REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HCCRA NO 115 OF 2014

K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 28 of 2012 delivered on 19th June, 2014 by Hon. D.G. Karani, PM]

JUDGMENT

1. The appellant was on 19th June 2014 convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment term of ten (10) years. The Particulars of Offence were set out as follows:

> *"**Particulars - K M:** On the 15th day of September 2012 in Yatta District within Machakos County being a male person, caused his penis to penetrate the vagina of P. K. a female person who was to his knowledge his grandmother."*

2. The appellant also faced an alternative charge of indecent act with an adult contrary to section 11(A) of the Sexual Offences Act. Alternative count of indecent act was charged as follows:

> *"**ALTERNATIVE CHARGE***
>
> *Committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006.*
>
> ***K M:** On the 15th day of September, in Yatta District within Machakos County, intentionally touched the vagina of PK with his penis against his will."*

3. Aggrieved by the conviction on the main charge and the sentence imposed therefor, the appellant appealed to this Court on first appeal.

Grounds of Appeal

4. The appellant raised the following grounds of appeal in his Amended Grounds of Appeal presented to court on 23rd November, 2015:

> *AMENDED GROUNDS OF APPEAL*
>
> *1. That the learned trial magistrate erred in law and in fact in convicting the appellant yet he failed to take into account that the charges were trumped up against the appellant with aim of settling a score sponsored by the family of PW1.*
>
> *2. That the appellant trial magistrate erred in law and in facts by admitting the testimony of PW1 which was marred with contradiction and inconsistencies that renders the prosecution evidence unworthy of trust and thus not credible.*
>
> *3. That the learned trial magistrate erred in law and in facts in his findings by applying a farfetched theory of non-discriminatory remark that was not only prejudicial but also violated the constitutional right of the appellant under section 27(4) of the constitution.*
>
> *4. That the learned magistrate erred in both law and in facts by failing to take into account that it is a miscarriage of justice for the trial court not to admit exhibit MFI the lab request form as prosecution evidence as the form was not dated and had no name of the author.*

5. That the learned trial a magistrate erred in laws and facts by dismissing appellant's explosive defense.

6. That the learned trial magistrate erred in law and in facts by failing to establish that it's a miscarriage of justice for the trial court to admit exhibit MF2 the p3 form as prosecution evidence as the producer was not the person authorized by the law to produce the same according to section 83 of the Evidence Act thus violating this section.

7. That the learned trial magistrate erred in law and in facts by failing to establish that MF3 the lab report form as the prosecution evidence which was the foundation of these cases its author never appeared before the trial court to explain the law the document made.

8. The learned trial magistrate erred in law and in facts by failing to take into account that MF3 the treatment cared as prosecution evidence was conceived through a compromising manner which built up a case which never was thus violating the provision of Article 50(4) of the constitution.

9. That the findings of the learned trial magistrate was next in conforming with the evidence of the prosecution witness therefore the trial court was not procedurally fair, independent and impartial as provided by the constitution.

10. That the learned trial magistrate erred in law and in facts by failing to establish that the appellant never violated the provisions of section 20(1) of the Sexual Offences Act no 3 of 2006.

11. *That the learned trial magistrate erred in law and in fact by failing to establish that the appellant never violated the provision of section 11A of the Sexual Offences Act No 3 of 2006*

Written Submissions

5. The appellant argued his grounds of appeal by submissions under 10 points, principally, as follows:

Ground 1

Appellant was a young man, who had no resources to enable him, to buy a portion of land; only that he inherited it from his grandfather. Why were the children not part of the prosecutions witness and no reason was given to the honorable trial court. The two were witnesses because the truth of what transpired was with them. Why did the prosecution refused to use and record statements of these two girls.

For a locked door to be pulled down in the middle night it causes a heavy bang , which ought to be heard by neighbors within the vicinity around her house.

The law is conclusive, there is no way such a commotion of pulling down a locked door at the middle of the night could not cause disturbances of the two girls who were sleeping in the janna's house of PW1.

Ground 2

The whole narrative theory of PW1 was made up of contradictions and inconsistencies leading to directions of concocted lies.

In the case of ***Ndungu Kimanyi vs. Republic*** [1979] KLR 282, the Court of Appeal held that:

> *"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do say anything which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence"*

Ground 3

That the learned trial magistrate erred in law and facts in his finding by applying a farfetched theory of nonexistence Kamba customs, which were discriminatory remark that not only pre-judicial but also violated the constitutional right of the appellant under Article 27(4) of the Constitution.

The farfetched theory by the learned magistrate in matter of incest with the definition of the word grandmother was improper in linking the appellant with PW1 by defiling her as his grandmother because this must be blood relation anything else the law does not recognize and such findings violated the constitutional rights of the appellant.

