the fact that the incident of **18 December 2016** occurred at 9.00 a.m. in the morning. Hence, the question of mistaken identification did not arise. The appellant's allegations that there was a grudge between him and his wife and therefore that the complainant may have been coached to accuse him falsely have no foundation; granted that the appellant himself spoke about them in favourable light in his defence statement. In particular, he said he had nothing against his wife or daughter; and therefore could not have committed the offence. At no time did he suggest to either **PW2** or **PW4** in cross-examination that they had accused him falsely for the sole purpose of settling scores. I therefore agree with the submission of counsel for the State that the allegation about what the appellant referred to as a "pre-existing grudge" was nothing but an afterthought.

[37] The appellant also urged the Court to take an adverse view of the fact that he paid for a DNA test to be conducted but that no such test was conducted. He was therefore of the view that, without a DNA test, the Prosecution could not be said to have proved penetration beyond reasonable doubt. While it is true that DNA testing is provided for in **Section 36** of the **Sexual Offences Act,** that provision is not mandatory. It provides thus in **Subsection (1):**

"...where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence." (Emphasis added)

[38] Hence, in **Evans Wamalwa Simiyu vs. Republic** [2016] eKLR, for instance, the Court of Appeal was of the view that:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

[39] Similarly, in **Williamson Sowa Mbwanga vs. Republic (supra),** the Court of Appeal stated as follows on defilement and paternity:

"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)." It is partly for this reason that section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to

order that samples be taken from him for forensic, scientific, or DNA testing.

[40] In the light of those decisions, the Court of Appeal reiterated its stance thus in **Mbogo Raphael Chengo vs. Republic (**supra):

> **"...the ground that no DNA was conducted on the complainant has no substance. The appellant was identified by way of recognition as the person who committed the offence as alleged."**

[41] I similarly find that the appellant's complaint that no DNA test was ordered for by the lower court is of no substance; and that credible inculpatory evidence of recognition was adduced by the complainant before the lower court that linked him with the defilement of the complainant. There can be no doubt that the lower court took into account the appellant's defence; which was no more than a denial, as he largely spoke about the events surrounding his arrest on **7 April 2017.**

[42] The case of **Bukenya & Others vs. Uganda** [1972] EA 549, was relied on by the appellant to support his argument that failure by the Prosecution to call the Chairman of Nyumba Kumi and the area chief was detrimental to its case. In that case it was held that:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

[43] The principle was restated by the Court of Appeal in **Sahali Omar vs. Republic [2017] eKLR** thus:

> **"The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that: -**
>
> **i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**
>
> **iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**
>
> **The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

[44] There is no indication, on the basis of the evidence placed before the lower court that either the chairman of the Nyumba Kumi or the area chief would have added value to what **PW3** had to say. Accordingly, since the prosecution is not expected to call a superfluity of witnesses, I am not in the least persuaded that failure to call those two witnesses was in any way detrimental to the Prosecution case. The same goes with the apparent failure by the Prosecution to present documentary evidence in connection with the death of the complainant's baby; as that aspect was only peripheral to the issue of penetration.

[45] Turning now to the appellant's complaint that his fair trial rights were impinged on by the trial court, I have paid attention to his written submissions on this point. His basic complaint was that he was not arraigned before court within 24 hours of his arrest; and indeed the record of the lower court confirms that, although the appellant was arrested on **7 April 2017, i**t was not until **10 April 2017** that he was arraigned before court; yet **Article 49(1)(f)** of the **Constitution** is explicit that:

> **"An arrested person has the right—**
>
> **(f) to be brought before a court as soon as reasonably possible, but not later than—**
>
> **(i) twenty-four hours after being arrested;"**

[46] But that provision also stipulates, in **Sub-article (1)(f)(ii),** that:

> **"(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."**

[47] Having confirmed that **7 April 2017** was a Friday and that the next ordinary court day was **10 April 2017,** it is manifest that the appellant's complaint is untenable. Moreover, authorities abound to show that in such situations, the appellant would have recourse in civil litigation for the vindication of his constitutional right; and therefore, a violation this kind, even if proved within the context of the criminal trial, would not vitiate the conviction recorded by the lower court. One such authority is **Evans Wamalwa Simiyu vs. Republic** [2016]

eKLR wherein the Court of Appeal held that:

> **"This issue has been the subject of several decisions of this Court. The correct position in law was set out in *Julius Kamau Mbugua v Republic* *(2010) eKLR*, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, we do not consider the issue fatal to the prosecution even if proved."**

[48] Lastly, I have given consideration to the sentence meted out on the appellant and whether it is excessive. It is instructive that, in the proviso to **Section 20(1)** of the **Sexual Offences Act,** it is stipulated that:

> **"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] In this case the appellant was sentenced to 20 years' imprisonment as opposed to life imprisonment. I note that in **K N N vs. Republic** [2020] eKLR, the sentence of life imprisonment for incest was reduced to 20 years, taking into account, *inter alia*, that the offender had already served 15 years by the time his appeal was decided. In the circumstances, it cannot be said that the sentence passed by the lower court is excessive or unlawful in any way. Indeed, in **Bernard Kimani Gacheru vs. Republic** [2002] eKLR, the Court of Appeal restated that:

> **It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist**.

[50] I therefore have no justifiable cause for interfering with the sentence imposed on the appellant by the trial court, save to state that the sentence of 20 years be reckoned from **7 April 2017** when the appellant was arrested, pursuant to **Section 333(1)** of the **Criminal Procedure Code**, there being no indication that he was admitted to bail pending his trial. **[51]** In the result, it is my conclusion that the appellant's appeal is without merit. The same is hereby dismissed in its entirety.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF SEPTEMBER 2021

OLGA SEWE

JUDGE