NAM v Republic (Criminal Appeal 3 of 2019)
[2020] KEHC 288 (KLR) (21 May 2020) (Judgment)

NAM v Republic [2020] eKLR

Neutral citation: [2020] KEHC 288 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 3 OF 2019

WM MUSYOKA, J

MAY 21, 2020

BETWEEN

NAM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Sexual Offence No. 4 of 2018 by the Mumias Senior Principal Magistrate's Court, TA Odera, Senior Principal Magistrate, of 7th December 2018)

A conviction for incest can not not be converted into a conviction for defilement.
The decision brings out the issue of the need for policy makers to focus on the fact that incest was a more serious offence than defilement in order to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors were the victims.

Reported by Ribia John

Criminal Law *– sexual offences – medical examinations – role of medical examinations in convictions – where the victim of a sexual offence was not subjected to a medical examination - whether a court could convict an accused person of a sexual offence having not conducted a medical examination on the victim of the sexual offence – Sexual Offences Act, section 20(1) and 36.*

Criminal Procedure *– pleas – plea taking process – role of the court in plea taking - where the plea did not include the sex of the accused and did not explain the severity of the sentence to the accused – whether such a plea was valid.*

Evidence Law *– witness testimony – cross examination – where the person to be cross examined was of tender age - whether the court infringed on the accused's right to challenge evidence where the accused was not permitted to cross-examine a victim of sexual assault who was of tender age – Criminal Procedure Code, section 211.*

Criminal Law *– incest – defilement – elements of incest and defilement – sentences of incest and defilement – where one was charged of incest but convicted of defilement - whether a conviction for incest could be converted*

into a conviction for defilement - whether there was an error in law considering the offence incest, with respect to minors, an offence lesser to defilement - Sexual Offences Act, section 8 and 20(1); Penal Code, section 20.

Words and Phrases *– tabia mbaya – implication of the word when used by minors in sexual offence cases - whether the reference to the term 'tabia mbaya' (bad manners) by children of tender years could be inferred to mean sexual intercourse.*

Brief facts

The appellant was charged and convicted of incest contrary to section 20(1) of the Sexual Offences Act and was sentenced to life imprisonment. Being dissatisfied with the conviction and sentence the appellant appealed and raised several grounds of appeal. He averred that the trial court convicted him on the basis of a defective charge, his mitigation was not taken into account, the report recorded in the police occurrence book differed from the evidence placed before the trial court, the medical evidence was weak, the evidence was malicious, fabricated, uncorroborated and doubtful, the court did not consider that there was a strategy planned to implicate him, his fair trial rights were violated, age and penetration were not sufficiently proved, and the court convicted on the basis of hearsay evidence.

Issues

i. Whether at the appellate court, an accused could challenge a charge by pointing to the inconsistency of the facts in the occurrence book vis-à-vis the charge while without having the same challenge on inconsistency raised before the trial court.
ii. Whether a court could convict an accused person of a sexual offence where a medical examination on the victim of the sexual offence had not been done.
iii. What was the role of the court in the plea taking process?
iv. Whether the court infringed on the accused's right to challenge evidence where the accused was not permitted to cross-examine the victim of the alleged sexual offence who was of tender age.
v. Whether the reference to the term '*tabia mbaya'* (bad manners) by children of tender years could be inferred to mean sexual intercourse.
vi. Whether a conviction for incest could be converted into a conviction for defilement.
vii. Whether there was an error in law in considering the offence of incest, with respect to minors, an offence lesser to defilement.

Relevant provisions of the Law

Sexual Offences Act, Act No. 3 of 2006

Section 20 (1)

20. Incest by male persons

(1) 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 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.

