



**AOO v Republic (Criminal Appeal E077 of 2022)  
[2024] KEHC 11359 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E077 OF 2022  
AC MRIMA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**AOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon. Kassim Akida (RM) in Kitale Chief Magistrate’s Court Criminal Case (S.O.) No. 0217 of 2021 delivered on 27th October 2022)*

**JUDGMENT**

**Background:**

1. AOO, the Appellant herein, was charged with the offence of Incest contrary to Section 20(1) of the [Sexual Offences Act](#), No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between 1<sup>st</sup> January 2018 and 30<sup>th</sup> July 2021 at [particulars withheld] within Trans-Nzoia County being a male person, you internationally caused your penis to penetrate the vagina of G.O.O., a child aged 16 years who to your knowledge is your daughter.
3. The Appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars of the alternative charge were that on diverse dates between 1<sup>st</sup> January 2018 and 30<sup>th</sup> July 2021 at [particulars withheld] within Trans-Nzoia County being a male person, you internationally caused the contact between your genital organ namely penis and the genital organ vagina of G.O.O a child aged 16 years who to your knowledge is your daughter.
5. A total of four witnesses testified for the Respondent. The Complainant, G.O.O, testified as PW1, Dr. Racheal Muyira, a Dentist at Kitale County Referral Hospital testified as PW2. Nelson Lusiola, a



Clinical Officer at Kitale County Referral Hospital testified as PW3. No. 853669 CP Toya Cheron, the investigating Officer, testified as PW4.

6. At the close of the prosecution's case, the Appellant was placed on his defence. He solely testified and gave sworn testimony.
7. Upon considering the entirety of the case, the trial Court found the Appellant guilty of the main offence of incest. He was convicted and sentenced to 20 years imprisonment.

### **The Appeal:**

8. The Appellant was dissatisfied with the conviction and sentence. Through Grounds of Appeal dated 11<sup>th</sup> November 2022, he urged this Court to quash the conviction and to set aside the sentence on the following basis: -
  1. That the learned trial magistrate erred in law and fact by convicting the appellant when the prosecution failed to prove their case beyond reasonable doubt.
  2. That the learned trial magistrate erred in law and fact in convicting the appellant when the essential ingredients of penetration was not proved to the required standard.
  3. That the trial learned magistrate erred in law and fact in convicting the appellant when the medical evidence did not confirm to the trial court that it is the appellant who had penetrated the victim.
  4. That the learned trial magistrate erred in law and in fact in convicting the appellant when there was nothing put before the trial court to suggest the appellant was responsible for the pregnancy.
  5. That the learned trial magistrate erred in law and fact by failing to draw an adverse inference against the prosecution for the failure by the prosecution to avail crucial witnesses.
  6. That the learned trial magistrate erred in law and fact by failing to warn itself on the danger of convicting on uncorroborated testimony of sole witness.
  7. That the learned trial magistrate erred in law and fact by relying of the testimony of the victim without being satisfied that she was telling the truth.
  8. That the learned trial magistrate erred in law and fact by failing to find that the victim was untruthful.
  9. That the learned trial magistrate erred in law and fact failing to ensure that the court remained impartial during the course of the entire proceedings and judgment.
  10. That the learned trial magistrate erred in law and fact as he placed reliance on matter not presented before the court as evidence and not on court record.
  11. That the learned trial magistrate erred in law and fact by basing his Judgment on inconsistent, incredible, contradictory and unreliable evidence of the prosecution witnesses.
  12. That the learned trial magistrate erred in law and fact by admitting his judgment that there were gaps and failing to resolve the said gaps in favour of the Appellant.
  13. That the learned trial magistrate erred in law and fact in convicting the Appellant on total disregard of the Appellant's defence without cogent reasons.



14. That the learned trial magistrate erred in law and fact and misdirected himself in failing to consider the alternative count.
15. That the learned trial magistrate erred in law and fact in ignoring all facts which pointed to the innocence of the Appellant.

#### **The Submissions:**

9. The Appellant filed written submissions dated 11<sup>th</sup> July 2023. He largely argued his grounds of appeal. It was his case that there were a lot of contradictions and inconsistencies in the prosecution's case that created a lot of doubt as to whether the offence occurred.
10. The Appellant relied on Charles Wambura -vs- Republic (2006) eKLR where it was observed that contradictions cannot be ignored.
11. It was submitted further that since DNA was not done to confirm paternity of the child, the trial Court ought to have made a finding the offence of defilement was not proved beyond reasonable doubt.
12. In reference to the evidence of the Clinical Officer, the Appellant submitted that since he stated that it was not possible to have normal genitalia where a minor is said to have been defiled and that her hymen was broken, there was no connection between him and the offence he was charged with.
13. The Appellant submitted that the failure by the prosecution to call witnesses including the Complainant's teachers was a fatal mistake to their case.

