



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABRANET

HCCRA NO. 129 OF 2017

M A A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original the conviction in the Principal Magistrate's Court at Eldama Ravine in Criminal Case No. 320 of 2015 delivered on the 16th day of February, 2017 by Hon. R. Yator SRM]

JUDGMENT

1. The appellant was convicted for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act and sentenced to imprisonment for life. The Particulars of the offence were stated in the charge sheet that he “on diverse dates and months in the year 2013 at [particulars withheld] village in Koibatek Sub-County within Baringo County, committed an act which caused penetration of his penis into the vagina of MJ who is to his knowledge his daughter aged 14 years.” The appellant faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. By Amended Grounds of Appeal dated 30th March, 2017, the appellant by Counsel appealed against conviction and sentence on the following grounds:

1. That the Honourable Magistrate erred both in law and in fact by convicting the Appellant solely relying on the evidence of a single witness (PW1) who was untruthful and unreliable.
 - 1A. That the honourable Magistrate erred both in law and in fact in failing to conduct proper *Voire dire* examination.
2. That the honourable magistrate erred in law and in fact by relying on fabricated, hearsay and un-corroborated evidence.
3. That the honourable magistrate erred both in law and in fact by relying on evidence not sufficient to warrant a conviction.
 - 3A. That the age of the complainant was not ascertained.
4. That the honourable magistrate erred in both in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt as required by law.
5. That the honourable magistrate erred both law and fact by failing to consider that appellant's defence, his witnesses and mitigation which was not shaken by the prosecution.
6. That the honourable magistrate erred in both law and in fact in sentencing the appellant under section 215 of the Penal Code.
7. That the honourable magistrate erred in both law and in fact by imposing a sentence that is manifestly harsh and excessive.

3. Counsel for the appellant filed written submissions dated 28th June, 2017, principally, as follows:

The appellant was convicted on account of a single witness PW1, hearsay evidence is inadmissible, further there was no medical evidence linking the appellant to the alleged evidence.

The law allows the testimony of a single witness without corroboration in sexual offences cases, it is a requirement that the trial court should satisfy itself that the witness is truthful. A trial court safeguards the competency of a witness to be truthful by swearing them in before taking of evidence save in cases of minors where they can give unsworn evidence but upon the trial court satisfy itself

that the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell truth, which involved in an oath, over and above the duty which is an ordinary duty of normal social conduct.

A *Voire Dire* examination is essentially a pre-testimony procedure. It is only after the examination that the court can decide whether the witness is intelligent enough to give evidence. It is also after this interview that the Court can decide whether the witness understands the meaning of an oath and thus should be sworn or simply appreciates the importance of telling the truth and should therefore adduce unsworn testimony. See *K M v. Republic* [2013] eKLR it further ensures that an accused person's right to a fair trial is safeguarded. It is our submission that having failed to conduct a *voire dire* examination, PW1's testimony was of no use to the court and the Appellant's appeal should be allowed. In the case of *Samuel Warui Karimi v. Republic* [2016] eKLR where the Court of Appeal held:

"We are in agreement that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in criminal trial, the trial becomes problematic. In the circumstance we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness."

Without prejudice and in the interest of justice was PW1 a credible witness, reliable and truthful witness? and did the prosecution prove its case beyond reasonable doubt?

It is our submission that the prosecution failed to prove its case beyond reasonable doubt and PW1's testimony was riddled with gaping holes, inconsistencies that made it unsafe to convict the appellant.

The complainant's age was not proved. Age of the victim under the Sexual Offences Act is a very critical component and must be proved by credible evidence. Contradicting information was given in regards to the complainant's age. Also the prosecution through PW4 produced a child's health card in the names of PW1 that showed she was born in 1998. The prosecution did not disclose how they obtained the card. On the other hand DW1 testified that he had lived with PW1 and her mother for over 17 years and by the time the union began, PW1 was aged 5 years. DW4 also testified that PW1, her daughter was born in 1995. It is worth noting on p. 19 the prosecution sought leave from the court to have PW1 taken for age assessment and such leave was granted but no finding was ever delivered to the court on the same. It is therefore our submission that PW1's age was not proved beyond reasonable doubt and the court ought to have had this issue resolved conclusively and only an age assessment report could have done it.