Held

1. Being an appellate court, the instant court re-evaluated the evidence on record and drew its own conclusions whilst bearing in mind that the instant court did not have the benefit of observing the witnesses as they testified.
2. OB No. 02/06/12/2017 was not placed before the court. A trial court based the trial on the charge sheet and the evidence presented to prove the charges made. Since OB No. 02/06/12/2017 was not placed before the court, there was no basis for the trial court to have any regard to it. There wasn't any defect in the charge that the appellant faced. The appellant's plea for OB No. 02/06/12/2017 to

be called up to see that the evidence tendered in support of the charge totally differed from what was recorded in that occurrence book should have been made before the trial court, and not on appeal.

3. The trial court took into account the appellant's mitigation, if at all what the appellant was recorded to have had told the court could be treated as mitigation. The appellant did not understand what mitigation was. It was nothing more than a plea by an accused person before the court, to be considered by the court, before plea. Mitigation followed after conviction, and, therefore, whatever was said in mitigation could not possibly affect the conviction, it could only be considered for the purpose of sentencing. Secondly, the statement by the prosecution that the appellant could be treated as a first offender did not exonerate him of the crime. It merely meant that since the prosecution did not have previous records relating to the appellant's criminal history, the court could treat the conviction of December 7, 2018 as his first criminal record. In any event, all those factors were taken into account by the court, and, therefore, an issue should not arise.
4. The appellant had not elaborated on his argument that the medical evidence was weak. He had not sought to demonstrate the weakness of the medical evidence. PW1 was taken for medical examination and treatment three days after the alleged incident. The assault happened on April 15, 2018, and PW1 was taken to the health centre on April 18, 2018. PW2 did not testify as whether or not she had bathed the child in the intervening period, but PW3 did not address her mind to that. She did the examination, and came up with findings. It was not clear whether it was those findings that the appellant was raising issues with. He had opportunity to cross-examine her on the findings, he did pose questions to her. He had opportunity to engage his own medical expert to counter the opinion given by PW3 if he so desired.
5. A trial court could convict in the absence of medical evidence, so long as it was persuaded that the testimony of the minor victim was believable and reliable. In the instant case, there was corroboration. PW1 informed her mother PW2 of what transpired, on the material day. Unfortunately, PW2 did not appear to have had examined PW1, or confirmed her story, or at least in her evidence-in-chief PW2 did not say whether or not she examined the child. Her story could not be compared or contrasted with the findings of PW3, relating to finding bruises, broken hymen and discharges, and detecting a foul smell from her vagina.
6. PW1 was only five or six years old, the appellant was said to be twenty years old or so. One would have expected blood from an encounter between the two. PW1 and PW2 did not talk about any. PW3 saw PW1 three days thereafter, she did not indicate whether or not the bruises were fresh or not, and if they were not, she did not estimate how old they were. That would have been critical since she was seeing PW1 three or so days after the alleged defilement. The appellant's misgivings with the medical evidence tendered, given the time that had lapsed before PW1 was medically examined. The child had been defiled, but the matter was handled in a rather inadequate manner, and the evidence gathered may not have sufficed to convict.
7. Courts generally treated reference by children of tender years to *tabia mbaya* as meaning intercourse. The testimony of PW1 could be interpreted to mean that the appellant defiled her. However, the testimony was in a language that was rather vague, and which would have required other evidence to support it. At age six, one would have expected that any penetration of a vagina by a twenty-year-old penis could cause tears and bruises that would lead to bleeding. Such encounter should have left PW1 with grave injuries if any penetration had happened. PW3 would have been expected to dwell on that. PW3's testimony was equivocal on whether or not there was penetration.
8. It could not be said that the trial court convicted on the basis of hearsay evidence, where the court heard from the mouth of the victim herself.
9. The plea taking process in the instant matter was ambiguous. It was not clear whether the accused person was male or female. There was also the issue of the severity of the sentence for the offence that he faced. The court taking plea must go the extra mile, of explaining to the accused person the

consequences of being convicted of such an offence. The court equated its responsibility in such circumstances to that of an educator. The court did not play that role. The appellant faced a charge whose penalty was mandatory life imprisonment. The trial court should have addressed the appellant on the seriousness of the charge.

