



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 48 OF 2019**

**SNK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from conviction and sentence of Hon. Wewa (S.P.M.) at Malindi Court dated 14.6.2019)**

**CORAM: Hon. Justice R. Nyakundi**

**The Appellant**

**Ms. Sombo for the State**

**JUDGMENT**

The appellant **SNK** was charged, prosecuted and finally convicted of indecent act contrary to Section 11(1) of the Sexual Offences Act instead of incest contrary to Section 20 (1) of the Act. The brief particulars of the offence alleged to have constituted the offence are that on 19.8.2015 in Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of DSK, a child aged seventeen (17) years who to his knowledge is a niece. As a consequence, he was sentenced to ten (10) years imprisonment, for the alternative count and not the main charge of incest. In the present case the uncontested facts from the prosecution are in support of incest; as I draw the inference shortly.

Being aggrieved with both conviction and sentence imposed by the trial court he appealed on the following grounds:

- (i). The Learned trial Magistrate erred in both Law and facts by failing to consider Section 11(1) of the Sexual Offences Act which conflicts and contradicts Section 216 and 329 of the Act, and Article 27 (1) (2) (4) of the Constitution.***
- (ii). That the Learned trial Magistrate erred in Law and fact by convicting and sentencing the appellant without considering that the doctors examination report proved that there was no penetration in the female's genital organ of (PW1) as per the evidence in chief.***
- (iii). The Learned trial Magistrate erred in both Law and fact by convicting and sentencing the appellant without reconciling the inconsistencies and contradictions in the evidence by the prosecution.***
- (iv). That the Learned trial Magistrate erred in both Law and fact by convicting the appellant***

*without considering the defence and the grudge with the complainant's father.*

On appeal the appellant relied on his written submissions in which he highlighted the reasons why the appeal should be allowed by this court. In the first contention, appellant submitted that the Learned trial Magistrate erred by not complying with the provisions of Section 214 of the Criminal Procedure Code on amendment of charges. He contended that the witnesses were not recalled for purposes of examination and cross-examination and with that he was prejudiced to warrant the charges to be dismissed.

The appellant also submitted that the evidence by the prosecution witnesses was inconsistent and contradicted with each other, which could have been resolved in his favor by the court. The appellant placed emphasis on the medical evidence which confirmed that the complainant genitalia was not lacerated, bruised or any findings made on the act of penetration.

To buttress the grounds on amendment, inconsistencies and contradictions in the evidence, appellant placed reliance on the following authorities **Denkeri Ram Kishan Pandya v R CR Appeal No. 106 of 1950 EACA 93, Kazungu Mramba Mweni v R CR Appeal No. 220 of 2007, Fuad Dumila Mohammed v R CR Appeal No. 210 of 2003, Oketh Okale v R {1965} EACA 555, Muiruri Njoroge v R CR Appeal No. 115 of 1985.**

Further, the appellant contended that the evidence on identification admitted by the trial court was incompatible with the principles in **Abdallah Bin Wendo v R 20 EACA 166, Wamunga v R {1989}, R v Turnbull {1976}.**

The other issue before me was that of sentence. The substance of the appeal was in relation with the unconstitutionality of the mandatory minimum sentence of ten (10) years imprisonment. With that, the appellant asked this court to exercise discretion to have the appeal allowed. As far as the Learned prosecution counsel for the state is concerned the appeal lacked merit on all the grounds ventilated by the appellant.

### **Analysis and determination**

This is a first appeal and the guidelines are well settled in the Known case of **Okeno v R {1972} E.A. 32.** The court is obliged to analyze and re-evaluate the evidence addressed before the trial court, independently and to draw my own conclusions. It is necessary to be quite sure that no evidence was given which is inadmissible and great care is required in approaching the evidence on appeal to keep all the issues perfectly clear to establish in what circumstances the appellant was convicted and sentenced.

Having set the guidelines, the attention in that case is to revisit the summary of the evidence at the trial in line with the grounds of appeal. It is acknowledged first of all that the decision of the trial would be tested against the provisions under Section 107 (1), 108 of the Evidence on the burden of proof. As a general rule, the prosecution has the burden to prove that the crime against the accused person dependent upon the existence or non-existence of the circumstances of the indictment is discharged beyond reasonable doubt. The principles summarized in **Woolmington v DPP {1935} AC 462** held that:

*“Throughout the web of English Criminal Law are golden thread is always to be seen that it is the duty of the prosecution to prove the prisoners guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of the whole case, there is a reasonable doubt, created by the evidence given either by the prosecution or by the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law and no attempt to whittle it down can be entertained.”*

I now turn to the appeal. At the outset, I would say I am indebted to the arguments raised by the appellant and the response by the respondent's counsel.