The complainant never reported or confided to anyone of the alleged offence despite the fact that it took place over two years ago. She only reported the father to the nurse when they insisted that her child looked like a *Woria*. PW1 testified that she did not tell anyone, during the four times that the offence was allegedly committed, as her father had asked her not to say and she was fearful. This evidence does not hold water, firstly, the complainant did not demonstrate the threat that was on her life from the appellant to make her keep quiet for all that period. Secondly, it was her testimony on p. 16 that on the material day of the alleged offence, her mother arrived home at 4.00 pm but she did not confide in her. Thirdly, she testified how she threatened to report her mother at the DC's Office for beating her on account of the father. She reported her mother but did not report to the police about the alleged offence. Fourthly, it was her testimony that she went to live with her aunt Z Ca after reporting her mother but did not report the alleged offence despite trusting her aunt to go to school and find out from there that she was pregnant. Lastly, during cross-examination, the complainant talked to her friend E with whom they had love affairs with the boys at school and despite the fact that they shared deep secrets she did not disclose the alleged offence.

In the case of *F N M v. Republic* [2016] eKLR the court allowed the appellant's appeal by questioning the credibility of the prosecution's witness on why the matter was never reported to anyone despite the same happening thrice. It observed as follows:

"There is evidence from both PW1 and PW2 that the appellant had made previous attempts to commit incest with the complainant. However there is no indication from any of the prosecution witnesses that any report was made on the attempts to either relatives, village headmen or any person in authority just for the records. In my view the three consistent attempts by the appellant to commit incest with the daughter, was a serious matter which should have been reported to someone. The fact that the appellant was a man of drunken habits, and the fact that he was fond of creating disturbance whenever he came home, should have been a good reason for reports to have been made incest with his daughter. The absence of evidence of a report on such a serious matter begs the question if indeed there was such attempts to commit incest, and whether PW1 and PW2 were credible witnesses." (Emphasis supplied)

There are inconsistencies that the complainant's testimony as to how the alleged offence took place. The testimony does not give a clear picture of the events of that day if at all it happened.

Reasonable doubt is a logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts. In *Philip Muiruri Ndaragu v. Republic* [2016] eKLR the court cited Duhaime, Llyod, legal definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

The trial court ought to have given consideration to the accused's defence. It is unfortunate that she dismissed the accused's defence on the grounds that it only disputed the paternity of PW1's child yet from the proceedings it is apparent that there was a third force by the name A who was behind the appellant's woes.

DW1 testified that the charges facing him were instigated not by PW1 but by PW1's uncle.

It is our submission that the learned trial magistrate should have weighed this testimony against that given by the prosecution

considering the fact that the defence witnesses were close family members including the complainant's mother who at all times would have the best interest of the complainant.

The learned trial magistrate then convicted the appellant under section 215 of the Penal Code which was an error as the said provision has no relevance whatsoever with the case at hand.

4. At the hearing of the Appellant the appellant's counsel highlighted the submissions to which the Counsel for the DPP orally responded opposing the appeal on the grounds that the complainant had testified that the complainant as step-daughter of the appellant had lived with the appellant for a long time and the appellant was well known to her; that the complainant testified that the appellant had defiled her 4 times even though she had 2 boyfriends, named M and R; that the complainant had given birth to a child but the case was not for the determination as to who the father was but one of defilement against the appellant; that the attempt by the complainant to testify for the defence under another name was the result of interference by the appellant, pointing out that when the complainant testified earlier for the prosecution she was living at a rescue centre after being rescued from the appellant's house upon intervention by PW2 the Gender and Violence Recovery Officer of the Nakuru Branch of the Nairobi Women's Hospital upon request by PW3, Dr Arafa who had attended the child and got from her information about continued defilement by the father and her subsequent beating by the father at the hospital; and that the error by the magistrate in stating that conviction was under section 215 of the Criminal Procedure Code without indicating the offence for which the appellant was convicted could be cured by section 382 of the CPC.

The evidence

5. The evidence before the Court was led by 5 prosecution witnesses and four defence witnesses as follows:

Prosecution's case

1. PW1 M.J

"I was a student at [particulars withheld] Primary and was living in [particulars withheld] together with my parents M A (accused) and my mother N C and I left school when I went to deliver. I was together with other two young children. I have lived with accused and mother since I was in class four and accused is my father.

It was in 2013 unknown date when I was sick and mother told me I stay at home as I could not go to school and she went to school and I remained behind with father and young children A R and Z C to take care of them. Father then told me he will read me the Quran so I get well and he called me to his bedroom and we were the only two and the other two children were sleeping in the sitting room and it was around 10.00 am.

