**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 49 OF 2019**

**GBB .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from a Judgment delivered on 18th March, 2019 in SOA Cr Case No.3540 of 2019 in Kapsabet Law Courts Before Hon D.Alego – Senior Principal Magistrate)**

**CORAM: Hon. Justice S.M.Githinji**

**Ms. Limo for the state**

**Mr Melly for the Appellant**

**J U D G M E N T**

**GBB**, the appellant herein was charged with the offence of incest in violation of section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 12th day of December, 2015 in Nandi South Sub-County, the appellant intentionally and unlawfully did cause his penis to penetrate the vagina of PC, a child aged 7 years, who to his knowledge was his daughter.

In the alternative, the appellant faced a charge of committing an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

Particulars of the offence hereof being that on the 12th December, 2015 in Nandi South Sub-County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of PC, a child aged 7 years old.

The prosecution case is that Pw -1 who is the mother of the complainant in this case, at the time of her offering evidence on 24th November, 2016, was aged 30 years and had 7 children. Her husband is the appellant herein. By the time she got married to the appellant she had two children, the complainant in this case who is her second born, and a first born. Within 10 years of her marriage to the appellant she sired five more children. The complainant is deaf and dumb and was not put in school.

On 12th December, 2015 the appellant left the house in the morning for his place of work at Kibwarong. At about 3Pm Pw-1 left the children at home and went to the saw mill. Pw-1 returned home at about 5Pm. She met the other children but the complainant was not in the room where the rest were. The house is three roomed and there was vomit in one of them. She asked the children where the complainant (PC) was and they said at Gogo's place. She got into the bedroom and found PC on the floor and the appellant in bed. The complainant was covered and when Pw-1 arrived she removed the blanket to uncover herself. Pw-1 saw blood on her and the clothes she was in. The complaint's hymen was torn. When Pw-1 asked her what had happened she pointed at the appellant. Pw 1 raised a distress call. The appellant held her and slapped her asking why she was raising a distress call. Neighbours turned up. He was arrested and taken to the chief. The complainant was taken for treatment at Kibworeng and later to Kapsabet Referral Hospital.

At the said Hospital, according to P-3 which was filled on the very same day of the incident. The Doctor who filled it, Dr Kemei, noted that the complainant appeared sick, pale and was unable to walk. The genitalia had third degree tear of the perineum with severe pv bleeding. The complainant was treated and the tear was repaired.

The appellant was taken to Kobujoi Police Station where the report had been made. Pw-3 recorded the statement of the complainant through her mother. She was taken for age assessment on 22nd September, 2016. The age was stated to be 10 years. After the investigations were completed, the appellant was charged on 18th December, 2015. The P-3 form, age assessment report and a report showing the complainant was a person with disability, were produced as exhibits.

The appellant, upon being placed on his defence, gave unsworn evidence and called no witness. His case is that he was born in 1974 and the complainant herein is his daughter. On 12th December, 2015 he was not at home. He was working at [Particulars Withheld] repairing motorcycles. On his way home he was accosted by some drunkards who arrested him. They took him to the AP's camp. He was then told that he had defiled his child. He was taken to Court and charged. He alleged that he did not defile his child and is innocent.

The trial court evaluated the evidence and found the principal charge against the appellant proved beyond reasonable doubt. He was convicted of the offence and sentenced to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to his Court on the grounds that; -

**1. Article 50 (2) (i) of the Constitution was not complied with and hence the appellant was not accorded a fair trial.**

**2. Given the seriousness of the charge the appellant ought to have been accorded legal representation.**

**3. The evidence of Pw-1 of which the Court heavily relied on was unbelievable.**

**4. Extraneous issues were weighed in convicting the appellant.**

**5. Defence was not properly weighed and was wrongly dismissed.**

**6. Conviction and sentence were influenced by speculations.**

**7. Appellant's application for the matter to be heard De-Novo was held wrongly to point to his guilt.**

**8. There was no medical evidence linking the appellant to the said offence.**

**9. The evidence and law were not properly evaluated and the decision is erroneous.**

The Advocate for the appellant filed written submissions which the prosecution submitted orally.

