



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**HIGH COURT CRIMINAL APPEAL NO. 22 OF 2018**

**PKW.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from both conviction and sentence arising from the Judgment of Hon. P. Mutua (SPM) delivered on 18<sup>th</sup> July 2018)**

**JUDGMENT**

1. The appellant was charged with incest contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 21<sup>st</sup> day of July 2017 in Nyeri District within Nyeri County, the Appellant being a male person caused his penis to penetrate the anus of RW a girl aged 11 years who was to his knowledge his daughter.

2. In the alternative the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of this offence are that on the 21<sup>st</sup> July 2017 in Nyeri District of Nyeri County, the Appellant intentionally touched the anus of RW a child aged 11 years with his penis.

3. The Appellant pleaded not guilty to both offences. The prosecution lined 5 witnesses and the Appellant gave an unsworn statement. The trial magistrate convicted the Appellant and sentenced him to 30 years imprisonment.

4. Dissatisfied by the above decision the Appellant preferred the instant appeal against both conviction and sentence on the following grounds:-

*a) The trial court failed in law and in fact in holding that the prosecution tendered evidence to prove that PW1, the minor, by the use of alleged light placed the Appellant as her assailant.*

*b) The trial court failed in law and in fact in holding that the prosecution discharged onus of proof that the alleged light was sufficient recognize the assailant.*

*c) The trial court failed in law and fact in holding that the minor was truthful as to who was the perpetrator yet didn't face him or heard his voice to recognize him.*

*d) The trial court failed in and in fact in holding that the Appellant was at home before the minor went to the toilet because she said the Appellant her. PW2, the minor's mother, failed to state the time the Appellant left the home to avoid domestic violence after they had quarreled.*

*e) The trial court failed to note that the case was not proved beyond all reasonable doubts.*

5. When the appeal came up for hearing, the Appellant relied on his written submissions filed on 8<sup>th</sup> October 2018 and the prosecution made oral submissions.

6. The Appellant submitted that although the minor stated that there was light at the plot and toilet she did not tell what was the nature and source of the light. The incident allegedly happened at night therefore it was necessary to establish how the Appellant was identified.

7. Both the minor and her mother were in the house before the incident. The minor stated that the Appellant followed her when she went to the toilet yet the mother says the Appellant was not in the house.

8. From the record the child RW testified that she was born in 2006. At the material time she was living with her father, mother and two

siblings at Majengo Kiawara. They were living in a 'plot' and the common toilet was outside the house. At 10:00pm she went to the toilet alone. She stated:-

*“ My mother was asleep. ...My father followed me. he did me bad manners at the toilet. He used his penis. He put it in my body. He put it in my behind. It is used to defecate. He told me not to tell anybody. I had worn a pine trouser and a skirt. My mother came and found us. She asked me what I was doing and I told her what my father had done. We went to the police station. ...with my mother and our children...”*

9. PW2 testified that she was in the house with her husband and her children on the night of 21<sup>st</sup> July 2017 at 10:00pm. She stated:-

*“On 21st July 2017 at 10:00pm I was in the house with my children and my husband”.*

10. They were all in the house. The complainant went to the toilet. She took long to come back. The other child told the PW2 to take her to the toilet. She took her. She found the complainant outside the toilet. On being asked why she had taken long PW2 said she told her 'amekaukiwa'. So, at what point did the accused person leave the house to follow the complainant as alleged? It is not stated. The PW2 did not say whether her husband left the house after the complainant left for the toilet. Or whether he left before the other child asked to be taken to the toilet or before the complainant left for the toilet. The lingering question is where was he when she left the house with the other child for the toilet? That fact was not addressed by the state.

11. The child said that the PW2 found her and her father. That means that the PW2 actually saw the accused at the scene during or at some point when the offence was being committed. From the child's evidence she told the mother on the spot what had happened.

12. Pw2's testimony is that she called out the accused but he did not respond. That she tried to open the door to the toilet and it was locked from inside and that is when she asked the child who was in the toilet and she said her father. The child's testimony mentions none of this. That her father locked himself in the toilet after the event, or that her mother called him and he failed to respond.

13. Neither of them say anything about what they did when the accused allegedly refused to open the toilet door. This was on a plot. There are other people. The accused asked about a 'Mama Grace' whom the child said was a witness but who did not testify. It would appear she was their neighbour but she knew nothing about the incident that night.

14. PW2 testified that when PW1 saw her she ran away. The child said nothing of the sort and PW2 did not explain why the minor ran away on seeing her yet she had just been defiled. Her testimony that it is only after they entered the house that the child told her what had happened is not consistent with that of the child who said that PW2 found her with the father, then asked her what had happened and she told her there and then. Her testimony that the child was standing outside the toilet is also inconsistent with that of the child who said : **my mother found us** not found me standing outside the toilet. Even the explanation that the child said she was in a state of 'kukaukiwa' is not found in the child's testimony.

