REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 41 OF 2019

JKK.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 662 of 2015 delivered on the 15th day of January 2018 by Hon. J. Tarmar, PM]

JUDGMENT

Introduction

1. The appellant was convicted and sentenced to imprisonment for life for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act on the 15th January 2018. The particulars of the offence were that the appellant had –

> *"On the month of December 2014 at unknown date at Sigoro in Koibatek sub-County within Baringo County committed an act which caused the penetration of his penis into the vagina of CK a child aged 16years who is to his knowledge a daughter."*

The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

2. The evidence presented before the trial court as set out in the record of proceedings was as follows:

> *"PW1: I am CK I am 16 years old. I do not go to school. In 2014 December I was at home I was with my brother. I was at Sigoro. I was in the house we were sleeping. We bolt the door with a nail. I had slept I woke up found my father on my bed. He took my leg put on his shoulders. He had sex with me. I did not know it was him. When he left I followed him. I saw him knew it was my father. He went to the main house we had slept in the kitchen. He removed my inner wear before defiling me. I went back to sleep. I woke up went to the toilet I saw blood in my private part. I felt pain when passing urine. I washed my petticoat which had blood. He had removed my inner wear. I washed my inner wear. He came back in the evening while drank. He was looking at me I saw he wanted to defile me. I took my clothes and left. He followed me. I ran away. I met KR we walked together. I saw my father. I went to the bush and went with K to their home. I slept at K's parent's home. I went to my mother's home the following day. I was at my maternal grandparent's home for a long time. My uncle MKK told me to go and live with CR who is his neighbor and if I am a good girl he will take me to Machakos to school. Later he said I was expectant. I told him what happened between me and my father. He brought me to Police station at Eldama Ravine. We also went to District Hospital in Eldama Ravine treatment chit 10.07.2015 outpatient 15783/15 MFI -1 we then went home laboratory request form 8661 MFI-2.*
>
> *P3 form MFI-3 Police came that day it is E my brother who identified my father to the Police. I have no grudge against my father. I later gave birth to a baby.*
>
> *Cross examined by accused*
>
> *I got 285 marks in K.C.P.E index was […..]. I was at S Primary School. I was there from class 1 – 8. My name is NCK. I was taken to District Hospital. I woke up the children and they saw you. I followed you and you entered the main house.*
>
> *You put my legs on your shoulder and you defiled me. I saw blood on my petticoat. You are harsh so I could not have told my brothers. I did not tell anyone. I told Boniface that my father was causing problems I did not tell him how. He told me to live at their home. It was December when you defiled me. I have said the truth.*
>
> *Re-examined*

No question.

PW2: *I am FJK I live in Sigoro I am a farmer. In November, 2014, I was at home at my parents' home. I went with one child K. I left the other children at home with K my husband. In January C came to my parents' home. She told me her father wanted to beat her. He chased all the children and they came to my parents' home. I gave Ct my child to live with her in Machakos till January so that she place her in school. She told me C was pregnant. I did not know anything till accused was arrested. Complainant is 16 years old. She was born 1999. Accused chased me from his home. He has other women that he lives with one now live at my home with accused.*

Cross examined by accused

My child is NCK. I did not make a report. I gave birth to complainant in 1999. C told me my child was pregnant. I have ten children. My child told me you impregnated her.

Re examination

Sigoro and Kiptuno are not very far.

PW3: *I am Dr. Arafa Salliy YAtor of Eldama Ravine District Hospital. I work as Senior Medical Officer. I treat women, children surgical procedures. I have worked for six years. I have bachelor of medicine and surgery. MFI -1 referred. Out patient No15783/15 lives at Sigoro card issued on 10.07.2015.* ***I examined the patient. She was expectant said she was defiled by her father every time when the father was drank. We did laboratory test. She was six months pregnant.*** *HIV treatment note MFI-1 now exhibit 1.*

Laboratory test lab request form. MFI-2 No infection. HIV negative. Pregnancy test MFI-2 now exhibit 2. PRC form I filled it. It is for the complainant 10.07.2015. She conceived in December 2014 by her father. PRC now MFI-4 produced as exhibit 4.

P3 form MFI-3 OB 18/10/07/2015 section 2 she was 30 weeks pregnant. She was 16 years old. I signed P3 form now exhibit 3.

Cross examined by accused

The child lives in Sigoro. We gave the girl iron tablets for pregnancy. I only know she is pregnant.

Re-examination

None

PW4: *I am Jelagat Rop. I live in Machakos. My home is in Sigoro. I know complainant. She is a neighbor in Sogoro. 30.06.2015 I was at home. In the evening, I talked to complainant's uncle "Return" He told me that child was at home. She had not done her exams as her mother had gone to her maternal home. Her uncle told me to take the child with me to Machakos. I went with that child, my house girl told me the child was pregnant.* ***I asked her who impregnated her she told me her father impregnated her. I know the father of the child it is accused herein. She told me she had not had sex with anyone else except her father.*** *Her mother had run away to her maternal home in Kipyon. She said she feared to tell her mother that her father defiled her. I went to charity welfare association in Machakos they told me matter must be dealt with where offence took place. On 10.07.2015 we travelled home. I went to District Children's officer I was told to make a report to Police. I went to the hospital with the child complainant- she told me she has never had a boyfriend. My home to accused's home is one kilometer.*

I have no grudge against accused. We live in Sigoro.