I cannot help, however, stating that the reasons given by the Learned trial Magistrate to convict the appellant for the indecent act were quite inadequate and out of step of a court established under Article 50 (1) of the Constitution. I would be demonstrating in a moment that the findings of fact in my view were incorrect and erroneous for being inconsistent with the evidence by the prosecution.

The keystone of the appellant's case, though broken down into various grounds of appeal is basically to answer the question whether the prosecution discharged the burden of proof of beyond reasonable doubt in relation with each ingredient of the offence as charged to secure a conviction of the alleged offence. Whatever else it is, the case of the appellant deserves attention as mirrored with the evidence adduced before the trial court.

When the prosecution initiated and charged the appellant with the offence of incest in terms of Section 20 (1) of the Sexual Offences Act, they set to proof the following elements:

***(a). The act of penetration of the genitalia of the victim.***

***(b). That the victim of the defilement was a female aged below eighteen (18) years old.***

***(c). That on the material day, named in the charge sheet it was the appellant who had carnal knowledge with the victim intentionally and unlawfully with full knowledge that she was his niece.***

The Law defines penetration under Section 2 of the Act to mean either partial or complete insertion of a male genitalia with that of the female genitalia. Further, genitalia, is expanded to comprise of the vagina and anus for purposes of the offence of defilement. Indeed in **Mark Oiruri v R {2013} eKLR** the Law concedes that there can be a possibility of sexual penetration without evidence of spermatozoa or semen for that matter. In this respect the court stated:

***“Many times the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the Law does not require that evidence of spermatozoa be availed, so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside, the girl’s organ.”***

Further, the court recognizing material circumstances in sexual penetration also in the case of **Erick Onyango Ondung v R {2014} eKLR** held:

***“In sexual offences, the slightest penetration of a female sex-organ by a male organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”***

In this appeal, the appellant major complaint touched on the inconsistencies of the complainant evidence and her witnesses which the Learned trial Magistrate failed to appreciate that penetration was not proved as alleged. He also raised the question of non-responsiveness of the medical evidence by PW5 who produced the Post Rape Care Form and the P3 Form as evidence on penetration.

Further, to this appellant argued that in view that no injuries were seen or established to have occurred to the vagina of the complainant, it was incumbent upon the Learned trial Magistrate to rule in his favor. This is the principle that will apply to the concerns raised by the appellant in **Philip Nzaka Watu v R {2016} eKLR** where the court expressed itself on the issue as follows:

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature***

**and extent of the discrepancies and inconsistencies in question.”** (emphasis supplied)

On appeal, I have reviewed the evidence and circumstances of the commission of the offence which the appellant faced before the trial court. This is a case where the complainant testified as to the time and place when the act of sexual intercourse took place and the person responsible to be the appellant.

As the prosecution indicated in their case, the complainant stayed in the same house with her sister **(PW2) KS** aged fourteen (14) years old. This was also affirmed by the testimony of **PW3 – HS** a brother to the complainant who also happened to be at the scene of the crime where **(PW1)** was defiled by the appellant. As a matter of fact, from **PW1, PW2 and PW3** perspective, the appellant was a person known and related with them by virtue of being an uncle. The averment on oath by these three star witnesses demonstrated the arrival of the appellant in their home, in absence of the parents who happened to be away on that particular day. It was at that time that the complainant stated that the appellant sneaked to her location and secretly penetrated her vagina. When this happened in the morning **(PW1)** telephoned her father **(PW4)** to seek assistance on what the appellant had done to her the previous night. **PW4** told the court that on receipt of the information about the defilement he also reported the matter to Bamba Police Station.

**PW5 P.C. Philip Dzombo** also stated in court that he had occasion to investigate the incident by recording witness statements and issuing the P3 Form to the complainant. That upon examination of the complainant and overall evidence availed, the appellant was arrested and charged with the offence of incest. At the trial, the appellant denied the charge.

I have gone through the evidence of **PW1, PW2 and PW3** in regard to the events of the 19.8.2015 at [Particulars Withheld] village. For the most part the complainant evidence remained consistent with that of **PW2 and PW3** as to the presence of the appellant in their room, even when they insisted that he does not spend a night with them on the material day. The complainant statement on how penetration occurred is simple and straight forward, that while in bed, appellant took his penis and penetrated her vagina.

