



**JSW v Republic (Criminal Appeal E073 of 2023)
[2024] KEHC 11450 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E073 OF 2023**

**DK KEMEL, J
SEPTEMBER 30, 2024**

BETWEEN

JSW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of Hon. J.O Manasses R.M in Sirisia Principal Magistrate’s Court Sexual Offences Criminal Case No. E035 of 2021 dated and delivered on 7th October 2023)

JUDGMENT

1. This is an appeal against the Appellant’s conviction and sentence of life imprisonment for incest under Section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the Appellant on diverse dates between 10th December 2020 and 9th January 2020 within Bungoma County, being a male person, caused his penis to penetrate the vagina of PC a female aged 4 years and 8 months who was to his knowledge his daughter.
2. He also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the Appellant on diverse dates between 10th December 2020 and 9th January 2020 within Bungoma County intentionally and unlawfully touched the vagina of PC a female aged 4 years and 8 months.
3. The Appellant’s appeal is on the following grounds:
 - i. That the learned trial magistrate erred in law and facts by failing to appreciate the facts and applicable law thereby making a wrong decision.
 - ii. That the learned trial magistrate erred in law and fact by proceeding with the case in a language foreign to the Appellant, which he did not understand thereby making a wrong judgement.



- iii. That the learned trial magistrate erred in law and fact by failing to identify the ingredients of the alleged offence and/or issues for determination thereby make a wrong conclusion.
 - iv. That the learned trial magistrate erred in law and fact by shifting the burden of proof thereby made a wrong judgement.
 - v. That the learned trial magistrate erred in law and fact by admitting and relying on the evidence of doubtful witnesses hence arriving a wrong finding.
 - vi. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of the evidence thereby making a wrong decision.
4. The role of this Court in its appellate jurisdiction is to review all the evidence and to make its own conclusions being careful to note that it did not itself hear the testimony or see the demeanour of witnesses. See (Okeno v R [1972] EA 32).
 5. The brief facts are that PC, testified as PW1 vide a next friend in the name of LM, a children officer based at Bungoma West as the complainant who was of tender age. She testified that the complainant recalled on 10th December 2020 at unknown time her mother had differed with the Appellant herein (her step father) and that she left in a huff leaving her behind with the Appellant herein. She testified that she was defiled by the Appellant herein and that she sustained injuries on her private parts. That her mother returned the following day and found her in pain and on interrogating her she divulged that the Appellant had defiled her and that she felt immense pain in her private parts. That she was rushed to Kaptama Health Centre for treatment but was referred to Sirisia Sub-County Hospital due to the extent of her injuries. At Sirisia Sub-County Hospital, she was referred to Moi Teaching Hospital and Referral Hospital at Eldoret for further treatment and that she stayed there for some time. That she had to undergo reconstructive surgery of her vagina due to fistula issue and after recovery she was discharged. That she was able to identify the perpetrator as the Appellant in the dock. On cross-examination, she referred to the Appellant as her father and that it was him who defiled her and that she was not re-counting what her mother had stated.
 6. PW2 was CNW who testified that PC is her daughter and that the Appellant herein was her husband. According to her, on 10th December 2020 at around 11.00 am, she was subjected to domestic violence by the Appellant herein prompting her to run away in efforts to save her life. She left him with her two children, , and proceeded to the home of a village elder to seek shelter. On 11th December 2020, on the advice of the village elder she returned home and proceeded to seek medical attention. According to her, she directed one Lenah to go and pick her daughter as she went with her son. She later on received a call from the biological father of her daughter alerting her that she had been defiled and had been rushed to Eldoret for treatment. On cross-examination, she identified the Appellant as her husband and noted that the Appellant was not the biological father of her daughter.
 7. PW3 was BCW, who testified that he is the biological father of the complainant herein and that on 10th December 2020, at 1500hrs he received a call from his cousin, L, telling him that he should go home and check on his daughter whom she was living with. He quickly proceeded to her house and was shown the private parts of his daughter, who was complaining to be in pain and not feeling well. He was not aware of what the problem was and so they took her to Kaptama Health Centre the next day where they were referred to Sirisia Sub-County Hospital where they were again referred to Bungoma Referral Hospital where they were subsequently referred to Eldoret Moi Teaching and Referral Hospital. He told the Court that he was advised to look for the mother of the complainant as she had been defiled. He reached out to PW2 who came to the hospital. He told the Court that the Appellant is responsible



for what happened to his daughter and that he knows him very well. On cross-examination, he told the Court that he is the biological father of the complainant but that the Appellant lived with her.