Cross examined by accused

I am fine. I was requested to go with the child before she goes back to school. Your wife went to her maternal home and the child followed her. I do not know if she had told anyone that you had sex with her. The problems that the child had was as in population they are nine and food is scares. She was not going to school. The child said you impregnated her. I went with the officer to Police Station she is the investigating officer in this case.

P3 was filled by the doctor. I was not in the room where the doctor was with the child.

Re-examination

The child had normal challenges at home e.g food. On my way to Machakos I suspected the child was pregnant. Complainant told me that she was impregnated by her father. I cannot frame up the child. I felt the child needed to get her justice.

PW5: *I am No.69168 Corporal Esther Mokami. I work at Eldama Ravine Police station in Criminal branch. I have worked at Eldama Ravine for three years six months. I am the investigating officer in this case. I was in criminal office OCS called me on phone told me to investigate this case. I found complainant and PW4. I took them to the hospital. Complainant was treated after examination P3 was filled together with PRC. It was a case of incest as the child was already expectant. It was found she was seven months pregnant. P3 exhibit -3, treatment note exhibit 1 PRC exhibit -4.*

Laboratory request form exhibit -2 that night me, OCS and another officer went to Sigoro found accused arrested him.

The day he chased away his wife he defiled his child the mother was at Kiptuno at her maternal home. I compiled file. Complainant told me in December they were asleep with her other siblings accused went to her bed. He removed her inner wear pinched her when she raised alarm told her to keep quiet. He defiled her and went away. In the evening the following day accused came while drank. She sensed danger and ran away to her friend's home where she slept. She then went to her maternal grandmother's home. I had seen accused before but not complainant. I have no grudge against accused.

Cross examination by accused

I was present when complainant was being examined by the doctor. You pinched her on her thigh when she wanted to raise alarm and told her to keep quiet. Complainant is of Sigoro village. OCS wrote on P3 form that the child is from Kiptuno. Kiptuno and Sigoro is one place. Her mother live in Kiptuno. You committed the offence in Sigoro. P3 form is valid the child also lived in Kiptuno. I am allowed to be in the room with complainant when she examined complainant. Complainant delivered in September 2015. Accused identified by pointing out.

Re –examination

I have a right to examine a child or victim of defilement. I know all that was written by witnesses. Complainant is from Sigoro. Her mother lived in Kiptuno. I was investigating a case of incest area is not a big deal.

PW2 Recalled at the request of for Cross examination by accused

DK called me told me complainant was expectant. R also told me that the complainant was expectant. I asked my child if she was expectant. She said she was expectant the clinic card for the child is at home. She gave birth at the hospital.

Re-examination

The child was expectant. She said it is her father accused who impregnated her.

3. Upon request by the Prosecution *"for an order that Government Chemist carry out DNA test on the child born out of this defilement and accused"* the court allowed the DNA testing to be done and the report thereon was given in the testimony PW6 below:

"Court – Government Chemist carry out a DNA test on the baby born out of this defilement case. OCPD - Koibatek to facilitate DCO, accused and complainant for running of DNA test.

Mention 03.03.2016 for DNA test.

Hon. M. Kasera – PM

24.02.2016."

PW6: *I am Nelly Maurine Papa Government analyst Nairobi. Bachelor of Science in Chemistry and Biochemistry from Nairobi. Worked for the last 22years acting under the request of No.69168 CPL Esther Mukami of Eldama Ravine Station. We were desired to examine the items labeled below and determine paternity of child.*

03.03.2016 at Government chemist Nairobi swabs that were obtained from;

1) JK

2) CK - complainant

3) VH – the child

Issues relating to genetic inheritance, every person inherit half of their DNA from mother and father Biological.

By examining a DNA from person it is possible to determine DNA gained from mother and father.

After examining the sample generated, ***I concluded that there are 99.9+ more chances that Jeremia Kespai is the father of VH. He is also the Biological father of CK.***

I now wish to produce the report as exhibit. Exhibit memo MFI 5(a) report MFI 5(b) produce as exhibit 5(a) and (b) respectively.

Cross examination by Accused

I received the sample from my department.

The accused was escorted to Government Chemist together with complainant, child and the children officer.

You were brought to the Government Chemist.

Mine was to determine the paternity of the child.

Re-examination

The swab was taken at Government Chemist department and involved the accused, C and V. They were escorted by the investigating officer and others.

From the report the accused is the Biological father of both the complainant and VH.