In this appeal, bearing in mind the principles in **Okeno v R (supra)** , **(Ruwalla v R {1957} EA 570)**, I have carefully analyzed the evidence given by **PW1, PW2 and PW3** on this element, as corroborated with medical evidence by **PW5**. However, it's also a principle for this court to remember that on appeal, the court goes by the record but makes due allowance to the inferences drawn by the trial court which had the advantage of hearing witnesses, observing their demeanor and making footnotes as to their credibility.

On many occasions, the court has to contend with the dicta in the persuasive authority in **Norminal Defendant v Clements {1960} 104 CLR 479 at 79-80**, where the court held:

*“If the credit of a witness is impugned as to some material fact in which he deposes upon the ground that his account is a late invention or has been lately advised or reconstructed, even though not with conscious dishonesty, that makes admissible statements to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, in as much as the rule forms a definite exception to the general principle excluding statements made by out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The Judge at the trial before him whether, the case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident however that the Judge at the trial must exercise care in assuming himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention, or reconstructions or that a foundation of such an attack has been laid by the party, but also that the contents of the statement are the fact to the side effect as his account given in his evidence and that having regard to the time and circumstances in which, it was made, it rationally tends to answer the attack.”*

The issue raised by the appellant was that the material evidence as to the facts of the case based on the

testimonies of PW1, PW2, PW3 and the medical evidence by PW5 was contradictory and inconsistent. On the part of this court, I have scrutinized the prosecution case with regard to penetration, the version by (PW1) was consistent and firm even in cross-examination on how the sexual act occurred on the night of 19.6.2015.

There is no evidence to impugn the credibility of the complainant testimony on what she told the court that the appellant using his penis penetrated her vagina. The questions raised on this appeal are whether the contradictions were such that, the findings of facts were rendered unreliable. For proof of the alleged sexual intercourse all what the prosecution is required to discharge by way of legal and evidential burden, is the act of penetration of the complainant's vagina or in any other case the anus.

The test to be applied inter alia to the principles in the cited cases elsewhere in this analysis is to be found in the case of **Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995** where the Supreme Court held:

***“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”***

***“For evidence to be capable of being corroborated it must:***

***(a). Be relevant and admissible Scafriot {1978} QB 1016.***

***(b). Be credible DPP v Kilbourne {1973} AC 729***

***(c). Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99***

***(d). Implicate the accused***

In the instant appeal, on evaluation and scrutiny of the record, in a hoist of events not known in Law the Learned trial Magistrate on her own motion discounted the overwhelming evidence on penetration by (PW1) as corroborated with that of PW2 and PW3 to dismiss the charge of defilement of the complainant. This was on account that there was discrepancy in the prosecution evidence as to whether the complainant was a niece to the appellant or a cousin.

The Learned trial Magistrate rejection of this strand of evidence was a misapprehension of the Law and facts of the case as prosecuted by the respondent. The basic element of defilement offence is the penetration of the complainant genitalia. It was not even necessary to go into the details of whether the medical report established that the complainant was penetrated. It is trite under Section 2 of Sexual Offences Act that penetration however slight and whether or not there was presence of spermatozoa, is sufficient to prove defilement as known and enacted by parliament within the four corners of the Sexual Offences Act.

Further, I should be wary about the significant impact upon the restrictive interpretation to Section 20 (1) of the Act given by the Learned trial Magistrate in considering whether the appellant was genuinely an uncle or a cousin to rule out the existence of incest against the appellant.

I consider it likely to be harmful to the administration of justice if the definition of a serious offence like defilement under Section 20 (1) of the Act becomes out of step with the understanding of a large section of the African Community definition of affinity relationship. I cannot be certain that majority of the Kenyan people do subscribe to the definition being construed by the Learned trial Magistrate and after all it occasioned a miscarriage of justice. In any case, there was no objection raised by the appellant that he