The findings of the trial magistrate was inconformity with the prosecution evidence he failed to establish that M M is the appellants grandmother while nothing in law can make PW1 qualify to be the appellants grandmother. It is discriminating to shift and link the appellant with a false grandmother on PW1. This violating Article 27(4) of the Constitution which states: ***"the state shall not discriminate directly or indirectly against any person or any group including races, sex, pregnancies, marital status, age, disability, religion, conscience, belief, culture, dress, language or birth."***

His findings violated the appellant's rights and made the whole trial unworthy and bad in law and only to be violated.

Ground 4

That the learned trial magistrate erred in law and fact by failing to take into account that its miscarriage of justice for the trial court to admit exhibit MF1 the lab request form as prosecution evidence as the document was not dated and had no name of author. Any analyzed findings found through MF1 itself is bad in law, ineffective and untrue to believe it is true that the prosecution did not have concrete prospects of obtaining evidence sufficient to meet standard required for trial and to sustain charges that is why the prosecution sought to introduce and brought intrinsically unreliable evidence against the appellant denying him a fair trial.

Ground 5

During trial the appellant in his defense demonstrated sufficiently his movement of the alleged fateful day. There is no straight forward evidence that shows that appellant met PW1 as alleged. The prosecution failed in totality in proving her case and presented evidence in colluding with all the prosecution witnesses.

Ground 6

That the learned trial magistrate erred in law and facts by failing to establish that it's a miscarriage of justice for the trial court to admit exhibit MF2 the P3 form as prosecution evidence as the producer was not the person authorized by law to produce the same according to section 83 of the Evidence Act, thus violating this section.

PW7 was not qualified in performing duties of examining and analyzing blood and urine samples and therefore cannot be relied upon on determining any fact. There was nothing to connect the appellant with as the examination results although the process was faulty no one that showed who manufactured MF1 the lab request form which was the base of the trial. The person who issued the p3 form never appeared before the trial court as required in section 83 of the Evidence Act it states: "***the court shall presume to be genuine every document purporting to be a certified copy of certificate or other document which is:***

1. declared by law to be admissible as evidence of particular fact;

2. Substantially in the form and purporting to be executed in the manner directed by law in that behalf: and

3. Purported to be duly certified by police officer."

In this regard no police officer that testified before the trial court as the maker of MF2 the p3 form as the prosecution evidence that made the whole trial worthless and bad in law.

Group 7 & 8

That the trial learned trial magistrate erred in law and in fact by failing to establish that MF1 the lab request form, as prosecution evidence and which was the foundation of this case, its author never appeared before the honorable court to explain on how the document was made.

That the trial magistrate erred in law and in facts by failing to take into account that MF3, the treatment card as prosecution evidence was conceived through a compromising manner which built up in case which never was, thus violating the provision of section 50(4) of the constitution:

"evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

Ground 9

That the findings of the learned trial magistrate were not in conformity with the evidence of prosecution witness; therefore the trial court was not procedurally fair, independent and impartial as provided by the Constitution. Following the massive gravity of inconsistency and contradictions by all the prosecution witnesses, the learned trial magistrate farfetched his own theory outside the perimeters of the prosecution evidence.

Ground 10

The learned trial magistrate erred in law and in fact by failing to establish that the appellant never violated the provision of section 20(1) and 11(A) of Sexual Offences Act. The whole evidence of the prosecution evidence was conceived through conspiracy to the aim of awarding a long family grudge which was fueled as a result of land dispute. It is material fact that all the evidence in prosecution exhibits contradicts each other and was made by unknown author.

RESPONDENT'S SUBMISSIONS

6. In their Written Submissions dated 10th February, 2016, the Prosecution's response was as follows:

The allegations made by the appellant herein are mere falsities, owing to the fact that during the hearing of the suit at the lower court, the prosecution witness that there was no bad blood that existed between the family members.

We submit that the second ground is baseless as trial court was able to find that the complainant was a truthful witness. He further contends that the prosecution failed to call in two crucial witnesses thus seeking to cover up the real events that occurred. The sate submits that section 143of the Evidence Act provides that no particular number of witnesses is required to prove a fact. His position was laid down in CRA 257/09 Benson Mbugua vs. Republic where the court upheld that the prosecution has the discretion to call whoever they wish to call as a witness and it is not for the defense to determine that issue for the prosecution. Lady Justice Lessit sitting in Nairobi in ***R vs. Sammy Mwangi Mbuthia & 2 others*** (2015) e KLR, quoted the Court of Appeal decision of ***Mwangi vs. Republic*** (1984) where the court held that; "*whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by oblique motive."*

In the instant case no ulterior motive has been proved.