#### **The Respondent's case:**

14. The Respondent challenged the Appeal through written submissions dated 9<sup>th</sup> May 2023. It was its case that even in the absence of penetration the offence of defilement could be established.
15. The decision of the Uganda Supreme Court decision in Bassita Hussein -vs- Uganda was relied upon where it was observed that the aspect of sexual intercourse can be proved by both direct and circumstantial evidence.
16. The Respondent reiterated that the evidence of PW2 and PW3 established the aspect of penetration. It was its argument that there is no legal requirement to prove penetration through DNA examination.
17. The Respondent referred this Court to Evans Wanjala Wanyonyi -vs- Republic (2019) eKLR where it was observed that an essential ingredient in the offence of defilement is penetration and not impregnation.
18. It was submitted that penetration was adequately proved based on victims' evidence and the medical evidence and it was not necessary to have paternity test.
19. As regards the claim that failure to call crucial witness damaged their case, the Respondent submitted that the uncalled witnesses could not have added value to their case.
20. In conclusion, it was its case that it had established its case by proving all the elements of the offence beyond reasonable doubt.

#### **Analysis:**

21. This being a first appeal, this court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74).



22. Similarly, in Criminal Appeal No. 280 of 2004 Odhiambo -vs- Republic (2005) 1 KLR, the Court of Appeal held that: -

On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion.

23. Further to the foregoing, this Court, in the processes of re-assessing the evidence, is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

24. As this Court embarks on discharging the above duty, it is necessary to appreciate the terms in which the *Sexual Offences Act* creates the offence of incest.

25. Section 20(1) of the said Act provides as follows;

Incest by male persons

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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

26. It is apparent from the foregoing provision that the ingredients of the charge of incest are mainly the following: -

- i. Age of the victim;
- ii. Penetration;
- iii. Identification of the perpetrator; and
- iv. Relationship between the victim and the assailant.

27. A consideration of the issues follows in seriatim.

#### **Age of the victim:**

28. The age of the victim in cases of incest has a bearing in sentencing. Under Section 20 of the Act, if the victim is a minor, then the assailant is liable to life imprisonment whereas if the victim is an adult, the assailant should be sentenced to a minimum of 10 years in jail.

29. In this case, the age of the complainant was proved by an Age Assessment Report. PW2 assessed her age at 16 years old.

30. The complainant was, therefore, a minor in law at the alleged time the offence as committed.



### **Penetration:**

31. Section 2(1) 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.”
32. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.... (emphasis added).
33. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
34. The issue of penetration herein ought not to call for any contestation. I say so for two reasons. The first reason is that the victim/complainant [who testified as PW1] was medically ascertained by PW3, the Clinical Officer, to be 3 months’ pregnant and that her hymen was old torn.
35. The other reason is that the evidence by the PW1 to the effect that she had, on several occasions, had sexual intercourse with a male was not controverted.
36. This Court, therefore, finds that PW1 was sexually penetrated by a male genital organ thereby resulting to getting pregnant.

### **The Perpetrator:**

37. One of the paramount issues for determination in this appeal is whether the Appellant was rightfully identified by recognition as the assailant. The identity of an assailant in criminal trials remains one of the most cardinal aspects of the justice system. It is, of course, premised on the fact that the person faced with the criminal offence denied committing the alleged offence.
38. Identification of assailants in law comes in many ways. In this case, the Appellant was identified by way of recognition and by only one witness, PW1. The law relating to identification by a single witness is by now well settled.
39. The Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -
  13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, “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.” Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi vs Republic* [1986] KLR 198:
    1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single



witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
  3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
  4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In *Mailanyi v Republic* (supra), the Court emphasized that:

What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....

There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

40. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

41. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal stated as under: -

.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.



42. In *Anil Phukan vs. State of Assam (1993) AIR 1462* the Court held as follows: -

A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

43. The identifying witness in this matter was the complainant, PW1. She was subjected to a voir-dire examination and from her response, she understood the importance of telling the truth and the consequence of telling falsehood.

44. In her evidence, she stated that in the year 2018, she lived with her father, the Appellant, at Kibomet with her siblings G, S, D and E. That the Appellant would come at night, send her siblings away and would then sexually assault her and that if she refused he would use force.

