



**DGW v Republic (Criminal Appeal E029 of 2021)
[2024] KEHC 10613 (KLR) (28 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E029 OF 2021
CJ KENDAGOR, J
AUGUST 28, 2024**

BETWEEN

DGW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence arising in Nyeri Law Courts Sexual Offences case number 49 of 2018 delivered on 12th October, 2022 by Hon. W. Kagendo, C.M)

JUDGMENT

1. The Appellant herein was charged with the offence of incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates between 2015 to 2016 at [particulars withheld] village in Nyeri District within Nyeri County being a male person caused his penis to penetrate the vagina of CW, a female person who to his knowledge his daughter.

In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. Particulars of the alternative charge were that on diverse dates between 2015 to 2016 at [particulars withheld] village in Nyeri District within Nyeri County, he intentionally and unlawfully touched the vagina of CW, a child aged 14 years, with his penis.
2. The Appellant denied the charges, and the case proceeded to trial. The prosecution called four witnesses, and when put on his defence, the appellant testified and called one witness.
3. At the conclusion of the trial, the learned trial magistrate found the Appellant guilty of the main charge, convicted him, and sentenced him to serve five years imprisonment.
4. The Appellant, dissatisfied with the conviction and sentence, filed a petition of appeal, raising seven grounds of appeal:



- i. That the judgment of the Honourable Court failed to consider the fact that the prosecution did not prove their case beyond reasonable doubt.
 - ii. The Honourable Court relied on the evidence of the complainant which was not corroborated and lacked probative value.
 - iii. The evidence by the prosecution was full of contradictions and cannot support a conviction.
 - iv. The degree of proof in a case of indecent assault was not met.
 - v. The Honourable Chief Magistrate failed to consider the evidence of the accused and entire defence.
 - vi. The medical evidence produced was insufficient to support the offence or a conviction.
 - vii. The judgment, conviction and sentence were against the weight of evidence, and the law and the same is excessive
5. The parties relied entirely on their written submissions at the appeal hearing. The appellant submitted that the ingredients of the offence of defilement were not proved, and the prosecution did not discharge the burden of proof.
 6. The appeal has been conceded by the State. Learned State Counsel Ms. Mwaniki conceded that there was insufficient evidence to support the main count.
 7. PW1 testified she was 15 years old and that the appellant was her stepfather. She testified that the appellant would visit and stay with her and her younger sibling, MG, at their Ruringu house while their mother was receiving medical treatment in Nairobi. She testified that she and her brother would sleep in the bedroom, and the appellant would sleep on the couch in the sitting room. She told the court that the appellant would call her through her phone and request her not to lock the main door and that when he got home, he woke her up at night and threatened her with a kitchen knife, removed her nightgown and panty, and proceeded to defile her. It was her testimony that the appellant defiled her six times on varying dates and threatened her in the same way using the same knife. She stated that after the first occurrence, she threw the blood-stained bedsheet away. She was unable to provide specific dates or time periods when the alleged offences were committed against her. She accused the appellant of violence directed at her mother (PW2). She stated that she refrained from confiding in her mother or anyone else due to the appellant's threats against her and her young brother's lives. She also stated that the appellant's presence consistently prevented her from having the opportunity to speak with her mother about the ordeals. According to PW1, she told her mother about the defilement after an argument ensued between them.
 8. PW2 was the complainant's mother. She told the court that she was in a relationship with the appellant and lived together between 2009 and 2018. She testified that she was hospitalized between 21st July, 2015 to 17th September, 2015 following an operation. She stated that she would leave her two children with the appellant when traveling to Nairobi for medical review. According to PW2, she learnt of the defilement incidences when the complainant broke down after an argument and accused the appellant of defiling her severally. She told the court that she escorted the complainant to the police and subsequent medical examination. In cross-examination, PW2 denied that the case was fabricated due to differences between herself and the appellant. She maintained that she had confidence in the appellant when she left the children in his custody.
 9. The clinical officer, PW3, testified on behalf of his colleague who examined PW1. According to PW3, PW1 was examined on 29th November, 2018. He testified that the complainant's hymen was broken,



- although not recently. He stated further that vaginal discharge was noted on examination and produced the post-rape care form and P3 Form.
10. PW4 was the investigating officer. She testified that the offence was reported to Nyeri Central Police Station on 29th November, 2018, and the Appellant was arrested on 7th December, 2018. She stated that she interrogated the complainant, who disclosed to her that the appellant had sexually assaulted her six times, and she concluded that the complainant was truthful.
 11. When the Appellant was placed on his defence, he gave a sworn statement. He denied the charge. He went into detail about the history of his relationship and stated that he had another family and children. At the time they met, PW2 had the complainant. He said that when PW2 was admitted, he only stayed with PW1 and her brother for three days before he took them to their aunt, PW2's sister, to look after them. The thread running through his defence was that they had a strained relationship with PW2 and that he was a victim of a trumped-up charge. According to the appellant, he was arrested around the time when he was receiving his pension after being laid off from Telkom, which he believes was the main reason for the alleged fabrication of the charge. DW2 corroborated DW1's testimony on the strained relationship between DW1 and PW2. He also stated that he used to work with the appellant at Telkom, maintaining cables, which involved extensive patrolling and travelling.
 12. As the first appellate court, I am duty bound to re-evaluate, re-examine and re-assess afresh the evidence tendered before the trial court to arrive at an independent conclusion or determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to assess their demeanour. These principles are laid out in *Okeno and Another v. Republic* (1972) E.A 32.
 13. The appellant was charged with an offence of incest by a male person contrary to section 201(1) of the *Sexual Offences Act* and, in the alternative, charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. I have considered the grounds of appeal herein against the record of appeal and submissions of both parties. The prosecution was required to establish the following ingredients: -
 - i. The relationship between the victim and the perpetrator;
 - ii. The age of the victim;
 - iii. Whether there was penetration;
 - iv. Whether the perpetrator was identified and linked to the offence.
 14. Section 22 of the said *Act* identifies the test of relationship in the following manner;