The complainant was able to positively identify the appellant through voice recognition thus even though the offence happened. The evidence of the medical documents produced by PW5 and 7 prove that there was presence of spermatozoa in the complainant's urine and discharge from her private organs and thus evidence of rape. PW2 stated that she saw a person run from the complainant's house as she approached after being called by the two girls and that the following morning, she accompanied the complainant to Matuu Hospital and she evidenced the treatment administered to the complainant. She further stated she saw the door to the complainant's house which had been broken down. The evidence of PW5 and 7 corroborate that of the complainant.

The trial court was put to task to determine the relationship between the appellant and the complainant. The defence called three witnesses including the appellant, he testified that he complainants was the wife of his grandfather; his grandfather had two wives. His father was the son of the complainants co-wife thus not his grandmother. DW2, father of the appellant sated his mother was no the complainant, DW3 testified DW3 was his son; thus making her the appellant's grandmother.

Section 20 (1) of the Sexual Offences Act under which the accused is charged lists the persons under which an incestuous relationship can exist as daughter, grand-daughter, sister, mother, niece, aunt, grandmother and section 22 of the same Act describes the test of the relationship to include half-brother/sister. The appellant contends that the Act does not make reference to step children, parents or grandparents, as scenario which the trial court had to make a determination on. The learned trial magistrate in his judgment contended that the definition of grandmother as encapsulated in Oxford dictionary did not make reference to the prevailing African settings where polygamy exists. He proceeded to find that there existed a relationship between the complainant and the appellant and upheld the offence of incest; noting that our customs and cultures form part of our sources of laws, as evidence by Article 2(4) of the Constitution. Article 159(2) (c) and 3 entreats court to be guided by principles of traditional dispute resolution mechanisms provided the principles do not contradict the Bill of Rights, the Constitution, and other written laws or result in outcomes that are repugnant to justice and morality. In the instant case Section 20(1) SOA having failed to take cognizance of the special circumstances in African settings, the courts are thus duty bound in their interpretation to apply the mischief rule to establish the enactment of this section was meant to cure. As pointed out by the trail magistrate, the traditional setting where polygamous marriage is recognized brings about some prohibited levels of consanguinity which members ought to uphold.

In reference to ground 4, 6, 7 and 8 the appellant contends that the trial court that the trail court erred in law and in fact by failing to take into medical documents advanced by the prosecution were undated, produced by incompetent persons and in essence violated the rights of the appellant. Documents in question are the p3 forms by complainant. It is notable in the trial courts proceedings that the appellant under the representation of counsel had the benefit of examining the fore-mentioned documents. The medical documents were presented to court by the authors. In the burden of proof, in COA ***Kassim Ali vs. Republic*** (2006) e KLR stated that *the absence of medical evidence to support the fact of rape it is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.*

With regard to the fifth ground, the appellant that the trial court did not take into cognizance his defense of alibi and thus the conviction was unlawful. In the judgment, the trial court appreciates the alibi defense raised but proceeds to make a determination that as stated in his evidence, the appellants sates he went home around 9.00 pm which puts him around the vicinity. DW2 during cross-examination stated the appellant was at his home but could not verify this fact as they were not together. State relies on the case of ***Boniface Gitonga Alias Munaa vs. Republic*** whilst addressing itself in the issue of voice recognition quoted the case of ***Karani vs. Republic*** (1985) KLR 290 stated:

> "*Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favoring safe identification."*

Finally the appellant contends that the trial court made findings that were in conformity with the appellants rights and that the charges preferred against him were not conceived through conspiracy. The state submits that the prosecution called a total of seven witnesses' clearly unequivocal laid basis for the charges herein.

The state thus submits that the trial court was in order to find that there was prohibited levels of consanguinity between the appellant and complainant; that the complainant's evidence of recognition together with the corroboration of facts adduced by the other prosecution witnesses was safe to place the appellant at the scene of crime and consequently convict him of the offence of incest contrary to Section 20(1) of SOA. Lastly it is trite law that has been set down in sexual offenses is that evidence of a single witness is safe enough to secure a conviction.

Evidence before the trial Court

7. The evidence before the trial court was as follows:

PROSECUTION'S CASE

1. **(PW1)** P K

"I come from Kionywani Location. When I good health I practice farming. I cannot tell my age (she is advanced in age) K M is known to me, he is a son of my son. I recall on 15.9.2012 at about 11.00 pm I was asleep in my house when the accused come. I gave him food and he left; he come back later and pushed the door. He told me that he come to teach me a lesson which he did. It was dark but he spoke. I am familiar with his voice and he had been in the house a short while earlier. I was at the time wearing a petticoat; he forced himself onto me and had intercourse with me. I tried to scream but he strangled me. When he was through he left and I sent some children who were asleep in another room to the home of J (my son), he come with his wife; in the morning wife of J took me to Matuu District Hospital. I was examined. J's wife was given some documents. I cannot read or write. We reported the matter to the police at Kithimani Police Station. I felt pain during the ordeal and sustained injuries in the process. I later recorded my statement with the police."