I entered the bedroom and he asked me to sit down so he reads me the Quran and he took water and put in a cup saying it was medicine and after reading he Quran he asked me to wash my face with the water which he poured on my face with the water which he poured on my face and head and he said if I felt like sleeping I could do so and he asked me to sleep in their bed and while I felt asleep and I felt something getting a hold of me and removing my pant I woke up and wanted to get out of bed and he pushed me against the bed and I told him I wanted to go check on the sleeping children and he then removed his penis and inserted into my private parts. I was on top of the bed and he sked me to cover myself with the blanket and he also entered into the blanket and lied on me and defiled me. He removed my pants when he asked me to sleep so I wake up feeling well. He was wearing a short which he removed half way he removed my legs and placed against his body and he turned me against my back and defiled me. I do not recall if the door was open. I told him he leaves me alone and said I wait he competes and before he defiled me he applied me Armis Milk Jelly against my stomach and privates parts when he defiled. I did not scream but he kept pushing me down. He then asked me to leave and not tell my mother saying it was my secret and his and I left him behind in bed. He asked me to go check on the other children and he asked me to prepare water for him to bathe so as to go to work and he then left for work. When I went to check on the children they were awake one of them was still very young and the second one had just sat down.

Mother then arrived around 4.00 pm and feared to tell her as father had asked me not to. One time I was sent to the shop by mother saying father had left some things behind and I went to check on the items and when I went to check on the items mother got annoyed saying the items were not all that I go back for them and I did not want to and she took a stick and hit me with it and I missed it and ran away to the road and I told her I will go report at the DC that she beats me always and I left that night and I went to report at the AP Kapdeng that she used to beat me and saying I leave that home and AP Officer came and I informed him and advised I go to my maternal home in [particulars withheld] or I go to my aunt at K one Z C and I started to live with her and I went to school when in class 8 and class teacher called me to her office saying I was not looking okay and I should go home. It was G C. I had started to see my stomach getting big. I went back to class and the following day on Friday I did not go to school and on Thursday I told my aunt Z that class teacher had said I stay at home and I did not tell her why and she said she will go inquire in school which she did and she came and told me that the teacher had said I was pregnant and asked me to go carry a pregnancy test and I went personally to Simothen Hospital and upon test the doctor said I was pregnant and gave me a book and that I return for clinic and I came to Mercy Hospital where I was admitted after some months when I was admitted at Mercy Hospital and while in hospital mother and father arrived and I then delivered and I was admitted there for some days and later my aunt one C came and took me to our home in [particulars withheld]. I gave birth to a baby girl one M C. At one time she started vomiting and diarrhearing and I was admitted when she was some months old and later personnel from rescue Centre came to take us to the rescue centre and I have been returned home.

Nurses had tried to ask me who the child belongs to and I told them since I had a pokot friend and the child belongs to the pokot and they said the child belongs to a Worja (Muslim) and they told me the child could belong to my father who is my step-father. Before date herein he had ever defiled me before and it was around four times and I never told anyone and he used to apply oil on my private parts and I never saw him wear a condom. I never told anyone he defiled me. He used to tell me not to tell anyone and I used to fear. He used to ask me if I had a boyfriend and I used to tell him I did not have a boyfriend, but I had a pokot friend one M whom

I once had sex with him while in class six and he was also in class six. I am 14 years old.”

Cross-examined by accused

“I had a friend in school called E who he used to stay for preps in the evening in class 8 and there were other boys who used to come disturb us and other students knew we had love affairs with those boys and I ever had sex with one R when I was in class 8. When I left home after disagreeing with mother its only my aunt whom I told I was pregnant and I did not know if I was pregnant. My aunt and mother N took me to home of my boyfriend one M saying they go a split on the child due sickness. You were concerned about my being admitted to the hospital and you paid my bills.”

Re-examination

“Father defiled me before I had sex with pokot.”

2. PW2 Angela Gwaro

“I come from Nakuru and I work at Gender Violence Recovery Nairobi Women Hospital. As the in-charge Nakuru Branch (GVRC). On the 4/5/2015 he had gone to Eldama Ravine to take a baby after being called on 3/5/2015 by Dr. Arafa saying there was a child at their ward who needed our rapid rescue as she had sired with the father who had defiled her and she gave birth to a baby and our concern of rescuing was because Dr. Arafa said the father followed her to the hospital and beat her and that she could not take care of the child and went to Hospital at paediatrics ward and the victim and the child were malnourished and she was depressed and could not respond to our questions. I met Dr. Arafa who briefed us and had filed a PRC form and processed discharge instructions where she attended to for depression and child for malnutrition and the child was also anaemic. M could not breastfeed the child and was holding the child’s leg upside down. On observation she had physical injuries on the back and legs but they were healed. We then went to the police where she recorded her statement and proceeded to the Nakuru Women Hospital where she was counselled and the child given medication (Nutrition and anaemia).