10. After he was put on his defence, the appellant gave a sworn statement. He was, therefore, accorded the right to adduce evidence, after his rights under section 211 of the Criminal Procedure Code, were read to him. He took advantage of that opportunity. He could not be heard to complain in that regard. On the right to challenge evidence, the record was clear, he confronted all the witnesses presented by the prosecution, and cross-examined them extensively, except for PW1, the principal accuser. He had a constitutional right to cross-examine her, to challenge her testimony, her tender age notwithstanding. He did not appear to have had been accorded that right, and, therefore, his constitutional right to challenge evidence was violated.

11. The other fair trial rights were observed. He was furnished with the prosecution evidence ahead of the actual trial. He was informed of his right to an advocate of his own choice. He was also informed of his right to an advocate at state expense for serious defilement cases such as the instant one. The court, however, did not appear to have had complied with section 43 of the Legal Aid Act, No. 6 of 2016, by informing the relevant authorities of the need to furnish the appellant with such an advocate.

12. The inconsistency or contradiction concerning the date of the appellant's arrest did not go to the heart of the matter. It was not a mandatory requirement under section 36 of the Sexual Offences Act, that in all cases the accused ought to be subjected to such a medical examination. Medical evidence was not the only basis for determining whether or not defilement had occurred. The matter was reported to the police after three or so days had lapsed, and it was likely that such an examination would have yielded nothing.

13. The appellant had initially been charged with defilement, before the charge was substituted with that of incest. Incest was committed where the offender was related to the victim of the offence within the degrees of relationship stated in the provision, that was to say daughter, granddaughter, sister, mother, niece, aunt or grandmother. In the instant case, according to the charge, PW1 was a granddaughter of the appellant, which meant that the appellant was her grandfather. A grandfather of someone was the father of either the mother or father of that other. In the instant case, the appellant was not the father of either the father or mother of PW1. It emerged from the evidence on record that the paternal grandmother of PW1 was his sister. He was, therefore, not the grandfather of PW1, but her granduncle. She was therefore, not his granddaughter, and he could not possibly commit the offence of incest with respect to her. The offence of incest could only be committed against immediate relatives of the offender, and not distant relatives. The appellant was not an immediate relative of PW1. The charge could not, therefore, hold against him. The same ought not to have been preferred in the first place. The decision to substitute the charge, therefore, dealt a serious blow to the case.

14. Under section 179 of the Criminal Procedure Code an accused person could be convicted of an offence other than that charged, so long as the facts disclosed that other offence, and that offence was cognate or predicate to the offence charged. Incest, with respect to a minor, was, strictly speaking, a defilement, of the said minor. Yet, the language of section 20 of the Sexual Offences Act made it a lesser offence to defilement. Under the Sexual Offences Act, defilement, as defined in section 8, was subject to mandatory sentences, incest, with respect to minors, was not subject to similar mandatory sentences, the sentences prescribed were largely discretionary save for the minimum penalty of ten years. So for all practical purposes incest was cognate to defilement. Under the circumstances, section 179 of the Criminal Procedure Code could not be applied to it. The court could not, therefore, convert a conviction for incest into one of defilement.

15. The court did not quite understand the policy behind making incest, with respect to minors, an offence lesser to defilement. Yet, in the offence of incest, with respect to minors, two offences overlapped,

defilement and incest. That alone should have made incest a much more serious offence compared to defilement. Secondly, incest happens largely within the home, between members of the same family, as opposed to general defilement which could happen between persons who were not related to each other or whose relationship was distant. It would mean in incest, with respect to minors, there was always that element of breach of trust. The person defiling the minor would be her elder relative, taking advantage of the familiarity between them to defile her under the cover of the family home, where she should be safest. The worst abusers of underage girls were their immediate relatives, who preyed on the underage girls under the safe cover of the home environment. It was usually difficult to have such crimes uncovered, because families made efforts to cover them up. No doubt, in those circumstances, incest, with respect to minors, ought to be a much more serious offence that defilement. It was about time that policy makers directed their focus to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors were the victims.