Cross-examination by Uvyu

"I cannot recall what time it was I have one son called J. ***The father of the accused is my step-son. I locked the door when he left. He forcefully forced the door to gain access into the house. The children I sent were in another room 10-15 meters away. They were awake when I went to see them; they had heard my screams. J came and the wife followed a short while later. J's wife took me to hospital. I know nothing of land dispute.*** *Accused had not been given any portion of land by my husband; the land has not been sub-divided."*

Re-examination by prosecutor

"He came back after I had given him food at night. M is my co-wife, accused is my grandson. Police did not visit the scene; ***I sent N and M.*** *There is no dispute over and."*

2. **(PW2)** E N

"I come from Kionywani, I am a farmer. ***On 15.9.2012 at about 11 pm I was at home when N and M came and called me asking me to wake up as K was killing PW1. My husband left for her house and I followed a short while later. I saw a person running away.*** *In the morning I went to the house of PW1 and my husband went to report to the headman. He later told me to take PW1 to hospital. Mother of the accused came and got a motorcycle. Before going to hospital we reported the matter to Matuu police station from where we were referred to hospital. PW1 was examined and put on medication; we then went to the police station and recorded statements. Accused was arrested and charged with the present offence. Accused was arrested by the members of the community policing."*

Cross-examined by Uvyu

"I did not witness the incident; ***I did not report that the door to my children's room was broken down. N and M did not record statements. I know nothing about a portion of land that was given to accused by his grandfather.*** *I summoned parents of the accused on the instructions of PW1."*

Re-examination by prosecutor

"Door to PW1's house was broken. I saw the same."

3. **(PW3)** Bernard Muasa Mutua

"I come from Makutano Sub-Location, I am an hotelier, a farmer and a member of community policing. On 17.09.2012 at about noon I was at home sleeping when PW1 and PW2 came and brought me a note from Matuu Police station. I and others started looking for him and found him on 18.09.2012 in a bush. We escorted him to Matuu Police station. It was alleged he had sexually assaulted PW1."

Cross-examination by Uvyu

"PW2 brought me the note. It had been authored by police officer known as Pamela. It was addressed to Chairman Community Policing; Kisavi Kitaka is the chairman. I cannot tell why the brought the letter to me and not the chairman. He never resisted. I was with Mutunga Mulei and Mutua Ndambuki. I told him reason for his arrest."

Re-examination by prosecutor

"The note directed the arrest of the accused."

4. **(PW4)** No 91276 PC Pamela Adhiambo

"Attached at Matuu Police Station, on 16.09.2012 I was in the office when one lady, accompanied by an elderly woman came and reported that the elderly woman had been raped by a person who was still at large. I escorted her to hospital for examination and later recorded witness statement. I issued them with a note to take to the In-charge Community Policing of their area for the arrest of the accused that I was told was a neighbor."

Cross-examined by Uvyu

"I cannot recall the name of the Community Policing In-charge I directed the note to. Accused was arrested after two days I wrote the note. I never visited the scene. I cannot recall the name of the lady who accompanied the complainant. Accused was not medical examined. I and another officer also escorted accused to hospital. Complainant never talked about a land issue. Complainant is mother to father of accused."

Re-examination by prosecutor

"Complainant is grandmother to accused. I was never told of a land issue. Doctors report supported the claim."

5. **(PW5)** Philip Njambara

"I am a clinical officer based at Matuu District Hospital. On 16.9.2012 I examined the complainant aged 89 years who had a history of having been raped by a person known to her. She had not received prior treatment. She had a discharge from the sexual genitalia. No pus cells were seen. The medical examination revealed that she had been raped. I also examined the accused person; he had few pus cells, he was H.I.V negative."

Cross-examination by Uvyu

"It was alleged he had raped. I cannot prove penetration. There were pus cells in his urine. Complainant had no pus cells. Pus cells are a result of infection. I cannot connect the spermatozoa to the accused. No DNA was done. I did not detect semen."

Re-examination by prosecutor

"There was no semen. She was referred to lad examination. There was no penetration. She had been raped by a person known to her. Accused had pus cells."

Questioned by court

"We look for injuries on the male plus semen stains. Complainant had a cut on occipital region, elbow joints."

6. **(PW6)** David Mutunga

"I work at Matuu District Hospital as a lab Technologist. P was tested for urine on 1.10.2012 and blood. She was found to be H.I.V negative from the blood test and the urinalysis revealed spermatozoa. I did not conduct the test; was done by my colleagues one Alphonce whose handwriting and signature are familiar to me. Alphonce is currently on leave."