When victim regained we took her to rescue centre where she has been staying till date. Before taking her blood sample was removed as well as the child for DNA test per court order and Police came with blood sample of accused and he signed the forms then he took all three samples to Government Chemist and since then the victim has been undergoing counselling and I have personally been doing so as well at the rescue centre. During counselling she told me she ever slept with the father who used to apply her oil while naked on her entire body then reads Quran before defiling her and that he had done so severally.”

Cross-examination

“She was ever sick and she could not tell when exactly she got sick. I heard the mother took her to hospital, but never used to visit her regularly. The nurses say you ever assaulted her in the ward after she told other patients you are the father. She said she could not tell what you were saying in Islam as she does not understand well the Quran.”

Re-examination

“She said she was being oiled before being defiled. I was present when they took blood sample for the victim and her child.”

3. PW3 Arafa Saleh

“Working in Eldama Ravine District as Senior Medical Officer and I have a PRC form which I filled on 7/4/2015 at Eldama Ravine District Hospital of a minor and on execution she alleged that her step-father had canal knowledge of her severally. Initially she came to hospital as her 8 month child was suffering from malnutrition and she was not taking care of the child. We found out that she was only 14 years old and on further talking to her she said she had been raped by the father hence conceived the child. She was a depressed girl (post-traumatic disorder) due to the same and said that the rape was always with struggle.

We also found out that she had several bruises on the back saying it was due to being beaten by the step-father who she alleged was very aggressive and intimidating. We continued to talk to her on a span of around two weeks as she was much stressed and could not talk with her in a day and we as team doctors continued talking to her and counsel her due to stress as the step-father was physically abusive ever in the ward. She had given birth at Mercy District Hospital and she told us she had been beaten by a pipe on the back. She was under duress, scared and could not talk without looking at someone on the eye and said was depressed most of the day and could not interact with any medical officers. Speech low and hesitant and she kept reiterating that whatever happened she feared going home and she admitted to us she had contemplated suicide before. She reported that her step-father used to lure her by reciting Quran using some massage oil. Upon inquiry why she did not report before as she was 8 months she said she was scared of her step-father.

She was well oriented and her concentration was good and good judgment and insight. Vaginal examination was normal and hymen broken and the pelvis showed she had undergone child birth which was traumatic due to her age. I signed the same on 7/4/2015.”

Cross-examined by accused

“We did not coach the girl as she explained well what happened.”

PW3 Recalled

“I have the p3 form for a minor with history of being defiled by a step-father and had given birth to a child and on examination we found she had delivered a child and her private parts showed she had delivered and I followed it in 6/1/2016”

Cross-examined by accused

“I did not know if you defiled the child but complainant said it was the step-father who had defiled her severally and that you used to apply oil saying you were paying for her.”

4. PW4 No. 234605 Inspector Judith Masimbo

“Stationed at Timboroa Police Station and I am the Investigating Officer herein. On 7/4/2015 I was at the office when OCS CI Mutuku called me and I found she was with a girl who is the complainant with a younger child aged 7 month and was with a lady from Nairobi Women Gender and Violence who had accompanied her from the hospital and OCS told me to go report which I did. I investigated the complainant who appeared tired and talking with difficulty. She said in the year 2013 at unknown date and time, she did not go to school as she was unwell and she told the mother working at [particulars withheld] who agreed she remains behind and on the same day the step-father was around and when they lived together and that at day time the step-father called and asked her why she did not go to school and she explained to him and that he called her to his bedroom saying he will recite the Quran to her and he laid on the bed an dread the Quran after which he remover her pant and dress she was wearing and he took Petroleum jelly and applied on her stomach and private parts as if to massage her then defiled her, she did not say if he used a condom. After defiling her she told her not to tell anyone which she did not. She said at that time there was no one else at home.