I have weighed the charges preferred against the appellant, the prosecution evidence, defence offered by the appellant, judgement passed and the sentence meted; grounds of appeal and submissions by both sides.

The issues which are not in dispute are that the complainant though not a biological daughter of the appellant, had been accepted and supported by the appellant as his daughter. He himself in his defence states that she is his daughter. Her age though not specifically established by way of a birth certificate, and the particulars of the charge indicate of her being 7 years old, the age assessment report placed her age at 10 years. The Court while convicting and sentencing the appellant held her age as 10 years and the lower age given in the charge sheet did not therefore prejudice the appellant in any way. There is no doubt that the victim was a child. Section 20 (1) of the Sexual Offences Act provides that where the victim of incest is a person under the age of 18 years (a child), the accused person shall be liable to imprisonment for life.

Under the Act, intermediary is defined to mean a person authorized by a Court, on account of his or her expertise or experience, to give evidence on the behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker. However, a close look at provisions of section 31 of the Act, in relation to vulnerable witnesses and the role of the intermediary in evidence giving, the above definition of the intermediary is not correct. Section 31 (4) (b) of the Act indicates the Court may direct that a vulnerable witness gives evidence through an intermediary. 7- indicates the role of an intermediary as to; -

**a. Convey the general purpose of any question to the relevant witness.**

**b. Inform the Court at any time that the witness is fatigued or stressed and**

**c. Request the Court for recess**.

The foregoing provisions are vivid in that the role of the intermediary is to assist a vulnerable witness offer evidence and not to give evidence on behalf of the witness.

In this case, the prosecution before calling the evidence of Pw-1 indicated that; -

**"Matter is for hearing. The complainant is deaf and dumb. The mother could act the intermediary."**

The Court never made a finding on that and give directions. Pw-1, the mother was called as a witness. The mother gave her own evidence

and did not assist the complainant give evidence as an intermediary. This lead us to the fact that there was no evidence by an eye witness to the alleged incident. The evidence of Pw-1 is circumstantial evidence. She alleged to have found the appellant in bed, and the complainant covered on the floor, in the same room. Complainant had blood-stained clothes and was bleeding. Though she did not state from where, the P-3 form is clear that it was from her genitalia. On cross-examination by the appellant, she revealed that the appellants clothes were as well blood stained and his penis. When Pw-1 raised alarm, the appellant tried to restrain her. When complainant was asked what happened, she pointed at the appellant. There is no evidence suggesting the appellant and Pw-1 had a disagreement or a grudge. The entire evidence reveals no cause why Pw-1 would have fixed the appellant.

In the case of ***Mwangi and Another-VS-Republic [2004]2KLR 32***, the Court of Appeal exhorted that; -

> **"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine it's strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."**

In this matter the evidence of Pw-1 is cogent and believable. I find that it was honestly offered. The appellant was found in the same room with the victim. The victim was unwell as a result of penetration of her vagina with a penis. The appellant was in bed and the victim on the floor both lying. The victim had blood oozing from her private parts and the appellant had blood on his penis and clothes. When Pw-1 raised an alarm, the appellant slapped her, against it. These set of facts when weighed together, also in consideration that the victim pointed at him as the culprit, leaves no doubt that it's the appellant who had committed the offence. The evidence points irresistibly to his guilt, and is not capable of explanation upon any other hypothesis than that of guilt to him. I find the available evidence conclusive and safe to the effect that it is the appellant who committed the alleged offence. His defence is flimsy. There is no way drunkards along the road would have arrested him out of no apparent reason, and then his wife fixes him with a serious offence. The defence was rightly dismissed.

Representation of the appellant in the lower court may not have changed a clear and firm facts position. Failure of representation did not compromise on the truth of the matter and the legal position. The outcome in this matter in terms of conviction and sentence was well deserved. The appeal lacks merit and is dismissed in its entirety.

**JUDGEMENT FOR ELDORET DELIVERED VIRTUALLY AT MALINDI ON THIS 14TH DAY OF OCTOBER, 2021**

**……..**

**S. M. GITHINJI**

**JUDGE**

**In the presence/absence of;**

1. The Appellant and

2. Ms. Limo for the state