***Prosecution** – That is the close of the prosecution case.*

Hon. J.L. Tamar – SRM"

4. When put on his defence the appellant, who had upon ruling on case to answer on 11/7/2017 initially said upon section 211 of Criminal Procedure Code being explained to him that he would give a sworn statement and after adjournment on 29/8/2017 to allow him make written submissions, declined to give evidence at the defence hearing on 4/10/2017 stating as follows:

"04.10.2017

Coram: Before Hon. J. Tamar- PM

PC: Kelwon

CC: Diana

Accused: Present

Accused:

I am not ready to proceed with my defence hearing because having read the typed proceedings, I find that it does not accurately reflect what transpired in court before Hon. Kasera for that reason I am not going to defend myself. ***I request for a retrial of my case because the magistrate did not record what witnesses stated.***

Hon. J.L. Tamar – SRM

COURT:

The Application for a retrial can only be made and granted by High Court after a decision had been made by the lower court. I am therefore, unable to accede to accused Application for a retrial. I direct that he proceeds to defend himself having sought adjournment to enable him complete his submission.

Hon. J.L. Tamar – SRM

Accused:

In that case I wish to rely on my submission already filed although I want a retrial in this case."

5. On 13.10.2016 when the matter came up for hearing before a new court, the Hon. J. Tamar- SRM complied with section 200 of the Criminal Procedure Code and minuted on record as follows:

***"Court** – **Section 200(3)** complied with. Accused states that he wishes to have the case proceed from where it had reached. He has no witnesses that he wishes to recall. Case to proceed.*

Hon. J.L. Tamar – SRM"

Judgment of the Trial Court

6. After considering the evidence presented before it, the trial court in its Judgment dated 15th January 2018 found the accused [appellant herein] guilty as follows:

"The accused is charged with the offence Under Section 20(1) of the Sexual Offences Act which provides that;

"Any person who commits an indecent Act or an act which causes penetration with a female person who is to his knowledge his daughter ----- is guilty of an offence termed Incest and liable to imprisonment for a term of not less ten years"

There is a proviso that where the alleged female person is under the age of 18 years, the accused person shall be liable to imprisonment for life.

It is therefore, important in the case facing the accused person to established the congenial relationship and the age of the complainant. These are important ingredients that must be established.

The evidence of PW1 the, complainant and PW2 her mother are clear and is not contested in regard to the relationship between the accused person and the complainant. The complainant testified that she was defiled by his own father after he chased her mother. This evidence was confirmed and corroborated by the evidence of ***PW2 FJK****. The accused did not dispute this asserting and it therefore, remains a fact that the complainant is the accused daughter.*

Similarly, the evidence of PW6, Nelly Papa established beyond doubt in her report produced as exhibit 5(b) that the child born out of the incestuous relationship belonged to the accused person.

I therefore, find that the complaint is the biological daughter of the accused person.

PW1 and PW2 also testified regarding the age of the complainant. PW1 told the court that she was 16 years of age at the time of the incident. She produced documents to prove this.

PW2 Florence *also told the court that the complainant was at the time aged 16 years having been born in 1999. No months or dates given. The medical documents produced in court such as the PRC form the treatment notes from Eldama Ravine Sub-County Hospital and the P3 form shows the age of the complainant as 16 years. Although this information may have been supplied by the complainant and or her mother. I did not see PW1 testify as to form an opinion about her apparent age, but I am satisfied by the witness evidence that the complainant was certainly under the age of 18 years. I so find and hold.*

The report by PW6 Nelly Papa and which has not been challenged by the accused shows that there is over 99.99 chance that the accused person JKK is the biological father of VH, the complainant child. This is sufficient medical evidence and proves in addition to witness testimony that the accused person had committed incest with his own daughter.

The accused in his submission challenged the charge as framed and points out that it is defective for lack of the use of the words ***"unlawfully*** *and* ***intentionally"****. I think the accused submission is misplaced. There is nowhere in* ***Section 20(1) of the Sexual offences Act*** *that the two words are used. It is however, used in the offence of rape* ***Under Section 3(1) of the Act.***

As regards the contradictions in the evidence of PW1, I find none. The complainant was clear that the accused removed her under pants, raised her legs to his shoulders and defiled her.

From my analysis of the evidence and having considered the accused submissions and the law relating to the offence, I find that the prosecution have established the case against the accused beyond reasonable doubt.

Consequently I find the accused guilty of the offence as charged in court and I convict him accordingly.

Dated and delivered this ***15th*** *day of* ***January, 2018****.*

Hon. J.L. Tamar

Principal Magistrate.

15.01.2018."

The sentence

7. The offence of incest by a male person carries with it a penalty of a minimum of imprisonment for 10 years with a possible life sentence in cases where the victim is a child. In sentencing the appellant, the trial court considered his previous convictions as follows:

*"**Court prosecutor***

The accused has previous records vide Cr. Case NO. 878/2015 Rep. v. JK and 669/2015 Rep v. JK.

The first one is on assault and the other matter is attempted incest.

Accused

The record is accurate

Mitigation

I am serving a life sentence. I have nothing in mitigation.