After the offence she stayed till late 2014 when she was not feeling well and was taken to Mercy Mission Hospital when she found to be four months pregnant and in November 2014 she delivered and the father at one time after she delivered she alleged the father also defiled her in 2014 when she had remained at home with the young children. She stayed at home with her bay but was unwell as she was not eating and the infant fell ill on February 2015 and took her to hospital where she was admitted at Eldama Ravine District Hospital quarreled her on own he was taking care of them at home and that the complainant was alleging the child was his.

Later PW1 was called by Dr. Arafa who interrogated her and called Gender and Violence Women Hospital where one Angela Ngwaro came to help her and accompanied her to the station and they then filed PRC form later p3 form was duly filled and which I personally saw and produced as exhibit 1 and 2. Later I recorded her statement and they left with PW2 for Nakuru. The accused was later arrested while in town when he telephoned him and he came to the station. I interrogated the complainant and the accused confirmed they were living together as her child. I established the child was 14 years old at the time of the offence and I have the health card in names of the complainant MF1 3 and she was born on 1st August 1998 and the offence was in 2013 and 2014 while she was aged 14 years.

Cross-examined by accused

“I do not know where the complainant is at currently. I did not go to the scene as the complainant was traumatized and refused to go home. Mother of the child never came to the station nor did I chase her away. After the doctor examined the child she confirmed the child had been defiled. The Complainant was brought by an officer from the rescue centre. I went to the hospital and interrogated the Dr. Arafa. The child had been admitted in February.”

Re-examination

“I have not been paid to give false evidence and the complainant recorded statement. The child said accused used to apply petroleum jelly on her before defiling and as such at time of reporting the oil could not have been found. The child took time to report as she as depressed and could not talk freely and accused had told her not to tell anyone hence was in fear. The mother never came to the police station but we met in court.”

Defence case

1. DW1 M A Agave a sworn statement and states as follows:

“I come from [particulars withheld] and I am a guard with [particulars withheld]. The charges are false and there is nothing to prove that the child is mine. DNA sample was taken and never got the results so to confirm if the child born was mine or not and all the evidence tendered was false and in fact if I was not pleased with my wife I would have married other women as my religion allows I marry up to five women. The charges were not initiated but the girl but my enemies whom we have disagreed with when they had married my wife and had said that I had remarried her for siring a child with the brother and they followed me for once 5 years saying I had taken away his wife and it reached a point I decided to settle with wife and her parents intervene and the problem settled for some time but the person who tackled me and help child complain I cannot compline recall his names.”

Cross-examination

“My wife is N or N K and is mother to the complainant and I am the step-father to the complainant herein. There is someone who is pushing charges and whose name is A I do not know his full names and he was not a prosecution witness. I was residing with my

wife for close to 17 years and I married her while the girl was 5 years old and I brought her up. In 2013 I was staying with PW1 who was a student at [particulars withheld].”

2. **DW2 J K K**

“I come from [particulars withheld], I am a carpenter. Accused is like my son and the wife is my daughter. We learnt that he had sired a child with my daughter’s eldest child and later it was alleged he had defiled her. When accused had annoyed him and they had gone up to Children’s Offices and resolved and resolved and I asked why I was not involved and A said we will ensure he is convicted after which he sent him away to their place and I have tried to work for father of accused to resolved matter at home and bring together A so we settle matter out of court and which I ask the child she said she was forced to satisfy against the father.”

Cross-examined

“I cannot tell what he does during the day as we are not together. I cannot tell if at all he defiled the child as I was not with him. A denied to charged accused for bad mouthing. A is a Police Officer from Meru and insists he gets accused behind bars and he is not the Investigating Officer.”

3. **DW3 L M**

“I come [particulars withheld] Village. I am village elder. On 9/4/2015 we learnt the accused had been arrested. On 10/4/2015 he was brought to court. On 25/2/2016 accused’s wife took her child to another care taker saying she wanted to take her grandchild to hospital and on 6/4/2015 they came to tell me the child was not in hospital and had been taken away.”

Cross-examination

“My home from accused’s home is 50 steps in one village. I do not spend much time with the accused and he did separate jobs and I cannot know what goes on in their lives. In 2013 accused’s daughter M was found to be expectant and I personally asked the girl whose pregnancy it was as she used to come to my home and at first she was hiding and she said the son of S M A A was responsible.”