was not related with the complainant. To make matters worse the Learned trial Magistrate advanced a direction on the nature of the relationship without bearing in mind the cogent evidence given by PW4 the father to the complainant and an uncle to the appellant. Despite evidence of the existence of one or more of the circumstances on the fact that the complainant was closely related with the appellant as a niece, it was not open for the Learned trial Magistrate to misapprehend the Law and evidence, to arrive at an erroneous decision, whether a cousin or uncle, there was causal consanguinity relationship to bring the case within Section 20 (1) of the Act. This was a clear model on interpretation of the letter versions the spirit of the Law. The Learned trial Magistrate was now being asked to call into his aid the spirit of the Law model as against the letter to harness a decision making process that contributes to the justice and fairness of the case. This is because the spirit of the Law is constructed by social norms are inherently linked to legitimacy **(See Horne 2009 Tyler, 2006). (A social norms approach to legitimacy, American Behavioral Scientist (53) (3) 415)**. The legislature in its wisdom could not categorize every affinity and consanguinity set with certainty within the limited provisions of Section 20 that is why courts exist to interpret the Law and give effect to the letter and spirit of the Law.

In my view, under Section 20 of the Act, what the prosecution is required to prove is a fact that:

***(i). Sexual intercourse between the complainant and the appellant was a nature that they are closely related.***

***(ii) That marriage between them is forbidden by Law.***

***(iii) However, the common usage of words like uncle, step brother, brother, sister etc are fastened as guide and not to stifle the degree of kindred, affinity or consanguinity specified in the statute that specifies which relatives are prohibited from marrying one another, hence by extension they would not engage in sexual relationship.***

***(iv). Persons within degrees of consanguinity makes defilement incestuous and unlawful.***

On that issue, I am of the view that statute need not expressly provide the finer details regarding incest in terms of degrees of relationship, because at one end of the degree, relationship is calculated by counting the number of generations back to common ancestor but not affinity. Whether making reference to a European descent or African ethnic tribe, uncle and cousin is normally a close knit bloodline affinity relationship.

I am left in doubt that the complainant (PW1) was sexually penetrated by the appellant either legitimately or illegitimately was his niece. In this regard there was no basis in fact and law for the Learned Magistrate to find otherwise. Further, moving forward to find in favour of the appellant for an offence of indecent assault which was not supported with any shred of evidence, was in my conceded view a misdirection of the Law.

As if that was not enough the Learned trial Magistrate was wrong in striking out the offence of incest and substituting with indecent assault a matter in which the prosecution adduced no evidence in support of it. Many important issues were left undecided and not even considered. Much as I regret having to adopt this word I would allow this appeal on grounds that the appellant was wrongly convicted for the offence of indecent assault instead of the substantive charge of incest contrary to Section 20 (1) of Sexual Offences Act.

The court is also not satisfied that the appellant should benefit from a mistake or omission knowingly or made unknowingly by the Learned trial Magistrate. In exercise of the powers conferred to this court under Section 382 of the Criminal Procedure Code the order so made occasioned a failure of justice and that narrow view of the matter by the trial court ought to be put right to give effect to the facts, evidence and the Law.

The second element in the present case subject matter of the charge was for the prosecution to prove age of the complainant. The evidence once again from PW1, PW4 and PW6 specifically demonstrates by

virtue of production of a birth certificate exhibit 3 in respect of age to be seventeen (17) years was final and conclusive and shall not be questioned by any court or persons. (See **Francis Omuroni v Uganda CA Appeal No. 2 of 2000**). That being so, in so far age is concerned no dispute exists.

Then comes the vital question relating to identification of the appellant. No doubt this was a case of recognition rather than general identification.

The incidences and threshold on identification or recognition and the position stipulated in Law is now settled as can be observed from the principles in **Abdalla Bin Wendo v R {1953} 20 EACA 156, Roria v R {1967} EA 583, R v Turnbull {1976} 3 ALL ER 549**. The evidence required for this offence on recognition must fit the guiding principle in **Simiyu v R {2005} IKLR 192**, wherein the Court of Appeal stated:

***“In every case in which there is a question as to the identity of the accused, the fact of them having been a description given and terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or person who gave the description and purpose to identify the accused and then the person to whom the description was given.”***

In the trial of the appellant there was evidence of PW1, PW2 and PW3 that during the night of 19.8.2015 he went to their house and forced himself to spend a night with them without any permission from the parties. It is not in dispute that the father and mother to PW1, PW2 and PW3 were out of the home when the appellant moved in to commit the offence against the complainant.

A further matter to seal the evidence on recognition is the fact of prior knowledge of the appellant as an uncle to PW1, PW2 and PW3. Before the appellant elected to spend a night in the same house, they had an opportunity to talk with him when he visited them to know whether there was anything he could assist them before they retire to bed.