8. PW4 was Mr. Paul Wamalwa who testified that he is a clinical officer attached to Sirisia Sub-County Hospital. According to him, he was in Court to produce the complainant's medical treatment notes from Kaptanai dispensary, Sirisia Sub-County Hospital dated 14TH January 2021 and 18th February 2021 respectively. He also had the discharge summary from Eldoret Moi Teaching and Referral Hospital dated 18th January 2021 and P3 form dates 25th March 2021. He told the Court that the complainant, aged 4 years then, was presented to their facility with a history of passing stool through the vagina and difficulty in walking; that this was a result of defilement by a person well known to her. On examination, he observed that her hymen was broken, presence of fecal matter on the vagina as well as communication between the vagina wall and rectum. Further, he observed that there were lacerations on the anal canal. They administered painkillers and antibiotics to the complainant and referred her to Eldoret for further analysis and medication. He told the Court that she underwent rectal vaginal fistula repair while at Eldoret. It was his finding that the 4-year-old complainant was defiled as result of the sustained rectal vaginal fistula and he gauged her injuries as grievous harm. He produced in Court several exhibits inter alia; the treatment notes from Sirisia Sub-County Hospital as PEXH.1; Complainant's outpatient card from Bungoma County Referral Hospital as PEXH.2; Discharge summary from Eldoret MTRH as PEXH.3; P3 Form dated 25th March 2021 as PEXH.4; Treatment notes from Kaptanai Dispensary as PEXH.5. On cross-examination, he told the Court that no medical examination was conducted on the Appellant as he was never presented to their facility.
9. PW5 was No. 235878 PC Samwel Oyoo who testified that he was the investigating officer in this matter. According to him, on 3rd January 2021 while at Nawela Police Post, he received a report wherein the Appellant herein was a suspect in a defilement case and in which the complainant was the victim. He commenced investigations by visiting the scene but he did not find the Appellant. He established that he had relocated to Kiambu County but they were able to track him down with the help of PW3. He later received a tip-off that he had been spotted at Kona shopping Centre and that he proceeded there and met him and that after introductions he requested that they proceed to Namwela Police Post for interrogation to which he complied. On 18th October 2021, he proceeded to charge him with the offence of incest as he was living with the complainant as a father even though not her biological father. On cross-examination, he stated that he did not involve the area chief or clan elder in the appellant's arrest.
10. Upon the close of the prosecution's case, the Appellant was found to have a case to answer and that he opted to tender an unsworn statement but later changed his mind and elected to remain silent in defence.
11. Vide Court directions issued on 12th February 2024, the appeal was to be canvassed by way of written submissions. Both parties have duly complied.
12. This being the first appellate Court, its duty is to reconsider and re-evaluate the evidence adduced before the trial court and make its own conclusions. It should however give regard to the fact that it has neither seen nor heard the witnesses. See: Kisumu Criminal Appeal 28 of 2009 David Njuguna Wairimu v Republic [2010] eKLR where the Court of appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

13. The issues arising for determination based on the grounds of appeal are as follows:
 - a. What are the ingredients for proof of incest and whether incest was proved in the instant case?
 - b. Whether the sentence was lawful and proportionate
14. Section 20 of the *Sexual Offences Act* deals with incest by males. It 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.
- (3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.”

15. The charge sheet in this case specified the offence as “incest contrary to Section 20(1) of the *Sexual Offences Act*”. At the conclusion of the trial, the trial Magistrate Court found and concluded as follows:

“...There are no glaring doubts per se on the Prosecution evidence. The witnesses were consistent and credible and degree highly probable in my view.

The said evidence is copious, overwhelming and compelling as well as of stubborn nature and resolve which resolve must benefit the victim and indeed the prosecution.

For this reason, I find the accused person JSW guilty of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 and do hereby convict him accordingly.”



a. What are the ingredients for proof of incest and whether incest was proved in the instant case?