4. **DW4 N J**

“I come from [particulars withheld] – K the accused is my husband and the complainant is my daughter. My daughter was born in 1995 and schooled at [particulars withheld] academy till class 8 and did not do KCPE as she was pregnant and delivered. In 2014 she delivered the baby who she sired with M A a pokot and in 2015 March her child got sick and took her to Eldama Ravine District Hospital and after three days after her admission with my grandchild I found she did not want to talk with me and the doctors were sending me away and I found her brothers to the accused to the father of the complainant (deceased) saying I will not take her saying the girl was theirs, but I take my grandchild who was around 6-7 months. On 9/4/2016 my husband was arrested. When PW1 gave birth she was 17 years and not sired with accused.

Problem arose from relatives to my girl’s father as they will ensure he is returned to Garissa. My husband is M while the person who sired with my girl.”

Cross-examination

“The accused is my husband and we have four children. The complainant is not is biological child but he has raised her as his step-father. PW1 told me the father to the child is Alingile and he followed up with the father of the child and at the time she was in class 8 and Alingile used to send me money for upkeep of the child and accused was arrested instead of Alingile. In 2013 I was working at [particulars withheld] and not home during day time and could not tell what went wrong during day time. At no time did the girl miss school nor tell me she had a headache.”

5. **DW5 L C**

“I come from [particulars withheld] and I am not employed. The accused is my father who was framed with charges herein (cries) by the complainant. I am complainant herein.”

The issues for determination

6. The issues for determination are principally whether on the evidence before the trial court the appellant committed the offence of incest as charged in the main count or that of indecent act as charged in the alternative count.

Determination

7. At the outset, failure to indicate the provision of the law under which an accused is convicted as required by section 169 of the Criminal Procedure Code is curable by section 382 of the Criminal Procedure Code where it is clear of the offence with which he is charged and convicted. In convicting the appellant, the trial court ruled as follows:

“The accused’s defence and that of his witnesses is mainly on the child that was born all saying it could not belong to the [accused]. However, I find the same to be baseless as I am convinced by evidence on record and in particular that of the complainant that she was indeed defiled by her step father who is accused herein. I hence find that the prosecution has proved its case beyond reasonable standard of prosecution and I do hereby convict the accused under section 215 of the Penal Code.”

8. The case presented by the Prosecution was one of incest by a male person contrary to section 20(1) of the Sexual Offences Act, and it was clear that the trial magistrate had convicted the appellant therefor. Section 215 of the CPC is merely the procedural provision for the court’s determination upon full trial of the charge.

9. In accordance with the principle of *Okeno v. R* [1972] EA 32, this court as a first Appellate Court shall re-examine the evidence and form its own conclusions allowing for the fact that it did not see or hear the witnesses testifying before the court.

Offence of Incest.

10. It is quite clear from the evidence that the appellant did not commit the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act as the alleged victim of the offence is a **step-daughter**. A step daughter is not one of the persons the sexual intercourse with whom a male person becomes guilty of incest. Section 22 of the Sexual Offences Act sets out that the persons with whom sexual intercourse counts to incest 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.”

11. Although section 22 of the Act provides for “half-father” the same is unlike “half- brother” or “half-sister” not defined. This Court cannot presume that a **step-father** is a “half father” within the meaning of the Act and that the Statute intended to make an offence for a male person who is such a half father if it means **step-father** to have sexual intercourse with the daughter to whom he is a half father and therefore his step-daughter.

12. Section 20 (1) of the Act under which the appellant was charged is clear as to the offence 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: 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.**”*

13. The appellant and the complainant are not in the father and daughter relationship within the meaning of section 22 and the offence of incest by a male person under section 20(1) of the Sexual Offences Act is not committed.

Voire dire examination

14. The trial court did conduct a *voire dire* and found that the child did not understand the nature of the oath and therefore allowed to give unsworn evidence. The trial court did not however make a finding as to whether the complainant was possessed of sufficient intelligence to justify the reception of her evidence. The examination went on as follows:

“29.10.2015

Coram: Before- Hon. R. Yator –SRM

State counsel – Macharia

Court clerk – Lilian

Accused – Present

Prosecutor – I am ready with two witnesses

Hon. R. Yator – SRM

Accused – I am ready.

Hon. R. Yator – SRM

Examination of minor

Voire dire

What is your name?

M J (M.J)

Where do you come from?

I come from Nakuru

How old are you?

I am 14 years old and I do not recall date of birth.

I am from a rescue Centre

Are you Christian/Muslim?

I am Muslim.

Do you know meaning of taking oath?

I do not know.

Do you go to school?

No. I am not as I left school in 2014 while in class eight and I left school because I went to deliver.