15. The use of the word 'penis' in kikuyu language by a child of 11 years in her testimony is again suspect. Even adults will be shy to name genital organs in their mother tongue. How then would a child who cannot say the word for 'anus' which she called 'behind' in kikuyu utter the word for 'penis'?

16. PW2 said the child's anus was bleeding when she checked her. However, the child did not mention that her mother examined her or that she bled. The pants she was wearing were taken to the doctor PW5 who said the pants appeared normal. There is no effort on the part of the prosecution to give details.

17. PW2's reaction to the whole scenario raises questions. She never explained how she established truly it was her husband, whom, from her own testimony she had left in the house, had miraculously gotten out of the house and ended up in the locked toilet in time to defile the child. Why wouldn't she call for help to get someone to open the toilet door or see who this monster was who had defiled her child? Or that hour of 11:00pm call a single neighbour to assist to take them to the police station?

18. She says she decided to go and report at the police station. Neither of the two officers who testified received the alleged report. The accused was arrested on 22<sup>nd</sup> July 2017, the following day by PW3 who testified as PC Oscar Kusker of Nyeri Police station. He said he received a call from a member of the public whom he came to know as EW.

*‘ ...who told me that she had reported a case with police and wanted help. She told me to find her in Nyeri Town near Majengo. I went there...she identified to me the suspect whom I arrested. I took him to Nyeri Police station where I booked him’*

19. While it is normal for the police to require a reportee to identify the suspect for arrest, this is normally booked out in the OB by the arresting officer. This police officer has no force number. The arresting instructions were not from the police station to arrest but by the PW2. He had no evidence that any matter had been reported as alleged but he proceeded to arrest the appellant at the identification by the PW2.

20. Pw4 no. 96370 PC Patricia Mweni was allocated the case to investigate. She testified that she telephoned the PW2 and by then the child had already been treated. She took over the child's skin tights from the doctor. She identified the P3 and the PRC forms in court. She only recorded statements. That the child was taken to hospital by her mother and a volunteer children officer who was neither named nor testified. She said she visited the scene.

21. The medical evidence was by PW5 Dr. Kinyua. She denied treating the child. Her evidence was that she examined the child for the P3.

The allegation was that the child was defiled by her stepfather. The child presented with an inflamed anal opening. She formed the opinion that it was because of forced penetration. She said she did not see the clothes, but that the pants were normal. She did not see any bleeding nor was there a discharge.

22. In his defence the Appellant stated that he had separated from his wife in December 2016. He was arrested on 22<sup>nd</sup> July 2017 from his place of work. He later learnt there were allegations that he had defiled his child.

### **Issues for determination**

23. The appeal raises the following issues for determination:-

- a) Was the offence of incest committed?
- b) Was it the appellant who committed the incest on the minor that is to say, did the prosecution prove its case against the appellant beyond reasonable doubt?

### **a) Was the offence of incest proved beyond reasonable doubt?**

24. Section 20 (1) of The Sexual Offences Act provided:-

***“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.”***

25. The ingredients of an offence of incest are as follows:-

- a) Relationship, within the meaning of the law; and
- b) Penetration

26. The relationship between the Appellant, the alleged perpetrator, and the minor appears not to be settled. While it does not matter as far as the definition of the offence is concerned but as a matter of fact- was the accused the father or step father? The doctor alluded to step father, the complainant and her mother spoke of father. That fact was not clarified. At the point of arrest, the arresting officer said that his duty was only to arrest. Yet it is a requirement of the constitution that at the point of arrest he ought to have been told what offence he was alleged to have committed. The arresting officer did not know hence he could not have carried out that duty. The appellant conceded that the PW2 was his wife. That he only learnt of the specific allegations against him when he was brought to court on the 24<sup>th</sup> July 2017.

27. Penetration has been defined by section 2 of the Sexual Offences Act to mean:

***“The partial or complete insertion of the genital organs of a person into the genital organs of another person”.***

28. The evidence of the minor that the accused put his ‘penis in my behind’ is doubtful. As pointed herein above it is not credible that a child will not mention the word for anus in her mother tongue and proceed to mention the word penis. Keeping in mind how difficult it can be to testify in these matters especially for a child facing her own father, the lack of detail as to how the offence was leaves a lot of questions unanswered taking into consideration the seriousness of the offence. When she says my mother found us? Where did she find them? Inside or outside the toilet? What was her attacker doing? This is the evidence surrounding the actual alleged act of penetration which would lead the court to accept the testimony as truthful. Could there have been another explanation for the inflamed anal opening? The appellant submitted that PW2’s testimony that when she asked the child what was wrong the first thing she told was ‘amekaukiwa’ that this could simply mean that the child had hardened stool which could have resulted in an inflamed anal opening. That does sound reasonable and not farfetched. Considering that apart from the inflammation there were no other injuries or signs of penetration.