“In case of the offence of incest, brother and sister include half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and uncle of the first degree, and a mother includes a half-mother and an aunty of the first degree whether through lawful wedlock or not.”
 15. On the relationship, it is not disputed that at the time of the alleged defilement, the appellant was married to PW2, the complainant's biological mother. They lived together and had one child together; the appellant was the complainant's stepfather, and the appellant conceded to this in his evidence.
 16. Is a stepfather considered a father under section 20(1) of the *Sexual Offences Act*? The Court of Appeal addressed this question in the case of *LOA v Republic* [2020] eKLR;

“The appellant submits that being a stepdaughter, she was not his daughter. That a stepdaughter is not one of the persons with whom a male person is guilty of incest if found to



have had sexual intercourse with. On the other hand, the respondent takes a contrary view; that a step-daughter is just as good as a daughter as she is among the persons whom a parent is prohibited from having sex with. Section 22 of the *Sexual Offences Act*, sets out the persons with whom having sex with will amount to incest. These are brother, sister, half-brother, half-sister, adoptive brother and sister, father, half-father, uncle of first degree, mother and mother and an aunt of the first degree. No doubt the appellant was PW1's half-father and or stepfather. Therefore, the two having sex was incestuous."

17. The relationship between the appellant and the complainant, therefore, falls within the definitions provided for under Section 22 of the *Sexual Offences Act*; the two having sex would be incestuous.
18. Regarding whether the complainant's age was proved, the prosecution produced the complainant's Birth Certificate, indicating she was born on 28th February 2004. I am thus satisfied that the complainant was a minor at the time of the incident complained of.
19. On whether there was penetration, the incidents complained of were alleged to have occurred on diverse dates between the years 2015 to 2016. The medical examination was conducted in November 2018, given the period between the incidents and the examination, there was no forensic evidence to support penetration.
20. Proof of penetration is required in proving a sexual offence, but it need not be proven solely by medical evidence. In the case of *E.E v Republic* [2015] eKLR, the court expressed itself on the question of penetration as follows;

"Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In *Bassita Hussein v Uganda*, Supreme Court criminal appeal No. 35 of 1995",

The court stated:-

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's oral evidence and corroborated by medical evidence or other evidence."

21. In this case, the trial court convicted the appellant based on the complainant's evidence. Under Section 124 of the *Evidence Act*, a court can convict based on the evidence of the victim alone in sexual offences. The critical question is whether the complainant was truthful and if the evidence, considered as a whole, points to the appellant as the perpetrator.
22. The complainant claimed to have been sexually assaulted around 2015 and 2016. There was no attempt to estimate dates, months, or descriptions that would have clarified when the incidents occurred. It wasn't until 2018 when the case was reported. It is also clear that the relationship between PW2 and the appellant had deteriorated around the same time. According to the prosecution witnesses, the incident was reported following an argument between PW2 and her daughter, the complainant. PW2 stated that, as a result of the argument, she had threatened to hit the complainant with an iron box. The complainant then went on her knees and told PW2 that she wanted to report what had transpired during her absence while receiving medical attention. These circumstances raise questions as to why the complainant did not report the defilement earlier despite the passage of time and chose to make the complaint at that specific time. The defence of victimization because of the hostility between the



appellant and PW2 cannot be ignored, given that there is evidence, including from the complainant, that she would take sides during their conflicts.

23. Even though a court has the power to convict under Section 124 of the *Evidence Act*, this section should be applied with the utmost care and only be used when the victim's evidence is absolutely clear and without any doubt. This provision cannot be relied upon to save a weak prosecution case. It is not intended to evoke sympathy.
24. Whereas innumerable witnesses need not be called to prove a case, some require the prosecution to call additional witnesses to dispel any doubt. In this case, there were glaring loopholes, and witnesses were mentioned but not called; one, Grace, who is stated to have been assisting in taking care of the complainant and her brother, is such a witness. This case required the court to exercise caution in relying on the complainant's sole testimony.
25. The lower court record shows that the Office of the Director of Public Prosecution (ODPP), through the Prosecution Counsel, addressed a letter dated 8th December 2020 indicating that they had considered the evidence and opined that it was insufficient evidence to prove criminal culpability. As the respondents in this case, they conceded to the appeal. The letter and submissions were based on concerns about a potential miscarriage of justice due to doubts about the commission of the offence. It is imperative that the court process is never manipulated or exploited for the purpose of settling personal scores.
26. I am satisfied that the prosecution's evidence did not meet the threshold of proving the case beyond reasonable doubt. Accordingly, the appeal is allowed, the conviction quashed, and the sentence set aside.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28TH DAY OF AUGUST 2024.

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C. KENDAGOR
JUDGE

In the presence of:

Court Assistant: Hellen

ODPP: Mr. Mwakio

Appellant: DGW

Appellant's Advocate: Mr. Gikunda