Hon. R. Yator – SRM

Court- I do note that the minor does not possess understanding of oath taking hence shall give unsworn evidence.”

15. Although the trial court should have ruled on the complainant's intelligence before allowing her to give unsworn statement, the appellant was allowed opportunity to cross-examine the complainant and from the evidence in chief, cross examination and re-examination. It is clear that the child was intelligent enough to testify reception of her testimony. Indeed at 14 years of age, the child was on the verge of quitting the tender age bracket where *voire dire* examination is mandatory. The reference to a child of tender years in section 19 of the Oaths and Statutory Interpretation Act is not to be understood in the context of the definition in the Children Act of 10 years but 14 years as indicated in *Kibageny Arap Kolil v. R* (1959) EA 82 and recently followed by the Court of Appeal as *Maripett Loonkomok v R Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015*; *Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014*; *Samuel Warue Karimi v R Court of Appeal at Nyeri Criminal Appeal 16 of 2014*.”

16. The court allowed cross-examination of the complainant who gave unsworn evidence by the accused guaranteed the appellant's the fair trial right to adduce and challenge the evidence adduced against him under Article 50 (2) (k) of the Constitution. I would find that no prejudice was occasioned by allowing the complainant [PW1] to give evidence unsworn after determining that she did not understand the nature of the oath but without ruling on whether she was possessed of sufficient intelligence to justify reception of the evidence.

Hearsay evidence?

17. Section 63 of the evidence act requires direct or oral testimony as follows

“63. Oral evidence must be direct

(1) *Oral evidence must in all cases be direct evidence.*

(2) *For the purposes of subsection (1) of this section, “direct evidence” means —*

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds: Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.”

18. The appellant’s submission that hearsay convicted on the basis of hearsay is, with respect, misconceived. PW1 the complainant had direct evidence as to the events of the sexual assault on her by the appellant on separate incidents in 2013 and 2014. This is not hearsay. As pointed out earlier the paternity of the complainant’s child is not in issue, and whether nurses suggested that child had “Woria” hair and therefore implicating her father, is immaterial.

Did the appellant have Sexual intercourse with the complainant?

19. 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.]”

20. The testimony of the complainant as to the father’s sexual intercourse with her was graphic and detailed as follows:

“It was in 2013 unknown date when I was sick and mother told me I stay at home as I could not go to school and she went to school and I remained behind with father and young children A R and Z C to take care of them. Father then told me he will read me the Quran so I get well and he called me to his bedroom and we were the only two and the other two children were sleeping in the sitting room and it was around 10.00 am.

*I entered the bedroom and he asked me to sit down so he reads me the Quran and he took water and put in a cup saying it was medicine and after reading the Quran he asked me to wash my face with the water which he poured on my face and head and he said if I felt like sleeping I could do so and he asked me to sleep in their bed and while I felt asleep and I felt something getting a hold of me and removing my pant I woke up and wanted to get out of bed and he pushed me against the bed and I told him I wanted to go check on the sleeping children and he then removed his penis and inserted into my private parts. I was on top of the bed and he asked me to cover myself with the blanket and he also entered into the blanket and lied on me and defiled me. He removed my pants when he asked me to sleep so I wake up feeling well. He was wearing a short which he removed half way he removed my legs and placed against his body and he turned me against my back and defiled me. I do not recall if the door was open. I told him he leaves me alone and said I wait he completes and before he defiled me he applied me Armis Milk Jelly against my stomach and privates parts when he defiled. I did not scream but he kept pushing me down. **He then asked me to leave and not tell my mother saying it was my secret and his** and I left him behind in bed. He asked me to go check on the other children and he asked me to prepare water for him to bathe so as to go to work and he then left for work.”*

21. The fact of the complainant’s defilement was discovered when she was in 2015 she went to hospital for treatment of her 8month old child on being asked who had impregnated her she replied that he had sex with one M, a Pokot. When the nurses suggested to her that her child had hair resembling a ‘woria’ or ethnic Somali and could belong to her father, she disclosed that the father had defiled her earlier in 2013 and again in 2014. On re-examination she conceded that she also had another boyfriend called R. It is not inconceivable that the girl did not tell anyone until after it was suggested by nurses in the hospital that the child had ‘woria’ hair and she had confided in the attending Dr. Arafa. She testified that the appellant had asked her not tell her mother as it was their secret.