Sentence

I have considered the nature of the offence and the circumstances as well as accused previous records.

Consequently, the accused is sentenced to serve life imprisonment as provided for by law.

Right of appeal explained.

Hon. J.L. Tarmar

Principal Magistrate

15.01.2018"

The appeal

8. The appellant challenged the judgment of the trial court upon grounds of appeal set out as follows:

*"**AMENDED GROUNDS***

1. That he learned trial magistrate erred in both law and fact by not noting that the charge sheet is defective.

2. That the trial magistrate erred in both in law and fact by failing to note that mu constitutional rights were contravened as enshrined in the Article 49(f) of the Constitution.

3. That the trial magistrate erred in law and fact by convicting the appellant yet the prosecution had proved its case beyond reasonable doubt.

4. The trial magistrate erred both in law and fact by not observing that the reception of PW1's Testimony was not justified at all.

5. That the trial magistrate erred in both law and fact in failing to note that I was unfairly tried."

SUBMISSIONS

9. The appellant filed written submissions and the DPP made oral submissions at the hearing to which the Appellant responded as set out in the record of proceedings for 12/2//2020 as follows:

"12/2/2020

Appellant

I have written submissions. I shall reply to DPP's Submissions.

DPP

The appeal is opposed on conviction but not opposed on sentence. Appellant was convicted of incest c/s 20 (1) of the Sexual Offences act and sentenced to life imprisonment.

PW1 testified that appellant was her father and that she was 16 years at the time of the incident.

PW2 also testified that he appellant was her husband and the complainant was her daughter. She said complainant was born in 1999 and was therefore 16 at the time of the offence. No date or month of birth was given by PW2 and PW1 and no document was produced to prove her age.

PW1 testified that in December 2014 she was defiled by her father who is the appellant herein. PW4 testified that she took the complainant into her home in 2015 to take her to school on the request of the complainant's uncle as the complainant had just done her KCPE examinations. She later heard from her house-help that the complainant was pregnant. She enquired from the complainant who the father of the child was and the complainant said it was her father as she had sex with any other person.

PW3 is the doctor from Ravine District Hospital. She examined he complainant on 10/7/2015 confirmed that the complainant was 6monthis pregnant. The case was reported to the Police. The accused was arrested and charged before court.

After the complainant gave birth the Prosecution requested for DNA on the appellant complainant and the baby.

PW6 Government Analyst who conducted the DNA analysis concluded that the appellant was the biological father of both the complainant and the baby. This was conclusive evidence of the defilement of his daughter.

However, I agree that there was no proper proof of age of the complainant as no document was produced. Proof of age is important due to the Proviso under section 20 (1) of Sexual Offences Act which provides for life sentence if complainant was under 18 years of age.

The evidence that the complainant is below 18 years was not conclusive but the fact that the appellant had defiled his daughter was proved.

The sentence should have been for a term of not less than 10 years as provided under section 20(10 of the Sexual Offences Act. I urge the dismissal of the appeal from conviction but the court may review the sentence.

Appellant in Reply

PW2is my second wife. The disagreement with my other wife. PW2 left the home and returned to her home. I refer to page 15 Lines 6-7. This is the genesis of the charge. ***PW1 used a different name to indicate she was my daughter yet she is not my daughter. I refer to the evidence of the investigation officer.***

The charge sheet talks of Ravine township and the PW1 said she was from Ravine yet the IO was talking about complainant from Sigor.

P.14 Line 7, PW1 gave a different [name]. From the inconsistency as to the name of the complainant Exhibit NO. 157B – Patient Card. The names on the card are different from complainant.

The person whose DNA was taken is different from the child. The pregnant person J.

I refer to p.21 line 20. Investigation Officer used exhibits that were not related to the case, lab report form and P3 form.

Investigation Officer said child was born in September 2015. How does the court know it is true and the I.O. did not produce Health Clinic Card or Birth certificate of the Child.

PW2 , the complainant's mother said she left the Clinic Card at home. P. 26 Line 2-13.

PW1 did not inform the court that she had given birth and PW2 did not inform court that the complainant had given birth.

I refer to the DNA report on 3/10/ - DNA samples were taken. It is not clear which child belonged to the complainant. The complainant did not say shehad given birth.

The name of the JK. The name of Victor Hesnic did not appear in any document produced.. It is not clear to whom the child belonged. The different names indicate that the offence was not proved. I prayed for a retrial. The trial court did not give me an opportunity to defend myself.

DPP

I urge the court to read the handwritten proceedings. The birth of the baby. Dr. Arafat testified that she examined the patient who said she was defiled by her father every time when he was drunk, and that she was examined and found to be six months pregnant."

ISSUE FOR DETERMINATION

10. The issues arising for determination in this appeal are whether the offence of incest by a male person was proved against the appellant with sub-issues as to defect in the charge sheet; the legal propriety of admission of the evidence of the child; and whether the appellant was accorded a fair trial by the trial court.