Appeal allowed.

Orders

Appeal allowed, conviction quashed, sentence against the appellant set aside and the appellant was set free unless he was otherwise lawfully held.

Citations

Cases

Kenya

Wakianda, Elijah Njihia v Republic Criminal Appeal 437 of 2010; [2016] KECA 181 (KLR) - (Followed)

Regional Court

Okeno v Republic [1972] EA 32 - (Applied)

Statutes

Kenya

1. Constitution of Kenya article 50(2)(k)- (Interpreted)
2. Criminal Procedure Code (cap 75) sections 179, 211- (Interpreted)
3. Legal Aid Act (cap 16A) section 43 - (Interpreted)
4. Penal Code Act (cap 63) section 20 - (Interpreted)
5. Sexual Offences Act (cap 63A) sections 20(1); 36 - (Interpreted)

Advocates

Ms Omondi, Prosecution Counsel, for the respondent

JUDGMENT

1. The appellant was convicted by Hon. TA Odera, Senior Principal Magistrate, of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006, and was sentenced to life imprisonment. The particulars of the charge against the appellant was that on the 15th day of April 2018 at [particulars withheld] Village, Shianda Location, in Mumias East Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of IAO, a girl aged 6 years who was, to his knowledge, his granddaughter. He had also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place as stated in the main count, he had intentionally touched the vagina of the subject child with his penis.

2. He pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses.

3. IO, the complainant, testified as PW1. She gave an unsworn statement, as the court found her to be intelligent enough to testify but too young to understand the nature of the oath. She identified the appellant as a person who lived in her grandmother's home. One day he took her to gugu's bed, and asked her to remove her shirt and panties, he laid her down and inserted his penis into her vagina. She felt pain. She informed her mother of what had transpired, who, in turn, took her to a doctor, who treated her.

4. PW2, SAM, was the mother of PW1. She testified that PW1 was born of April 21, 2012. She said that April 15, 2018was a Sunday. She went for a women's prayer meeting, at 2.00 PM, leaving her children at home, where she lived with her husband, and her mother-in-law, who lived with the appellant. When she came back, A, her son, told her that PW1 should tell her about what she was doing with the appellant. She confronted PW1, who informed her what had happened. PW1 ran out to her grandmother, who came to the scene, followed shortly by the appellant. She advised the grandmother to get the appellant a wife so that he did not make PW1 his wife. She took PW1, to the Assistant Chief on the following Wednesday. The appellant was called to a seating of village elders, where he admitted the charge. He was taken to the police. The child was then taken to a health centre. She stated that the appellant knew that PW1 was his granddaughter. She explained that she did not take PW1 to hospital immediately because she thought the issue would be sorted out. Her mother-in-law and other relatives had also become hostile to the child, which forced her to move the child to live with her own mother. She also explained that she had been under pressure from her father-in-law, her brother-in-law and her husband to withdraw the case.

5. Grace Tatu Alego testified as PW3. She was the clinical officer who attended to PW1. PW1 was treated at the health centre where PW3 worked on 18th April 2018. She was five years old at the time, and came accompanied by PW2, with a history of rape several times by a relative. Upon examination, she found PW1 had a broken hymen, bruises and some discharge. On laboratory tests, no sexually transmitted disease was found. She was put on medication. She concluded that PW1 had been defiled. Number 88511 Police Constable Elias Mwangi was PW4. He investigated the case after it was allocated to him on 18th April 2018, when it was first reported at the local police base. He explained that PW1 was six years old, and was brought to the base by PW2. The appellant was arrested by members of the public and brought to the base. He gave details of what he did by way of investigations.

6. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He denied the offence, saying that he saw police officers, on 18th April 2018, come to his home and arrest him. He said that he lived with his sister, and that PW1 referred to him as grandfather. He said PW1 lied to court.

7. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of their judgment.

8. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court convicted him on the basis of a defective charge, his mitigation was not taken into account, the report recorded in the police occurrence book differed from the evidence placed before the trial court, the medical evidence was weak, the evidence was malicious fabricated uncorroborated and doubtful, the court did not consider that there was a strategy planned to implicate him, his fair trial rights were violated, age and penetration were not sufficiently proved, and the court convicted on the basis of hearsay evidence.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses

as they testified. The Court of Appeal's decision in the case of *Okeno v Republic* [1972] EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> " An appellant 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 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 conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

10. The appeal was canvassed on March 10, 2020. The appellant relied on written submissions that he placed before the court, while Ms. Omondi, Prosecution Counsel, relied on the trial court record. The appellant submitted that the charge was defective as the evidence adduced to support it was inconsistent with the record in OB 02/06/12/2017, his mitigation was not considered and that he was not given a chance to cross-examine PW1, the testimony of PW1 was not adequately corroborated, he was not sufficiently identified, there was inconsistency with regard to the reporting of the matter to the police, he was not subjected to medical examination to connect him to the offence, and the sentence was excessive.

11. I will consider the appeal based on the grounds of appeal, and the written submissions placed before me by the appellant.

12. The appellant says that the charge was defective, principally because the evidence tendered did not conform to the facts set out in the report in OB No. 02/06/12/2017. I have closely, thoroughly and scrupulously perused through the record of the trial court. I have noted that the issue of the contents of OB No 02/06/12/2017 did not come up at the trial. OB No 02/06/12/2017 was not placed before the court. A trial court bases the trial on the charge sheet and the evidence presented to prove the charges made. Since OB No 02/06/12/2017 was not placed before the court, there was no basis for the trial court to have any regard to it. I have closely read through the charge that the appellant faced, and I have not detected any defect in it. The appellant invites me to call for OB No 02/06/12/2017 to see that the evidence tendered in support of the charge totally differed from what was recorded in that occurrence book. The appellant should have made that plea before the trial court, and not on appeal.

13. He avers that the mitigation that he made was not taken into account, especially the fact that he was a first offender who had never participated in any criminal activity. The record indicates that the appellant merely told the court, in mitigation, that he concurred with the prosecutor that he could be treated as a first offender. Before handing down the sentence, the trial court indicated that it had considered the mitigation, nature of the offence, the pre-sentence report, among other factors.

14. I believe the record should speak for itself. For avoidance of any doubt, the events of 7th December 2018 and 24th December 2018 are recorded as follows;

> " 7/12/18
>
> Before Hon TA Odera SPM
>
> C/Pros – Makena
>
> C/Clerk – Temoi
>
> Accused – Present

Court – Judgement

Court – Judgment dated 7/12/18 read to accused.

Prosecutor – We have no previous records. May be treated as first offender.

Mitigation"

I wish to concur with the same.

Order – Mention on 24/12/18 for sexual offences act forms and prosecution's report and sentence.

TA Odera SPM

7/12/18

24/12/18

Before Hon. TA Odera SPM

C/Pros – Makena

C/Clerk – Temoi

Accused –Present

Inter – English/Kiswahili

Court – I have considered mitigation, nature of the offence, pre-sentence report, the age of the minor, the relationship with the offender, the prevalence of the offence within the jurisdiction of this court. The offence has a minimum sentence.

Sentence

The accused to serve life imprisonment as provided by law. 14 days right of appeal.

TA Odera

SPM

24/12/18"

15. The record is clear, the trial court took into account the appellant's mitigation, if at all what he is recorded to have had told the court can be treated as mitigation. What I sense is that the appellant did not understand what mitigation is. It is nothing more than a plea by an accused person before the court, to be considered by the court, before plea. Mitigation follows after conviction, and, therefore, whatever is said in mitigation cannot possibly affect the conviction, it can only be considered for the purpose of sentence. Secondly, the statement by the prosecution that the appellant could be treated as a first offender did not exonerate him of the crime. It merely meant that since the prosecution did not have previous records relating to the appellant's criminal history, the court could treat the conviction of 7th December 2018 as his first criminal record. In any event, all these factors were taken into account by the court, and, therefore, the issue should not arise.