Cross-examined by Uvyu

"Document is dated 22.09.2012 I tested for H.I.V and Urinalysis. I am a lab Technologist from Kenya Medical Training College. I hold a diploma obtained in 2003. I am registered. I cannot recall my number. The document is not signed neither does it have a name."

Re-examination

"The document was sent to me by the Clinician. It is mandatory for the Clinical to sign. I cannot recall my registration."

7. **(PW7)** Alphonce Muia of Matuu District Hospital

"I am a lab Technician. I examined the complainant, her blood sample and urine for analysis. I tested for H.I.V and spermatozoa."

Cross-examination by Uvyu

"I am a graduate of KMTC in 1991-1992. I am a certificate holder. I have not carried it with me. Exhibit 1 is not dated to bear the name of the clinical that referred the patient. Results in both were negative. There is evidence of spermatozoa."

Re-examination by prosecutor

"I am competent even though I am a certificate holder. Name appearing is of the referring clinical."

DEFENCE CASE

8. **When put on his defence the appellant accused person** testified and called witnesses as follows:

(DW1) K M

"I come from Kionywani, Yatta. I am a stone cutter at Kyasioni market. On 15.9.2012 at 6.00 am I went to work and finished at 4.00 pm and we were paid our dues for the day. I boarded a motorcycle to go home; I arrived at Kionywani market at 7:30 pm. I went to the bar and asked for senator beer, my Uncle K K joined me till 9.00 pm and left for home together; everyone was asleep. I woke up in the morning and left for work. On 18.09.2012 I woke up at 6.00 am and had breakfast. I drove the cows to the river with one N M who is my sister-in-law; we fetched water and took some home. We left home at 1.00 pm, my father told me to take goats and cows to pastures. At about 11.00 am Mutunga Mulei and Mutie Ndambuki come and arrested me; they did not tell me why. They took me home where we found my father with K M; my father asked them why they arrested me, they told him to follow us to the chief. I was taken to Kioywani where Kivuva Mutua gave Mutie Ndambuki Ksh.500/= for a motorcycle to take me to Matuu Police Station where I was fingerprinted. At 6.00 pm I was taken to Matuu District Hospital where I was examined; blood drawn from my hand for purpose of finding out if I had a disease.

On 19.9 2012 I was taken to court. Compliant is my grandmother. My maternal grandmother is M. I did not have sexual intercourse with the complainant; I had not seen her in a while. The present charges are as a result of domestic feuds. I did not touch the private parts."

Cross-examination by prosecutor

"Complainant is wife of my grandfather. I used to go home every day. I was framed as a result of family difference; given a parcel of land by my grandfather hence the present charges. I was told why I was arrested. I have two brothers. They were not given land."

(DW2) P M K

"Accused is my last born. P is not grandmother to accused. He was arrested he was with children of his brother."

Cross-examination by prosecutor

"I was at home. Accused was at home at the day of the alleged rape; Home of complainant is a distance from mine. I was not at his home."

(DW3) M M K

"DW2 is my son while accused is my grandson, complainant is my co-wife. His maternal grandson is M."

Cross-examination by prosecutor

"Complainant has children. I do not know what accused did."

9. In convicting the appellant, the trial court found on the evidence before the court that the Prosecution had proved the charge of incest contrary to section 20 (1) of the Sexual Offences Act.

Issues for Determination

10. The issues for determination in the appeal are whether the alleged forcible sexual intercourse with the complainant by the appellant was proved and whether the said rape amount to the offence of incest charged.

Determination

On the evidence before the Court

11. PW1 in her statement stated, "I recall on 15.9.2012 at about 11 pm I was asleep in my home when the accused come and I gave him food and he left." (PW1) continued "….he come back later and pushed the door. He told me he had come to teach me a lesson which he did… I

am familiar with his voice and he had been to my house a short while earlier."

12. PW2 stated; "I recall on 15.09.12 at about 11.00 pm I was at home when N and M came hurrying and called me asking me to wake up **as K was killing PW1. My husband left for her house and I followed a short while later. I saw a person running away**…."

13. There was unexplained inertia on part of the key witnesses who were crucial in proving the case against the appellant but who were not availed to testify in court. PW1 stated she screamed and the children heard her, the bang of knocking down the door causes a loud bang that could have been heard by anyone next door. But to any reasonable person the two girls next door did not do anything, or they did not testify to it, and if PW2 saw someone run away then they could have run after him in attempt to catch him.