DETERMINATION

(a)Matters of law

Defective charge

11. The appellant submitted in that the omission of the word "unlawful" in the charge sheet the charge was defective, citing ***David Odhiambo v. R*** Court of Appeal No. 5 of 2005, a case of rape, and urged that *"the offence alleged to have been committed to have been*

committed by the appellant is incest and the word "unlawful" ought to have been included in the particulars of the charge." The words "intentionally" and "unlawful" are necessary as part of the charge of rape which is includes the element of a person who "***intentionally and unlawfully*** commits an act which causes penetration with his or her genital organs". In the charge of incest, however, as relevant here by a male person under section 20 (1) of the Sexual Offences Act the offence is committed where-

> *"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:"*

12. A charge of incest need not include the word **"unlawful"** as there can be no ***lawful***, in the sense of consensual sexual intercourse, between the relatives in the prohibited degrees of consanguinity. The defence of deception by the child under section 11 (2) of the Sexual Offences Act that *"child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence"* is excepted in case of ***Incest*** by subsection (5) thereof as follows:

> *"5.* ***The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."***

13. While a particular of ***unlawful*** act is relevant in a charge of rape, that is ***unlawful*** penetration, ***Incest*** is a prohibited sexual act which is unlawful ***per se***. There is no merit in this ground of appeal.

Right to be presented before court within 24 hours

14. The appellant claimed that he was *"arrested on 10/7/2015 as per charge sheet. I was kept at Eldama ravine police station for (4) days hence the provision of Article 49 ((f) of the Constitution of Kenya have clearly been violated. It was for the prosecution to explain to the court why they were unable to take the appellant to court for (4) days."* The charge sheet shows that he was arrested on the 10th July 2015 and presented before the court on 13th July 201, a delay really of 48 hours as he should have been presented on the 12th July 2015. It is not inordinate delay as would of itself exemplify gross violation of the constitutional right and the prosecution may well have had an explanation for the delay given the geographical realities of the expansive county. As observed in the ***Kenya Judiciary Criminal Procedure Bench Book 2018,*** at paragraph 19, pp.24-25 failure to produce a suspect before the court within 24 hours of arrest is not necessarily fatal to a prosecution but it may found a claim for compensation in damages for breach of the constitutional right, as follows:

> *"If the right to appear before the court under Articles 49(1) (f) and (g) is violated, an accused has a right to seek a remedy, including compensation (art. 22 (1), 23(3)(e), COK). In* ***Fappyton Mutuku Ngui, v. R*** *(Court of Appeal at Nairobi Criminal Appeal No. 32 of 2013), the court in dismissing the appeal, stated that the violation of this right did not automatically entitle the accused to an acquittal or discharge. Instead, where it is established that there was violation, a remedy in damages may be sought. Delaying an accused' s appearance may, however, merit dismissal, such as when the delay has resulted in the violation of other constitutional rights or otherwise resulted in the violation of to her constitutional rights or otherwise inhibited an accused's ability to present a defence."*

15. I do not accept that the delay in the presentation of the accused before the court in this case vitiates the criminal charge the subject of this appeal. **In this case, the appellant was on presentation before the court on 13/7/2015 upon plea of not guilty granted a bond of Ksh.500,000/- with one surety of same amount and no issue of inability to present his defence on account delay in arraignment arose. The appellant is not shown to have raised the issue of delay in presentation before the trial court which would call for the prosecution to explain the delay and he may yet pursue constitutional redress, if so advised by his legal advisors.**

Admission of Evidence of PW1

16. There is obviously no question that the evidence of the child PW1 was not properly received. The trial court complied with section 19 of the Oaths and Statutory Declarations Act in holding a *voire dire* to establish the reception of the evidence of the child as follows:

> ***"VOIRE DIRE***
>
> ***PW1 Minor in Kiswahili***
>
> *What is your name?*
>
> ***C…. K….***
>
> *How old are you?*
>
> ***I am 16 years old.***
>
> *Do you go to school?*
>
> ***I do not go to school.***
>
> ***I was to join form one in 2015 but my father chased my mother away so she went to her maternal home.***

Do you go to church?

I go to [Particulara Withheld] Church Kiplegay in Sigoro.

Who is God?

He is our creator

What does God do to sinner?

He punishes sinner by letting them go through bad things.

Court – ***Witness is [possessed] of good understanding of oaths; she is giving a sworn statement."***

17. However, the holding of *voire dire* for the child aged 16 years in this case was ***ex abundanti cautela*** because the requirement for *voire dire* examination is on children of tender age, which has been judicially defined to mean children of under fourteen years. See ***Kibageny Arap Kolil v. R*** (1959) EA 82 and ***Patrick Kathurima v. R***, Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014 and Paragraphs 90-6, pp.82.-83 of the ***Kenya Judiciary Criminal Procedure Bench Book 2018.***

18. Paragraph 91 and 92 of the ***Kenya Judiciary Criminal Procedure Bench Book 2018,*** guides the conduct of *voire dire* examination of proposed children witnesses as follows:

"91. Where a child under the age of fourteen is called as a witness, the court must first conduct a voire dire examination before allowing the child to testify in order to:

i) Determine whether the child understands the nature of an oath, in which case evidence may be received on oath.

ii) Ascertain whether, ***if the child does not understand the nature of an oath, the child possesses sufficient intelligence and understands the duty to tell the truth.*** *If in the affirmative, the evidence may be received though not given on aoth (s.19(1) Oaths & Statutory Declarations Act; Maripett Loonkomok v. R Court of Appeal at Mombasa Criminal Appeal NO. 68 of 2015).*

92. There is no particular format for conducting and recording a voire dire. It could be a dialogue in which the court records questions posed to the child and the child's answers are recorded verbatim in the first person. Alternatively, the court may choose to omit the questions put to the witness but record the answers verbatim in the first person (***James Mwangi Muriithi v. R*** *Court of Appeal at Nyeri No. 10 of 2014;* ***Maripett Loonkomok v. R*** *Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015)."*

19. It is on the basis of the question and answer session with the child that the trial court found her to "*understand the nature of the oath*" and, therefore, capable of giving sworn statement. There is, therefore, no merit in the appellant's objection as to admission of evidence on oath of the child.

Age of the complainant

20. As conceded by the DPP, the age of the complainant as an ingredient of the offence for purposes of the proviso to section 20 (1) of the Sexual Offences Act prescribing a higher sentence for incest against children, was not proved to the required standard of beyond reasonable doubt, there having been as submitted by the appellant no certificate of birth or child health clinic card or age assessment report.

Unfair trial?

21. The appellant submits that he was –

"… substantially prejudiced and was not accorded a fair trial as enshrined in Article 25 and Article 50 of the Constitution of Kenya. This is because at my defence, I requested for retrial which the trial magistrate declined citing it is the High Court's duty to grant retrials. But then instead of letting me proceed with my defence she skipped he defence and set a date for judgment hearing. Thus my contention is that this is highly prejudiced."

22. Article 25 of the Constitution ordains the right to fair trial as one of the unlimitable rights of the Bill of Rights. As relevant, the particular component of the right to fair trial which is the right of an accused to an opportunity to be heard in defence of a charge is enshrined in Article 50 (2) (k) as follows:

"Every accused person has the right to a fair trial, which includes the right— (a) …..

(k) to adduce and challenge evidence;"

23. The appellant must be deemed to have given an unsworn statement by way of his written submissions, which he chose to rely on upon the refusal of an order for retrial, as follows:

"04.10.2017

Coram: Before Hon. J. Tamar- PM

PC: Kelwon

CC: Diana

Accused: Present

Accused:

I am not ready to proceed with my defence hearing because having read the typed proceedings, I find that it does not accurately reflect what transpired in court before Hon. Kasera for that reason I am not going to defend myself. I request for a retrial of my case because the magistrate did not record what witnesses stated.

Hon. J.L. Tamar – SRM

COURT:

The Application for a retrial can only be made and granted by High Court after a decision had been made by the lower court. I am therefore, unable to accede to accused Application for a retrial. I direct that he proceeds to defend himself having sought adjournment to enable him complete his submission.

Hon. J.L. Tamar – SRM

Accused:

In that case I wish to rely on my submission already fixed although I want a retrial in this case.

COURT:

Judgment on 20.11.2017

Hon. J.L. Tamar – SRM"

24. An objection by an accused that the record of the trial court "*does not accurately reflect what transpired in court*" can only be resolved on the principle that the record of court is in case of conflict with any other recording the true record of the proceedings because they may be as many versions of the proceedings as there are parties interested in the case. While the objection may reignite the calls for automated transcription of judicial proceedings, the court is bound by the official record of proceedings which is the court's recording and not such record as may be maintained or recalled from the memory of the parties.

25. Properly within his constitutional rights in Article 50 (2) of the Constitution, the appellant chose to rely on written submissions, which amount to making a statement unsworn. and which statement as seen in the Judgment the trial court considered, finding that:

"After the conclusion of the prosecution case, I found based on evaluation on the evidence that a case had been made against the accused to require his defence. On the date the matter was coming for Defence Hearing the accused raised issues regarding the proceeding as taken by my colleague. That they are not accurate and do not reflect what transpired during the hearing. He told the court that he was not going to defend himself. He sought for a retrial.

In my view, the application by the accused was intended to delay the conclusion of this case, the accused did not point out the inaccuracy in the proceedings. It is not possible for this court to know what transpired in court other than what is captured in the proceedings.

Secondly, the accused is not being truthful because on 29th August, 2017 he sought time to complete his written submission on a case to answer.

I therefore, declined the accused request where upon he sought to rely on his written submission.

In his written submission the accused faults the charge as framed for omitting the words ***unlawfully*** *and* ***intentionally*** *as required in Sexual offences cases.*

The accused also pointed out that there existed contradiction in the evidence of PW1 in relation to whether it was him the accused who defiled her or not and as such the evidence should not be admitted.