16. The appellant argues that the medical evidence was weak. The appellant has not elaborated on this in his written submissions. He has not sought to demonstrate the weakness of the medical evidence. PW1 was taken for medical examination and treatment three days after the alleged incident. The assault happened on April 15, 2018, and PW1 was taken to the health centre on April 18, 2018. PW2 did not testify as whether or not she had bathed the child in the intervening period, but PW3 did not address her mind to that. She did the examination, and came up with findings. It is not clear whether it is

these findings that the appellant is raising issues with. He had opportunity to cross-examine her on the findings, and I note from the record that he did pose questions to her. He had opportunity to engage his own medical expert to counter the opinion given by PW3 if he so desired.

17. The appellant appears, in his written submissions, to say that there was no corroboration of the evidence by PW1. The law is clear that a trial court can convict in the absence of medical evidence, so long as it is persuaded that the testimony of the minor victim was believable and reliable. In this case, there was corroboration. PW1 informed her mother PW2 of what transpired, the same day. Unfortunately, PW2 does not appear to have had examined PW1, or confirmed her story, or at least in her evidence in chief PW2 did not say whether or not she examined the child. Her story cannot, therefore, be compared or contrasted with the findings of PW3, relating to finding bruises, broken hymen and discharges, and detecting a foul smell from her vagina. PW1 was only five or six years old, the appellant was said to be twenty years old or so. One would have expected blood from an encounter between the two. PW1 and PW2 did not talk about any. PW3 saw PW1 three days thereafter, she did not indicate whether or not the bruises were fresh or not, and if they were not, she did not estimate how old they were. That would have been critical since she was seeing PW1 three or so days after the alleged defilement. I would share the appellant's misgivings with the medical evidence tendered, given the time that had lapsed before PW1 was medically examined. It would appear that the child had been defiled, but the matter was handled in a rather inadequate manner, and the evidence gathered may not suffice to convict.

18. He also raised the issue of age and penetration. On age, PW1 testified that she was in pre-school. The court estimated her age as six. Her mother, PW2 said that she was born on April 21, 2012, which made her about six years old as at April 15, 2018. There cannot be any better evidence on the age of a child than that provided by her own mother. I find that the age of PW1 was sufficiently proved.

19. The issue of penetration is a little bit more complicated. PW1 described what transpired in the following words:

> " He told me to remove my skirt and panties. He then did to me tabia mbaya. He laid me down before doing for me Tabial Mbaya here (CT: witness points at her vagina). He held my vagina by his hand. He was not wearing clothes during the incident. I felt pain on the part I have shown when he did Tabia Mbaya. I told mother about the incident and she took me to the doctor who treated me. My hand I mean his part like here (CT witness points at her vagina). Brito has such "hand "and he uses it to urinate."

20. The courts have generally treated reference by children of tender years to tabia mbaya as meaning intercourse. The testimony of PW1 can be interpreted to mean that the appellant defiled her. However, the testimony is in a language that is rather vague, and which would have required other evidence to support it. At age six, one would have expected that any penetration of a vagina by a twenty-year-old penis could cause tears and bruises that would lead to bleeding. If that had happened, it would have been expected that PW1 would have referred to it, and PW2 too would also have noticed it and made reference to it in her testimony. None of the two referred to there having been any bleeding or blood. If there had been reference to bleeding by PW1 and PW2, that would have sufficed to provide basis to interpretation of PW1's testimony that she had been penetrated by the appellant. PW3 did not talk about penetration, other than saying that PW1 had been defiled. PW1 was six years old when the alleged defilement by the twenty-year-old happened. As said above, such encounter should have left PW1 with grave injuries if any penetration had happened. PW3 would have been expected to dwell on that. I believe her testimony was equivocal on whether or not there was penetration.