Proof of penetration

14. Penetration is an ingredient of the offence of incest. Section 2 of the Sexual Offences Act defines ***penetration*** to mean -

> "*The partial or complete insertion of the genital organs of a person into the genital organs of another person"*

15. The medical evidence presented to court by the (PW5) Philip Njaramba, the Clinical Officer the maker of the P3 form, did not conclusively indicate that the complainant had been raped. He gave contradictory statements in cross-examination and re-examination as follows:

> ***On cross-examination that*** *- "It was alleged he had raped. I cannot prove penetration. There were pus cells in his urine. Complainant had no pus cells. Pus cells are as a result of infection. I cannot connect the spermatozoa to the accused. No DNA was done. I did not detect semen."*
>
> ***On re-examination:*** *"There was no semen. She was referred for lab examination. There was penetration. She had been raped by a person known to her. Accused had pus cells."*

16. The evidence of PW6 and PW7 both lab technologists the former testify in on behalf of the latter when it was said that he was on leave is of little use because of the laboratory chits on which the test results were recorded are undated, unsigned and on one occasion shown to have been done on a date a fortnight after the fact. The lab request forms (MFI-5) Lab request forms were unsigned and undated, save one which carried the date of 1/10/2012, raising a doubt as to when the tests were done.

17. Relying on ***Kassam Ali,*** supra, the Prosecution urged that the want of medical evidence was not fatal to proof of rape. Agreed, but in circumstances where what else remains in evidence cannot prove the offence, the want of medical evidence or its glaring inconsistencies has a very direct consequences on proof of the offence.

Crucial witness not called to testify

18. During cross-examination, the complaint PW1 testified s follows:

> "***I locked the door when he left. He forcefully forced the door to gain access into the house. The children I sent were in another room 10-15 meters away. They were awake when I went to see them; they had heard my screams. J came and the wife followed a short while later.***"

19. The two children who the complainant allegedly sent to report the matter to her son J did not testify. Had they done so, they would have confirmed that they had heard the complainant scream as she alleged and they would confirmed telling J's wife PW2 that the appellant had raped the complainant as alleged by PW2. In the absence of their testimony, PW2 statement thereon is inadmissible hearsay.

20. Of course, section143 of the Evidence Act does not require any number of witnesses to prove a fact, in these terms:

> ***"143. Number of witnesses***
>
> *No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

21. But a Prosecution that fails to call crucial witnesses stands the risk of failing to prove the charges if doubts are raised by other evidence adduced in the trial as to the commission of the offence. In applying ***Bukenya & Ors. v. Uganda*** (1972) EA 594, the Court of Appeal in ***Nguku v. R*** (1985) KLR 412 held that -

> ***"Where a party fails to produce certain evidence, a presumption arises that he evidence if produced would be unfavourable to that party."***

22. This court must presume that the evidence of the two girls who played a key role in matter by witnessing the screams of the complainant, the breaking of her locked door their room having been only 10-15 meters from the complainant's room, according to the complainant, and reporting the assault to the complainant's son [who did not also testify] upon being sent by the complainant who apparently told them, according to the evidence of J's wife PW2, the person who had attacked her, would have been adverse to the prosecution's case. That PW2, who came a short while later after the complainant's son J, saw a man running away could have been confirmed by her said son had he been

called as a witness.

23. In this case there not being any corroboration of the allegations of rape by the complainant, conviction may only be founded on a finding under section 124 of the Evidence Act, that the complainant victim of sexual offence was for reasons to be recorded telling the truth as to the allegation of sexual intercourse. Section 124 of the Evidence act is in the following terms:

> "*124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:* ***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.*** *[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]*"

24. The trial court did not put on record any findings as to the believability of the complainant as to the allegation of rape so as to justify reliance on her uncorroborated evidence. For its part this court must, while acknowledging that it did not see or hear the witnesses and therefore, consistently with the standard in ***Okeno v. R*** [1972] EA 32, deferring to the trial court on any observation as to credibility of witnesses, point out glaring gaps, inconsistencies and contradictions in the evidence of the complainant PW1 ***inter se*** and as against that of other witnesses, which makes it unsafe to convict thereon.

25. The complainant testified that the appellant broke into her house by forcefully pushing her locked door, and while PW2 in re-examination said she had seen the broken door, the Investigating Officer PW4 did not visit the scene and could not confirm such forcible entry. The two children who were in another room in the complainant's house and who should have heard the noise from the forcible breaking of the locked door were not called as witnesses. In addition, the complainant contradicted herself in her stating that the children were asleep in another room while later in testimony she said they were awake and they had heard her screams. According to the complainant, the attacker when through with raping her left and she then went to wake up the children to send them to call her son, and while it is unlikely that the son's wife PW2 who came a short while later after her husband could have seen a person running away, if it was sought to show that the person running away was the attacker. The complainant's son J as the first responder to her distress call was not called to testify to confirm what the two children who had been sent by the complainant told him. The record shows that the complainant had sent the children "to tell J what had befallen me", which was that the appellant had raped her yet according to J's wife PW2 the children told her that "K was killing PW1" suggesting a physical rather than a sexual assault.