The accused also submitted that the age of the complainant had not been established to the satisfaction of the court by producing

proof of the complainant age.

*I know turn to consider the evidence tendered by prosecution in support of the charges and the accused submission. I also wish to point out that **Under Section 211 CPC** and the provisions of the Constitution the accused is entitled to remain silent if he chose to. However, in this case I do not consider that the accused selected to remain silent as he opted to rely on his written submission file in court."*

26. I do not find merit in the objection as to breach of constitutional right to fair trial under Article 25 of the Constitution. The appellant had opportunity to challenge the evidence presented by the prosecution and to adduce his own evidence but he within his rights chose to make a statement unsworn by way of written submissions filed in court.

27. I also do not find a defect in the trial as would call for an order for the retrial in accordance with the principles established in the well-known ***Fatehali Manji v. R*** (1966) EA 343 that the remedy for a defective trial is retrial unless the interests of justice dictate otherwise:

> ***"In general a retrial would be ordered only when the original trial was illegal or defective.*** *It would not be ordered where conviction was set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by mistake of the trial Court for which the Prosecution was not to blame, it does not necessarily follow that a retrial should be ordered.* ***Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."***

28. No illegality or defect calls for a retrial. If the appellant considers that there is evidence which is compelling and which was not available at the trial, he may move the Constitutional Court, as he may be advised by his legal advisors, under Article 50(6) of the Constitution. As far as this court can see now, the appellant squandered his constitutional right and opportunity to call evidence in defence when he was put on his defence under the pretext that the trial court had omitted to record evidence as adduced by the prosecution witnesses before the Prosecution closed its case.

(b) Analysis of the Evidence

29. In discharging the duty of a first appellate court, the High Court must reconsider the evidence and make its own conclusion before deciding whether the conclusion of the trial court is to be upheld. See ***Okeno v. R*** (1972) EA 32.

Identification of the appellant

DNA testing on the complainant's child

30. The identity of the perpetrator herein does not depend solely on physical identification of by the victim of her assailant where the conditions favouring positive identification such as time, lighting and other physical surrounding circumstances come into play. The consistent testimonies of the mother, (PW2), the doctor (PW3) and her sponsor (PW4) that the complainant (PW1) had told each of them that she had been defiled by her father repeatedly when he came home drunk according to PW4, supports the complainant's identification evidence against the appellant. However, that is not all there is to the identification of the appellant.

31. The defilement of the child led to her conception and she gave birth to a child of her own on whom DNA testing to determine the father was done. Any doubt as to the identity of the perpetrator of defilement, which may have arisen from the physical description of the assailant during the attack which took place at night, is laid to rest by the DNA profiling of the complainant's child report whereon PEX. No.6 established the appellant as the father of the child as follows:

> *"**Report***
>
> *The DNA profiles generated from the above listed items are tabulated at the end of this report.*
>
> ***Issues relating to Genetic inheritance:***
>
> *Every person inherits half of their DNA from their biological mother and the other half from their biological father. By examining the DNA from a person and their parents, it is possible to determine the elements of DNA gained from their biological mother and those gained from their biological father.*
>
> *Conclusion and opinion*
>
> *Based on the above findings, there are 99.99+% chances that JKK is the biological father to VK, CK's child."*

Proof of birth of child resulting from defilement

32. The appellant that the there was no evidence to prove that there was indeed a child born to the complainant as a result of the defilement for lack of a Child Ante Natal and Post Natal Documents and a Certificate of Birth. The testimonies of the prosecution witnesses testifying to the existence of the child and to the taking of DNA swabs from the child and her supposed parents for purposes of DNA analysis put the matter beyond doubt. The issue is settled by the testimony of the employer (PW4) who suspected that she was pregnant and therefore escorted her to hospital where she was examined and found to be 6months pregnant according to the evidence of the doctor (PW3) and the testimony of DNA expert (PW6) who reported on DNA process that –

> *"On the 3rd day of March 2016, at the laboratory of Government's Nairobi, the following buccal swabs were obtained from:*
>
> *1. JKK (accused)*
>
> *2. C K (complainant)*
>
> *3.* ***VH (child).****"*

33. That the complainant gave birth to a child who was subjected together with the appellant and the complainant to DNA profiling and analysis is not in doubt. On re-examination, PW6 confirmed that the appellant, complainant and the child were escorted to the Government Chemist Offices where DNA swabs were taken from all the three. The DNA processing was upon an order of the court obtained by the prosecution as noted above.