16. The ingredients for the offence of incest are:
- (i) Proof that the offender is a relative of the victim.
 - (ii) Proof of penetration or indecent Act.
 - (iii) Identification of the perpetrator.
 - (iv) Proof of the age of the victim.
17. On the first ingredient, the evidence of the complainant was that the Appellant was her “baba” and at the material time, she was living with him. Her mother, PW2, further expounded on the actual relationship stating that the Appellant was the complainant’s stepfather. In cross examination, she insisted that the Appellant was her father and that she was living with him.
18. To understand whether indeed the degree of consanguinity contemplated under Section 20 of the *Sexual Offences Act* was established, reference is made to Section 22 of the Act which provides that:
- “22(1) In cases of the offences 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 ...”
19. Further, sub-section (3) reads:
- “22(3) A accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.”
20. In this case, the complainant testified that the Appellant was her “baba”, with her mother (PW2) testifying that he was her stepfather and that the complainant’s biological father is PW3. It is common knowledge that although Section 22 does not use the word stepfather, the phrase half father refers to a stepfather. Hence, by being a stepfather to the complainant, the Appellant’s relationship with the complainant fell within the prohibited degree of consanguinity contemplated under Section 20 and 22 of the Act.
21. I do, in the circumstances, align myself with Court of Appeal decision in Mombasa Criminal Appeal No. 223 of 2009- BNM v Republic [2011] eKLR. The Court held thus:
- “Does this fact that no biological or blood ties exist between the two negate a charge of Incest? The answer is to be found in section 22 of the *Sexual Offences Act* which deals with ‘Test of relationship’. S. 22(1) provides as follows:
- “22(1) In cases of the offences 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 ...”
22. My own understanding is that ‘half father’ is a term which means exactly the same as ‘step-father’ – it means one who is not a biological father of the child. Therefore, by dint of this Section 22(1) of the



Act, the Appellant being a step-father of the complainant and one who stood in 'loco parentis' can legally be charged and indeed convicted of the crime of Incest with her.

23. In her evidence, the complainant vide her next of friend made a brief statement in which she said that her 'baba' whom she positively identified in Court defiled her causing her to sustain injuries on her private parts
24. On proof of penetration or indecent act, the evidence of PW1 was that the Appellant had carnal knowledge of her, implying there was penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as;

“the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
25. PW1 testified that the Appellant defiled the complainant on 10th December 2020 just when her mother left her behind with her step-father after their disagreement. On cross-examination, the complainant referred to the Appellant as “baba Jacob” and stated that the Appellant defiled her and that she was not told by PW2 to say that. PW4, Mr. Paul Wamalwa, a clinical officer who filled PW1’s P3 Form testified that upon examination, there was broken hymen and fecal matter on the vagina as well as communication between the vagina wall and rectum. Further, he observed there were lacerations on the anal canal. His prognosis was that the complainant was defiled and that her injuries were of grievous harm.
26. The examination by PW4 was done on 18th February 2021 whereas the offence was allegedly committed on 10th December 2021 while the P3 form was filled on 25th February 2021. Hence, examination was done two months and eight days after the offence. This sealed the case that PW1 was indeed speaking the truth. The sustained rectal vaginal fistula, anal canal lacerations and a vagina reconstructive surgery were signs that carnal knowledge had definitely taken place.
27. The Appellant submitted that the learned trial magistrate erred in relying on contradicting evidence of PW1 and PW2 and the fact that the minor at the time of the hearing was five years old was still not allowed to speak in Court. He submitted that it was only upon the Court to declare the complainant a vulnerable witness that the Court can resort to directing that the witness render evidence vide an intermediary and not the prosecution. (Section 31 (5) of the [Sexual Offences Act](#)).
28. On 15th February 2022, it is clear from the lower Court record that the Court on the subsequent request of the Prosecution instructed that the children’s officer from Sirisia children’s office act as guardian ad litem in favour of the complainant herein. The Appellant’s advocate submitted that the process of the complainant testifying through the children’s officer as an intermediary did not materialize.
29. [The Constitution](#) of Kenya under Article 53(2) and Section 4(1)(2) of the Children’s Act does provide for the concept of the best interests of the child as a factor to consider in making a decision affecting children. It is therefore one of the foundation stone through which the corpus of our jurisprudence has been developed.
30. Under the provisions of Section 31(1) of the [Sexual Offences Act](#) was erroneous. Section 31(2) of the [Sexual Offences Act](#) provides as follows:-

“The court may on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of?



- a. Age;
- b. Intellectual, psychological or physical impairment
- c. Trauma;
- d. Cultural differences;
- e. The possibility of intimidation;
- f. Race;
- g. Religion;
- h. Language;
- i. The relationship of the witness to any party to the proceedings;
- j. The nature of the subject matter of the evidence; or
- k. Any other factor the court considers relevant."

31. Section 2 of the *Sexual Offences Act* defines an intermediary as?

“a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker”.

32. In this case, on the request of the Prosecution, the children's officer from Sirisia was directed to testify as an intermediary. Under the provisions of Section 31(7) of the *Sexual Offences Act*, an intermediary's role is to convey the substance of any question to a vulnerable witness, inform the Court at any time that the witness is fatigued or stressed and to request the court for recess.

33. The Court of Appeal in the case of *MMV Republic* [2004] eKLR stated as follows regarding the procedure of appointing an intermediary and his role-

“The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness. The expertise, possession of special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness. The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The Trial Court must then give directions to delineate the extent of the intermediary's participation in the proceedings.”