21. He has also said that the conviction was founded on hearsay evidence. He has not pointed to any bit of the evidence that he says was hearsay. PW1 was the victim of the offence. She gave evidence of what happened to her in his hands. It cannot be said that the trial court convicted on the basis of hearsay evidence, where the court heard from the mouth of the victim herself.

22. The last issue is about his fair trial rights being violated. The appellant has not dwelt on this ground in his written submissions.

23. I have looked at the record. Plea was taken on April 20, 2018. It was recorded in a manner that was inconsistent with the standard set by the Court of Appeal in *Elijah Njihia Wakianda v Republic* Nakuru Criminal Appeal Number No 73 of 2016, where the court had to deal with a record in respect of plea which read as follows:

> " Court: the substance of the charge(s) and every element thereof has been stated by the court to the accused person in a language he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - it is true."

24. With respect to that record, the court said –

> " With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of 'charges(s) when there was a single charge and the rather odd 'in a language he understands,' when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one is guilty and leads to conviction.
>
> We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specially asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.
>
> ... We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.
>
> ... The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

25. The record at the plea taking exercise conducted on April 20, 2018 is similar to that that was the subject of *Elijah Njihia Wakianda vs. Republic* (*supra*). It was recorded as follows:

> " 20/4/18
>
> Before Hon. CC Kipkorir SRM
>
> C/Pros – Makena
>
> C/Clerk – Cohen

Inter – English/Kiswahili

Accused – Present

The substance of the charge(s) and every element thereof has been stated by the court by the accused person, in language he/she understands, who being asked whether he/she admits or denies truth of the charge(s). His/her response is as outlined herein below;

The accused is explained to his/her rights to bond if he has pleaded not guilty.

The accused his explained to his/her rights to counsel and is advised to instruct an Advocate as soon as possible to avoid delay in the case. The accused persons in capital offences and juvenile offenders shall have court appointed counsel to handle cases on their behalf.

Accused – Main count: Si ukweli ...”

26. Going by the case law cited above, there can be no doubt that the plea taking process in the instant matter was ambiguous. It was not clear whether the accused person was male or female. There is also the issue of the severity of the sentence for the offence that he faced. The Court of Appeal in *Elijah Njihia Wakianda vs. Republic* stated that the court taking plea must go the extra mile, of explaining to the accused person the consequences of being convicted of such an offence. The court equated the responsibility of the court in such circumstances to that of an educator. The record before me indicates that the court did not play that role. The appellant faced a charge whose penalty was mandatory life imprisonment. The trial court should have addressed the appellant on the seriousness of the charge.

27. Apart from that the appellant has, in his written submissions, raised the issue of not being given a chance to cross-examine PW1, his accuser. Article 50(2)(k) of the *Constitution* is about the right to adduce and challenge evidence. With regard to adducing evidence, I have noted from the trial record that the appellant, after he was put on his defence, gave a sworn statement. He was, therefore, accorded the right to adduce evidence, after his rights under section 211 of the *Criminal Procedure Code*, were read to him. He took advantage of that opportunity. He cannot be heard to complain in that regard. On the right to challenge evidence, the record is clear, he confronted all the witnesses presented by the prosecution, and cross-examined them extensively, except for PW1, the principal accuser. He had a constitutional right to cross-examine her, to challenge her testimony, her tender age notwithstanding. He does not appear to have had been accorded that right, and, therefore, his constitutional right to challenge evidence was violated.

28. The record is clear that the other fair trial rights were observed. He was furnished with the prosecution evidence ahead of the actual trial. He was informed of his right to an advocate of his own choice. He was also informed of his right to an advocate at state expense for serious defilement cases such as the instant one. The court, however, does not appear to have had complied with section 43 of the *Legal Aid Act*, No 6 of 2016, by informing the relevant authorities of the need to furnish the appellant with such an advocate.