22. The fact of paternity of the complainant’s child is not in issue in these proceedings, and it may be that her child was sired by any other person other than the appellant. The sole question is whether the appellant ever defiled the complainant, whether resulting in the conception or not.

23. The evidence of the complaint was coherent in the narration of the events leading to the defilement by the father. She remained steadfast in her cross-examination that the father had in pretext of reading the Quran and praying for her applied oil/petroleum jelly to her private parts and defiled her. The apparent profanity of the Quran is appalling.

24. The defence centered on an alleged persecution by one A, alleged Police Officer relative of the complainant’s biological father. See evidence of DW1, DW2, DW3 and DW4. [The complainant herself under a different name was offered a defence witness but the court turned her away as she had already testified for the Prosecution. It may well be that the prosecution of the appellant was pursued by the said A as a relative of the complainant. The question before the court is, however, not the motive of the prosecution but the truth of the charge of defilement. If the appellant defiled the complainant it matters not that the Prosecution therefor could not have happened had the said A not pursued it. Crime must be punished whenever, howsoever, and through whomever it may be discovered or pursued.

25. The question that resolves the issue is why the said A, relative of the complainant’s father would seek the prosecution of the appellant for

an offence that he had not committed. No evidence for the basis of such a grudge leading to the trumped charge was offered. The alleged displeasure that the appellant had married the complainant's mother was not shown as a basis for giving false evidence of defilement but only as reason for the aggressive prosecution of the appellant, not impinging on the truth of the charge.

26. Significantly, however, the complainant was consistent in the statement that the appellant had had sexual intercourse with her on several occasions in 2013 and 2014. She made this statement to Doctor Arafa (PW3), the investigating officer (PW5) and before the court, and she was unshaken in cross-examination. The court had no reason to disbelieve her evidence especially in her candour as to her previous sexual relations with not only the appellant but a pokot boy M in class 6 and another boy named Rodney in class 8. I believe for these reasons that the complainant was telling the truth.

Age of the complainant

27. The fact of the age of the complainant was proved by a clinic card produced by PW4 showing that she was born on 1/8/1998. Although the court had earlier ordered for an age assessment to be done, the same may not have been necessary if there was an available Child Health Card ex. 3. That the appellant's oral statement in defence as DW1 that he had lived with the complainant for 17 years and that he had married the mother when she was 5 years of age is no scientific basis of challenging the entries in the clinic card, which had not been shown in cross-examination to be a forgery and false. The offence was committed in 2013 and 2014 when she was 14 years. Most importantly, the trial court to which this court must defer having seen and examined the girl is found upon *Voire dire* that:

"I do note that the minor does not possess understanding of oath taking hence shall give unsworn evidence."

Conviction on the Alternative Charge of indecent act

28. The evidence adduced by the prosecution and by the defence indicates clearly that the appellant had sexual intercourse with the complainant. The complainant was not a **daughter** but a **step-daughter** and, therefore, the offence of incest cannot be proved. However, as sexual intercourse was proved and the complainant was a child at the time of sexual intercourse at 14 years before August, 2013 and 15 before August, 2014, the sexual offence of defilement was established. The appellant was, however, not charged with defilement but with the offence of indecent act with a child as alternative count in the charge sheet.

29. As the offence of defilement of a child is not a minor offence within the meaning of section 179 (2) of the Criminal Procedure Code, it is not permissible to convict for the offence which although it has been proved was not charged and it carries a more severe sentence. The sentence for defilement of a child between age 12 and 15 years is imprisonment for not less than 20 years imprisonment and it is therefore a more serious offence to the offence of incest under section 20(1) which has a minimum of ten (10) years.

30. The sentence for the offence of indecent act with a child contrary to section 11(1) of Sexual Offences Act is imprisonment for not less than 10 years. As the appellant was charged with the offence of indecent act with a child which is proved, he shall be convicted for the said alternative charge of indecent act contrary to section 11 (1) of the Sexual Offence Act.

Orders

31. Accordingly, for the reasons set out above, the conviction and sentence of the appellant for the offence of incest contrary to section 20 (1) of the Sexual Offences Act is quashed and set aside, respectively.

32. The appellant is now convicted for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, which is in the following terms:

"11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

33. The appellant is, therefore, sentenced to imprisonment for 10 years from the date of conviction and sentence in the trial court.

DATED AND DELIVERED THIS 4TH DAY OF JULY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mwaita H/B for Mr. Salunyi for the Appellant.

Ms. Macharia, Ass. DPP for the respondent.