34. In this case, it is apparent that the trial Court did follow the correct procedure in receiving the evidence of PW1 in her perceived role as an intermediary after it declared PC a vulnerable witness under the provisions of Section 31(1) of the *Sexual Offences Act*. PC did not to give evidence due to her tender age of 4 years. In the said circumstances, the children’s officer from Sirisia who testified as PW1, gave evidence on behalf of the complainant. She did play the role of an intermediary. This Court’s finding is that the trial Court was proper on the adoption of the evidence of the guardian ad litem as an intermediary as the complainant was a vulnerable witness.
35. It is almost obvious that sexual assault cases especially those involving minors are committed in exclusion of eye witnesses. That is why the law came to the aid of these vulnerable victims by dint of the proviso to Section 124 of the *Evidence Act*. The same reads:
- “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth” (emphasis added).
36. The proviso stipulates that a Court can convict an accused person in a sexual assault cases where the minor is the victim solely on the victim’s evidence as long as the Court believes that the minor is speaking the truth. The learned trial magistrate did believe the evidence of the minor. This Court too, has no reason to doubt that she told the truth. She did not condone the acts of the Appellant as she spoke immediately she was able to that she was assaulted. As fate had it, the medical evidence capped it that she was indeed sexually assaulted. It is also clear that the Appellant took advantage of the fact that he had been left to take care of the complainant after a marital discord with his wife that led to her seeking shelter elsewhere. Instead of cementing the trust bestowed on him, he turned the beast and defiled his daughter.
37. I need not therefore emphasize that the Appellant’s identification was by way of recognition. He was a person well known to the complainant and besides, a relative. The Appellant was indeed the complainant’s step-father.
38. The age of a victim in a case of incest is paramount in view of the sentence as prescribed under Section 20(1) of the *Sexual Offences Act*. The Court of Appeal in *Kaingu alias Kasono v R* CR Appeal No. 54 of 2010 handed down a powerful Judgment on this issue:
- “Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.”
39. To those urgings, the same Court in *Richard Wabome Chege v R (CR Appeal No. 61 of 2014)* held that:
- “On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate, but also by the parent or the doctor who examined the complainant.” (See also *Francis Omuroni v Uganda* CR Appeal No. 2 of 2000)
40. In the instant case, the fact of the matter is that the complainant told the Court that he was five years old at the time of rendering her testimony and the available medical record like the Kaptanai Dispensary patient record stipulated her age as four years and so did the NHIF record book as provided by Sirisia



sub-County Hospital. It is clear, that by the Court using the evidence of PW1 as the admitted credible evidence on exact age of the complainant at the time of the incident and the availed medical notes to confirm that as of 10th December 2020, the complainant herein was indeed within the range of four years. In any event, whether the age was four or five years, there was no prejudice suffered since the complainant fell within the age bracket of less than eighteen years for purposes of sentencing.

41. I therefore refute the Appellant's submissions that the age of PW1 could only be proved by way of presentation of a birth certificate in Court.
42. I therefore conclude that the prosecution proved its case beyond any reasonable doubt. The conviction of the Appellant was based on cogent evidence adduced by the prosecution and i uphold it.

b. Whether the sentence was lawful and proportionate

43. On sentence, Section 20(1) of the [Sexual Offences Act](#) provides that:

“(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 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.”

44. This provision is couched in mandatory terms such that a trial Court cannot exercise discretion by deviating from the sentence provided. Indeed, the complainant was aged below five years and a minor at that. The complainant sustained severe injuries as her vaginal wall as well as rectal wall were damaged as a result of the defilement and had to undergo several reconstructive surgery. She suffered great bodily and mental anguish and that she has been scarred for life. She has to contend with a fistula for the better part of her life. She did not deserve to have her life ruined at that young and vulnerable age. The Appellant who was the girl's step- father was expected to protect her but he instead turned into a monster. It seems he was trying to seek revenge against his wife who had left him following a disagreement. Of course, the hapless complainant had nothing to do with the disagreement between the Appellant and her mother and thus did not deserve to be sexually assaulted. No evidence came out to the effect that the Appellant had been framed for the offence. The Appellant thus deserved a stiff sentence in the circumstances. I find the sentence imposed to be proper in all respects. Hence, I find that the learned trial magistrate rendered a legal sentence as per the law and i see no reason to interfere with it.
45. In view of the fore going observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. I uphold the conviction and sentence of the trial court.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024

D. KEMEI

JUDGE

In the presence of



No appearance for Appellant

Nyongesa for Appellant

Miss Kibet for Respondent

Kizito Court Assistant