### **b) Was it the appellant who committed the incest on the minor that is to say, did the prosecution prove its case against the appellant beyond reasonable doubt?**

29. I have already looked at the evidence on the events of the 21<sup>st</sup> July 2017. There is sufficient doubt that the appellant is the person who is alleged to have committed the above offence. The evidence of the child and the mother create this doubt as they cannot explain when the appellant who according to them was sleeping in the same house left the house. The inconsistencies in their testimonies makes the evidence of identification utterly unreliable.

30. The minor stated that ‘my father followed me’. There is nowhere she says she actually saw him, or saw his face. She mentions lights at the toilet. The source of the light and the nature of such light was not stated. The mother of the minor did not see the Appellant as alleged by the child.

31. The law is clear that in criminal cases whatever the distinction, the burden is always on the prosecution to prove its case against an accused beyond reasonable doubt and there should be no room for conjecture. That is what was held in **Mkendeshwo vs Republic [2002 1 KR 46** where the Court of Appeal said:-

***“In criminal cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally, the accused assumes no legal burden of establishing his innocence.”***

32. I have carefully analysed the evidence on record. While alive to the fact that I did not observe the witnesses give their evidence, reading the record gave the impression there was more to this matter than was told to the trial court. There is need to exercise caution and scrutinize all the evidence as presented, the proviso to s. 124 of the Evidence Act notwithstanding. The fact the law allows conviction for as long as the victim is believed does not necessarily lower the standard to less than beyond reasonable doubt. The proviso to Section 124 of the ***Evidence Act*** as amended by ***Act No. 5 of 2003*** and ***Act No. 3 of 2006*** clearly states :

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” (Emphasis added).***

I think the consistency of the overall evidence is one reason and that was lacking in this case.

33. The trial court dismissed the appellant’s defence for the reason that it was unsworn. He termed it as worthless.

### **211. Defence**

***(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).*** It is the right of the accused to make either a sworn or unsworn statement in his defence. The court has the obligation to consider whatever he says and cannot be dismissed as worthless. Unlike the witnesses for the prosecution an accused person has no obligation to make sworn statement.

It is possible he was telling the truth that he was not at home that night having disagreed with PW2 earlier. That could explain why though the child said they were staying with the mother and father in the house at the material time she only mentioned her mother as having been sleeping when she left the house. She did not mention the father. Secondly, PW2 also stated that they all including the accused sleeping in the house but there is this yawning gap in the testimony as to what time he left the house to go and commit the offence, and the identity of the person in the locked toilet.

34. At the end I find that the prosecution did not discharge its burden in the subordinate court to establish the charge against the appellant beyond a reasonable doubt. The appeal is allowed. The conviction is quashed, and sentence are set aside and the Appellant is to be set at liberty unless otherwise legally held.

35. There is one issue though that I find myself minded to address. I noted that when the minor testified she told the court ***“I used to attend [name redacted by court] Primary School class 3. Currently I am not attending school...I am currently in the Remand Home.”*** Though I have not seen the P&C file, I believe the child was taken to the Remand Home as a child in need of care and protection, as a place of safety, as a place of rescue now that it was alleged it was her father who had defiled her. ***“place of safety”*** means any institution, hospital or other suitable place the occupier of which is willing to accept the temporary care of a child; Police stations and remand homes are excluded as places of safety but because the Government has not invested in sufficient rescue centres child victims especially of sexual violence end up spending time in police stations and remand homes as places of safety from the homes where these offence occur. The down turn is that these children end up being victims of neglect, by the system. RW’s case is classical. ‘Rescued’ in July. Ended up in the remand, and by November when she was testifying, she was still in the remand. And her schooling had come to an end. I cannot over emphasis the need to open the parallel P&C file for the child victim so that as the Criminal case progresses the court has secured the child’s welfare as required by Article 53 of the Constitution and sections 4, 76, 118, 119 and 120 of the Children Act. With the help of a Children Officer’s report and recommendation, a child’s victim’s welfare and rights during and after trial can be properly secured, but only if the trial court will be conscious of the mandate to do so.

**Dated, delivered and signed at Nyeri this day of 1<sup>st</sup> March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Court Assistant: Juliet

Ms. Jebet for state

Appellant –present

**Mumbua T.Matheka**

**Judge**

1/3/19