26. The defence of the appellant throughout the trial during cross-examination of the prosecution witnesses and in his own defence that the charges were actuated by a family land dispute where the grandfather, the husband of the complainant, is said to have given some land to him. Weighed against the evidence of the appellant in defence that the charges were a frame up on account of a family dispute relating to land, the evidence presented by the Prosecution, with the noted inconsistencies and gaps in the said evidence, fall short of proof beyond reasonable doubt. While there may have been a physical assault of some kind between the appellant and the complainant as shown by the evidence of injuries on her head, chest and elbow indicated in the P3 form, sexual intercourse or contact which is the basis of the two counts preferred against the appellant was not proved.

27. It was simply unsafe to convict.

Judgment of the trial court

28. The trial court found the appellant to have been adequately identified by the complainant by voice recognition as follows:

> "*The accused was well known to PW 1. She knew his voice. When PW 2 arrived at her house with her husband* ***she immediately told them that the accused had raped her.*** *I am satisfied that the accused was positively identified by PW 1 from his voice. He had been to her house a short while before the act and she had fed him.*"

29. There was no evidence that the complainant told PW2 and her husband J that the appellant had raped her. J did not testify and PW2 who testified did not claim that they were told by the complainant that the appellant had raped her. She said that she had been told by her children N and M that the complainant had told them that the ***"accused was killing her"***. It is unclear where the trial court got the information that the complainant had told her son and the daughter-in-law (PW2) and the appellant had raped her.

30. With tremendous respect, I think the trial court in its judgment actively courted the reprimand, which this court hereby gives, of concocting fanciful theory that the appellant, whose sworn evidence indicated that he had been drinking before he went home on the material night of alleged rape, must have had unwanted sexual intercourse with the complainant. The Court ruled that –

> "*From the foregoing I am called upon to determine whether the accused did have intercourse with PW 1 and if so whether same amounted to incest on account of his being a grandson to PW 1. It was the evidence of the accused visited her home on the night of 15/9/2012 at about 11.00pm and she gave him some food. After supper he left the house but returned later and forced himself into the house and had intercourse with her. She could not scream as he had strangled her. Though it was dark she was able to recognize him from his voice as he spoke to her before the act when he told her that he had come back to teach her a lesson.* ***There were two children asleep in an adjacent room whom she sent to alert her son of what had transpired and when her son and his wife (PW 2) arrived she was able to immediately tell them that it is the accused who had sexually abused her. The medical evidence presented before court by way of the P3 form and lab results shows that she had been raped.*** *In particular the P 3 shows that upon examination a day later a cream whitish discharge was observed from the external genitalia while the lab results showed that spermatozoa was observed in her urine. The evidence of PW 1 that accused had been to his house and she had fed him is*

credible. ***The accused in accounting for his movements for the day said that he had returned home at about 9.00pm and found all asleep. This placed [him] within the vicinity of the house of PW 1 around the time of the offence. That all were asleep must have presented him with the perfect opportunity to pay a nocturnal visit to her house undisturbed. It is also to be noted that he had taken some alcoholic drinks at Kiongwani market before proceeding home.*** *The accused was well known to PW 1. She knew his voice. When PW 2 arrived at her house with her husband she immediately told them that the accused had raped her. In am satisfied that the accused was positively identified by PW 1 from his voice. He had been to her house a short while before the act and she had fed him."*

31. I should respectfully agree with Sir Udo Udoma, CJ. In ***Bukenya v. Uganda*** (1967) EA 341, 345, that - ***"As a general rule of law a magistrate can only decide a case on the evidence before him.*** *He is not entitled to import into the case his personal knowledge or extraneous matter." And in* ***Okethi Okale (1965) EA 555, 557 that-***

> *"[I]n every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning.* ***We think it is dangerous and inadvisable for a trial judge to put forward a theory … not canvassed during the evidence or in Counsel's speeches."***

II. Whether incest proved

32. In the trial magistrate's appreciation of the law, the appellant stood in a prohibited degree of consanguinity. The court reasoned that because the complainant a co-wife of the appellant's grandfather was in the same position in the African polygamous systems as the appellants grandmother, his father's mother, sexual intercourse with the complainant was prohibited and incestuous. The Court ruled:

> *"Given the medical evidence and positive identification it is my finding that the accused did have carnal knowledge of PW 1 on the night of 15.9.2013. Does it amount to incest? The evidence before me is to the effect that the accused is a step grandson to PW 1 in that his father is a son of one M M a co-wife to PW 1. The defence referred the court to the definition of grandmother as given in the Concise oxford English Dictionary Eleventh Edition which I have considered. The situation prevailing here is that this is an African setting where polygamy is allowed. PW 1 is a co-wife to M M who is the mother of the father of accused. While he readily acknowledged M M as his grandmother he however vehemently denied that PW 1 could not qualify as his grandmother.*
>
> *Given the relationship by marriage between PW 1 and M M whom the accused acknowledged as his grandmother and therefore falls within the prohibited degree of consanguinity. If he cannot have sexual intercourse with M M it applies that he cannot and could not have sexual intercourse with PW 1 without repercussions.*
>
> *The definition of grandmother is given in the Dictionary ignores the unique picture presently under African Customs where marriages are largely polygamous and Kamba customs are no exception. I find that given those realities it appear a shallow definition and reject the same.*
>
> *In the end it is my finding that the prosecution has proved its case against the accused in the main count and I accordingly proceed to convict him on the charge of Incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006 as charged.*
>
> ***D. G. KARANI***
>
> ***PRINCIPAL MAGISTRATE***
>
> ***19.6.2014"***

33. So far as relevant section 20 (1) of the Sexual Offences Act provides for the offence of incest as follows:

> *"20. (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:"*

34. Section 22 of the Act delimits the test of relationship in certain incest cases as follows:

> *"22. (1) In cases of the offence of incest,* ***brother and sister*** *includes half brother, half sister and* ***adoptive brother and adoptive sister*** *and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.*
>
> *(2) In this Act –*
>
> *(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;*
>
> *(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;*
>
> *(c)* ***"half-brother"*** *means a brother who shares only one parent with another;*
>
> *(d)* ***"half-sister"*** *means a sister who shares only one parent with another; and*

(e) "adoptive brother" means a brother who is related to another through ***adoption*** *and "adoptive sister" has a corresponding meaning."*

35. Sexual intercourse with one's biological grandmother is incest contrary to section 20 (1) of the Act. Sexual intercourse with any other grandmother so called is not, in law, incest, however, repulsive the act may be.

36. The polygamy argument adopted by the trial court in order to extend the offence of incest to cover sexual intercourse with a co-wife of one's grandmother, attractive though it may be, has no backing in the law or science. Incest is defined as ***"sexual relations between people classed as too closely related to marry each other"***, according to Concise Oxford English Dictionary 11th ed. (2006). As I understand it, incest is proscribed for its adverse biological consequences of mating within the same genetic (blood) relations. Indeed, as defined in section 21 above, incest does not cover step relations, only **half** relatives with whom one "*shares only one parent with another"*.

37. While the Sexual Offences Act of Kenya has extended incest to cover sexual intercourse with ***adopted*** relatives at brother or sister level, it has not been so enlarged to included ***co-wives*** to a grandmother or mother. If that were to happen, it should have the consideration through legislative amendment by the representatives of the People in Parliament rather than by extension through activist judicial art.

38. **With respect, and while this court is grossly repulsed by any such act of sexual intercourse or assault by one with a person at the same position as his grandmother by reason of polygamous marriage, advanced age, or other relation, that is not the criminal sanction of the offence of incest. The person, though his act is abhorrent to Society, is not guilty of incest; he may only be guilty of rape, if the sexual intercourse is not consensual, or of indecent act, if penetration is not proved. The appellant could not have been guilty of incest in any way.**

39. There was no evidence led of acts that amount to indecent act contrary to section 11A of the Sexual Offences Act. It is a pity that the trial court in its manner of recording evidence denied the court the opportunity to get firsthand the relevant evidence, from the horse's own mouth as it were, and in the language of the witness to hear what the appellant is aged to have done so as to consider whether the alternative offence charged, or other lesser offence or attempt of the offence in the main count (as the court is entitled to consider and convict on, under sections 179 and 180 of the Criminal Procedure Code , respectively) is proved. In the record of the trial court, it appears the court was recording the evidence in its own words, rather than the words of the witness. The Court for instance wrote that –

"*I was at the time wearing a petticoat;* ***he forced himself onto me and had intercourse with me."***

40. When the evidence on act of sexual intercourse is discredited by want of medical evidence, there should be evidence of the acts alleged to have been done in sufficient detail for the court to consider whether attempt thereof or any other complete offence is disclosed by the evidence, although falling short of proving the offence charged.

ORDERS:

41. Accordingly, for the reasons set out above, the Court finds that find the offence of incest contrary to section 20 (1) of the Sexual Offences Act was not proved against the appellant, and I also do not find that the alternative count of indecent act contrary to section 11A of the Sexual Offences Act has been proved. There shall, therefore, be an order for the appellant to be released immediately from custody unless he is otherwise lawfully held.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF JULY 2018.

ODUNGA J.

JUDGE

Appearances:

Appellant in person.

Ms. Olive Njuguna, Prosecution Counsel for the Respondent.