45. PW1 narrated what used to happen. That, the assailant would take his penis and insert it in her vagina. PW1 never shared the incident with anyone since the Appellant threatened her.

46. It was further her evidence that in 2018, the Appellant had sex with her severally but did not do so in the year 2019 and 2020 since her elder brother had finished High School and was always home.

47. PW1 went on to state that on 1<sup>st</sup> June 2021, she had finished eating her food and went to bed. That, the Appellant went to her bed, removed his clothes and remained with only his vest and an innerwear. The Appellant then forcefully removed PW1's underwear and forced his penis into her vagina.

48. It was PW1's testimony that after the ordeal, she started changing behaviour in school and her teacher by the name Beatrice noticed it and asked what was wrong. She declined to disclose for fear of her father. When she went home, PW1 confided in neighbour, Hellen who had visited.

49. PW1 was then able to disclose to Teacher Beatrice the ordeal she had been undergoing for such a long time. The teacher promised to find a safe place for her.

50. There is no doubt PW1 knew the Appellant who was her father. The Appellant did not deny such. Therefore, the possibility of mistaken identity is eradicated.

51. The trial Court heard PW1 testifying. It observed her demeanour. The Court then assessed PW1 as follows: -

.... The girl spoke for herself. At no particular point did she appear to say what she was told to say by any person other than her conscience. She appeared sad that she had to tell a story of her father not as her protector but as her predator and tormentor. She explained in detail how on various occasions the accused defiled her .... whenever he had the opportunity to...

52. The Appellant tendered his defence. He denied committing the offence. He claimed that PW1 ran away from home after he punished her for damaging the television.

53. This Court has considered the defence. To this Court, the defence is unable to discredit PW1's evidence. The defence is also uncorroborated. This Court finds PW1 to have been a truthful witness and hereby believes her evidence.

54. The Appellant, however, contended that the prosecution ought to have undertaken a DNA test of the child born by PW1 as to confirm that he was the father of the child. The argument appears to be sound, but this Court does not hold to such. That is because although undertaking the DNA Test in the circumstances of a matter as the instant one would prove the offence, unfortunately that is not the only available way in law. Further, dictates of Section 2 of the *Sexual Offences Act* as appreciated against



the principles espoused by the Court of Appeal in Mark Oiruri -vs- Republic [2013] eKLR do not place such a burden on the prosecution.

55. There was also a claim by the Appellant that the prosecution did not call certain crucial witnesses of significance to this case as to prove that he was the assailant. Besides, the Court of Appeal in Criminal Appeal No. 31 of 2005, Julius Kalewa Mutunga -vs- Republic stating that such decision is within the discretion of the prosecution, the Court further observed as follows: -

.... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

56. Drawing from the above, this Court finds that none of the contentions raised by the Appellant on this issue hold.
57. This Court now finds and hold that the identification of the Appellant by way of recognition by PW1 was without error.

#### **Relationship between the victim and the assailant:**

58. This limb of the offence was not in contest. The evidence presented was that the Appellant was the father of PW1.
59. The Appellant did not challenge that fact. He was in concurrence. Therefore, the relationship between PW1 and the Appellant was within the confines of Section 20 of the *Sexual Offences Act*.
60. Therefore, having considered all the grounds challenging the conviction, this Court finds that none is in favour of the Appellant. As such, the Appellant was properly convicted and the appeal on conviction lacks any legal leg to stand on.

#### **Sentence:**

61. The Appellant was sentenced to 20 years' imprisonment.
62. Section 20 (1) of the *Sexual Offences Act* provides as follows: -

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.

63. Being cognizant of the recent decision by the Supreme Court of Kenya in *Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi*, the Appellant was liable to be sentenced to life imprisonment as provided for in Section 20(1) of the *Sexual Offences Act*.
64. In exercising its discretion in sentencing, the Court received the Appellant's mitigations and also called for a Pre-Sentence Report.



65. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
66. Having considered the sentencing proceedings, this Court does not find how the Court erred in the sentencing process. The discretion was exercised judiciously and the contention against sentencing cannot stand. Further, given the circumstances in this case, the sentence rendered was indeed lenient.
67. The appeal on the sentence, therefore, also fails.

**Disposition:**

70. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
71. Consequently, the following final Orders hereby issue: -
  - a. The Appeal is wholly dismissed.
  - b. The file is hereby marked as CLOSED.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually in the presence of:**

Mr. Wekhuyi, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