It is also clear that the following day PW4 was telephoned by (PW1) to report this particular incident of the appellant spending a night and in the course he committed an act of penetration against (PW1).

In my view the evidence of recognition of PW1, PW2 and PW3 had all the hallmarks of truthful testimonies to satisfy and support the fact on recognition, in consonant with the principles in **Simiyu case (supra)**.

All the above factors put together leave no doubt that there was in view of this court an irresistible inference ordained in **Rex v Kipkering Arap Koske {1949} 16 EACA 135** that the prosecution evidence establishes beyond reasonable doubt that the facts proven with regard to the offence of incest are incompatible with the innocence of the appellant.

In the result all the grounds of appeal raised by the appellant find no shelter in this court as the findings are on concurrent with the evidence save on substantive disagreement by the trial court as whether the charge proved was the main count of incest or indecent assault. With greatest respect the *mensrea* required to have unlawful penetration by the appellant with the complainant was in no doubt present from the evidence presented by the prosecution. The *actus reus* for the offence is the penetration which occurred against the complainant in the night of 19.8.2015 in her bedroom. It is the Law that the slightest penetration suffices. It is also evident from the record the appellant was positively recognized. Unfortunately, it turned out that the Learned Magistrate ignored all these because of ‘consanguinity’ as to whether the appellant was an uncle or a cousin, when **PW4** testimony clearly defined the relationship as that of a niece. There was no need of any other evidence to establish affinity.

I find the serious misdirection about this issue going to the root of the entire Judgment. This court pursuant to the principles in **Ruwala and Okeno (supra)** authorities do fault the Learned Magistrates by making the following orders.

That the appellant rightful charge of incest contrary to Section 20 (1) of the Sexual Offences Act was proved beyond reasonable doubt. Consequently, the last and duly conviction of the appellant ought to be varied and substituted with the offence of incest and not indecent assault as opined by the Learned trial Magistrate.

Last but not least, after considering the ground of appeal on Section 214 of the Criminal Procedure Code on amendment of the charges initiated by the prosecution this is my opinion:

***(1). In the case of Yongo v R {1983} KLR 319 a charge is defective under Section 214 of the Criminal Procedure Code where***

***(a). It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses or it does not, for such reasons, accord with the evidence given at the trial or it gives a misdescription of the alleged offence in its particulars.”***

In the present appeal, the record shows that the charge sheet was amended midstream the trial. Thereafter, the key witnesses were recalled to affirm or clarify existence or non-existence of facts in terms of Section 107 (1) of the Evidence act on the allegations made against the appellant. This means the appellant was given an opportunity to cross-examine the witnesses on the emerging issues after an amendment, one of the most common grounds on amendment raised is limited to time, date or misdescription of the elements of the offence.

The appellant was charged with two counts under the sexual offences to wit incest and indecent assault. He was initially convicted of indecent which on appeal has been quashed and found to be a misdirection and an error on the face of the record. The court has forth held that the offence of incest as set out the charge was in the form authorized under Section 134 and Section 135 of the Criminal Procedure Code.

The charge of incest did not contravene this rule as the prosecution was further to recall witnesses as required by Section 214 upon amendment. The golden rule on proof of beyond reasonable for the offence of incest against the appellant was also satisfied by the evidence tendered by the prosecution. It appears to me that the ground has no merit as a basis of the appeal.

As regards sentence, the case of **Ogalo S/o Owuor v R {1954} 24 EACA 270** sets the legal position in which an appellate court can exercise discretion to interfere with the decision of the trial court on an order for a verdict of sentence against a convict.

In the instant case parliament prescribed punishment of life imprisonment.

The sentence of ten (10) years imposed was addressing a different provision of the Law and not the offence of incest. On my re-appraisal of the evidence, this was one case which deserves a fair, just and proportionate sentence for such a heinous act which left no doubt a traumatic experience on the complainant.

For that reason, I would have been within the range of the principles in **Ruwala** case and **Ogola** to revise the sentence upwards to fit the crime. Bearing in mind many factors which go to sentence and in absence of the fact that this issue was not properly canvassed specifically on enhancement as a matter of Law and fact I decline to interfere with it. In the premises, the appellant shall serve the sentence of ten (10) years from the date of Judgment of the trial court.

This appeal as unprecedented as it was submitted, lacks merit on both facts and Law. The misdirections in the findings of fact of the trial court have been set right in the interest of justice.

Accordingly, the appeal is dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF APRIL 2020**

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**R. NYAKUNDI**

**JUDGE**