29. The appellant has raised a few other issues in his written submissions which are not covered in the grounds of appeal. Firstly, there is the issue as to contradictions relating to the date of his arrest. I have gone through the record and noted the inconsistency. However, I find that the inconsistency or contradiction does not go to the heart of the matter. The other issue is about the appellant himself not being subjected to medical examination to connect him to the offence. Firstly, it is not a mandatory requirement under section 36 of the *Sexual Offences Act*, that in all cases the accused ought to be subjected to such a test. Secondly, medical evidence is not the only basis for determining whether or not defilement had occurred. Thirdly, the matter was reported to the police after three or so days had lapsed, and it is likely that such an examination would have yielded nothing.

30. The appellant was charged with incest contrary to section 20 of the *Penal Code*, which states as follows:

> " 20. Incest by male persons
>
> (1) 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 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."

31. The record indicates that the appellant had initially been charged with defilement, before the charge was substituted with that of incest. Incest is committed where the offender is related to the victim of the offence within the degrees of relationship stated in the provision, that is to say daughter, granddaughter, sister, mother, niece, aunt or grandmother. In the instant case, according to the charge, PW1 was a granddaughter of the appellant, which meant that the appellant was her grandfather. A grandfather of someone is the father of either the mother or father of that other. In the instant case, the appellant was not the father of either the father or mother of PW1. It emerged from the evidence on record that the paternal grandmother of PW1 was his sister. He was, therefore, not the grandfather of PW1, but her granduncle. She was therefore, not his granddaughter, and he could not possibly commit the offence of incest with respect to her. The offence of incest can only be committed against immediate relatives of the offender, and not distant relatives. The appellant was not an immediate relative of PW1. The charge could not, therefore, hold against him. The same ought not to have been preferred in the first place. The decision to substitute the charge, therefore, dealt a serious blow to the case.

32. I am alive to section 179 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, under which an accused person could be convicted of an offence other than that charged, so long as the facts disclose that other offence, and that offence is cognate or predicate to the offence charged. Incest, with respect to a minor, is, strictly speaking, a defilement, of the said minor. Yet, the language of section 20 of the *Sexual Offences Act* makes it a lesser offence to defilement. Under the *Sexual Offences Act*, defilement, as defined in section 8, is subject to mandatory sentences, incest, with respect to minors, is not subject to similar mandatory sentences, the sentences prescribed are largely discretionary save for the minimum penalty of ten years. So for all practical purposes incest is cognate to defilement. Under the circumstances, section 179 of the *Criminal Procedure Code* cannot be applied to it. I cannot, therefore, convert a conviction for incest into one of defilement.

33. Let me state that I do not quite understand the policy behind making incest, with respect to minors, an offence lesser to defilement. Yet, in the offence of incest, with respect to minors, two offences overlap, defilement and incest. That alone should make incest a much more serious offence compared to defilement. Secondly, incest happens largely within the home, between members of the same family, as opposed to general defilement which may happen between persons who are not related to each other or whose relationship is distant. It would mean in incest, with respect to minors, there is always that element of breach of trust. The person defiling the minor would be her elder relative, taking advantage of the familiarity between them to defile her under the cover of the family home, where she should be safest. The worst abusers of underage girls are their immediate relatives, who prey on the underage girls under the safe cover of the home environment. It is usually difficult to have such crimes uncovered, because families make efforts to cover them up. No doubt, in those circumstances, incest, with respect

to minors, ought to be a much more serious offence that defilement. It is about time that policy makers focused on this to afford better protection to underage girls within families, by amending the penalties prescribed for incest where minors are the victims.

34. Overall, it is my finding that, on the whole, the trial of the appellant in Mumias SPMCRSO No 4 of 2018, was unsatisfactory. Fair trial principles were not observed, the plea taking was bungled and the appellant was convicted on a wrong charge. Consequently, I shall allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set free unless he is otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF MAY, 2020

W. MUSYOKA

JUDGE