Inconsistencies in the evidence

34. The appellant pointed out to inconsistencies with regard to the names of the complainant urging that –

> *"The complainant's names are contradicting. PW2, that is the complainant's mother testified that her daughter is called Naomi CK. But then on medical documents and charge sheet her names are CK. My Lord, take note that in Tugen names beginning with letters 'CH' belong to men while as those starting with letter 'J' belong to women. In this instant case the complainant's names start with letters 'CH'."*

35. The appellant's submissions above would amount to additional evidence on appeal. Even with whatever the spelling of the complainant's names it was clear that the person who was the victim of the offence of incest and therefore the complainant herein was the prosecution witness PW1 who was the daughter of the appellant and PW2. She is also the person about whom the doctor testified that she had been examined and found to be 6months pregnant and who told the doctor that she had been defiled by her father. She was also the person by whatever name whose DNA was taken to be compared with that of her baby and that of the appellant and the child to determine the parentage of the latter. There is no merit in the submissions as to the inconsistencies with the spelling or recording of names, bearing in mind that the child or her mother did not write the court record which may have been written by a person not aware of or sensitive to peculiarities of Tugen spellings upon the oral testimony of the witnesses. Indeed in the prosecution exhibits the child is various referred to as ***C*** and ***J*** but the surname remains K or K.

The relationship of father/daughter between the appellant and the complainant

36. Although no certificate of birth was produced to link the appellant to the complainant, there was other evidence of the complainant (PW1) herself testifying that her father the appellant herein had defiled her, her mother PW2 testifying that the appellant was her husband and father of her child, the complainant and the DNA expert's testimony that upon analysis of the DNA swabs from the appellant, the complainant and the complainant's child she had formed an opinion that –

> "**Re-examination**
>
> *The swab was taken at Government Chemist department and involved the accused, C and V. They were escorted by the investigating officer and others.*
>
> ***From the report the accused is the Biological father of both the complainant and VH.***"

37. I would find it proved beyond reasonable doubt that the complainant was the appellant's daughter.

Existence of a grudge between the appellant and his wife

38. The appellant submits that the charge was trumped up by his wife, the complainant's mother, alleging grudge arising out of the appellant's extramarital relation with other women. True the witness PW2 testified that she was estranged wife and that the accused had chased her away from his home.

39. The fact of the complainant's pregnancy was discovered when on suspicion the complainant's sponsor who took her into her house upon being chased away from home by the appellant, the complainant was taken to hospital for examination and found to be 6months pregnant. The alleged grudge while understandable in circumstances of spurned spouse would not explain the reality of the complainant's being impregnated and giving birth to a child whose DNA examination established that the child was sired by the appellant with the complainant.

Gaps in evidence

40. As conceded by the DPP no document was produced to prove age of the complainant to bring it within the proviso on incest with a child under section 20 (1) of the sexual Offences Act.

(c) Findings of this first appellate court

Appeal from conviction

41. ***On the evidence, the prosecution demonstrated, that the appellant had sexually assaulted and penetrated the complainant who was his daughter but whose age was not proved to the required standard and, therefore, it cannot be held that the complainant was under 18 years of age.***

42. The appellant's identity and filial relationship with the complainant being confirmed in the nature of father and daughter and the act of defilement proved against him, the offence of incest by male contrary to section 20 (1) of the Sexual Offence Act is established. Accordingly, the court affirms the conviction of the appellant by the trial court therefor. The minor age of the complainant not having been proved, the Proviso of section 20 (1) of the Sexual Offences Act which applies to incest with children has a maximum sentence of life imprisonment was not properly invoked.

Appeal from sentence

43. The trial court properly considered the recidivist nature of the accused who had two previous convictions including one for attempted incest, the same nature of offence for which he is convicted herein. However, the trial court obviously proceeded on the mistaken belief that the sentence of life imprisonment is a requirement of the law on incest on a child. The appeal from sentence must succeed in that section 20 (1) proviso of the Sexual Offences Act only sets out the ***maximum,*** and not ***mandatory***, sentence for which the offender *'shall be liable'* (see ***Opoya v. Uganda*** (1967) EA 752) in the offence of incest by male where the victim is a child below the age of 18 years. In his statement that ***"consequently, the accused is sentenced to serve life imprisonment as provided by law"***, there is implicit consideration, which is plainly wrong, that the sentence of imprisonment for life is a ***mandatory*** sentence.

44. In accordance with the principle of ***Wanjema v. R*** (1971) EA 493, this court is entitled to interfere with the sentencing discretion of the trial court which in this case is, with respect, wrong on principle. Even for the appellant with two previous convictions for assault and attempted incest - and the court is aware that the conviction for attempted incest was quashed on appeal, see KBT HCCRA NO. 168 of 2017 - the maximum sentence of life imprisonment is excessive.

45. I consider a sentence of imprisonment for a term of **fifteen (15) years** to meet the justice of the case.

(d) Orders

46. Accordingly, for the reasons set out above, pursuant to section 354 (3) of the Criminal Procedure Code, the appellant's appeal from conviction for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 is dismissed.

47. However, pursuant to section 354 (3) (b) of the Criminal Procedure Code, the sentence of life imprisonment shall be reviewed to imprisonment for **fifteen (15) years** for the offence of incest by a male under section 20 (1) of the Sexual Offences Act herein committed by the appellant on a victim whose age was not proved to have been under 18 years.

48. The sentence will run from the date of completion of other previous sentence in accordance with section 37 of the Penal Code.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia Ass. DPP for the Respondent.