



REPUBLIC OF KENYA



**AK v Republic (Criminal Appeal E066 of 2020)
[2024] KEELC 6113 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E066 OF 2020
HI ONG'UDI, J
SEPTEMBER 25, 2024**

BETWEEN

AK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment delivered by Hon A. Mukenga, Senior Resident Magistrate on 9th September, 2022 in Molo Chief Magistrate's Court Sexual Offences Case No. 87 of 2021)

JUDGMENT

1. AK “the appellant” was charged and convicted of the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The particulars were that the appellant on 20th February, 2021 at 1600 hours at [Particulars Withheld] caused his penis to penetrate the vagina of BCK a child aged 15 years who to his knowledge was his daughter.
2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. Particulars were that on 20th day of February, 2021 at about 1600 hours at [Particulars Withheld] he intentionally and unlawfully touched the vagina of BK a child aged 15 years old with his penis.
3. Upon conviction on the main count he was sentenced to 30 years imprisonment. Being aggrieved by the entire Judgment he filed this appeal.
4. A summary of the case before the trial court is that the minor (PW1) is a daughter of the appellant and she was born on 28th March, 2006 as per the birth certificate (P.EXB 2). The prosecution called a total of six (6) witnesses. PW1 testified that on 20th February, 2021 at about 4.00pm she was at home in her parent’s bedroom arranging clothes, when her father (appellant) entered and locked the door.



- He ordered her not to scream, removed her clothes and pushed her on the bed, and forced her to have sex with him. When he was through he released her and she ran to S her friend's house and informed her. S promised not to tell anyone.
5. In March, 2021 a week after doing her KCPE she started vomiting. The appellant asked if she was pregnant and she answered in the affirmative. He advised her to tell her mother (PW4) that a sawmill person was responsible for the pregnancy. A while later PW4 discovered that the girl was pregnant. On 31st March, 2021 accompanied by her father (appellant) and her mother (PW4), she was taken to DS house for an abortion. She was given some drugs and she bled for four (4) days.
 6. Later on, 24th May, 2021 morning the appellant again wanted to have sex with her. She refused and reported it to the mother, which annoyed the appellant. On 26th May, 2021 she ran away from home and went to the house of (PW2). Later two police officers came for her and took her to the police station, where she found the appellant locked up in the cells. The next day she was taken to the hospital (Londiani sub-county). She identified the P3 Form (P EXB 1) which had been filled for her at the hospital.
 7. In cross examination she was categorical that the appellant had had sex with her and this was on 20th February, 2021 at around 4.00pm. She gave details on how both of them were dressed. He warned her against screaming. She said she sought help from Purity a neighbor (PW2) since her own mother (PW4) had not assisted her when she reported to her. She also explained to her how they had gone for the abortion.
 8. PC(PW2) testified that on 26th May, 2021 at 10.00pm she was asleep in her house when PW1 (a neighbor) came knocking. The door was opened for her and on joining her in the sitting room she told her of her unsafety at home since her father (appellant) had defiled her. PW1 spent the night at her home.
 9. The next day she went to do her chores leaving PW1 at her home. The parents never came for her. On 28th May, 2021 she informed the village elder of the incident. The matter escalated to the chief's office where she and the village elder took PW1. The matter was reported to Londiani police post.
 10. In cross examination she denied knowledge of PW1 having run away from home to a mechanic's house. She insisted that PW1 had told her that the appellant had defiled her. She admitted to having one day found the appellant beating up a young man for wanting to have an affair with PW1. She denied having wanted the appellant to marry her, nor having any issues with him.
 11. RKB (PW3) confirmed the report by PW2 and the steps he took as a village elder.
 12. MC (PW4) is the mother to PW1. She testified how PW1 had around 26th May, 2021 told her how she'd jail the father for raping her and helping her procure an abortion. As she waited for the appellant to come back she learnt from her other children that PW1 had run away.
 13. Three (3) days later she saw PW1 being brought by police officers who took her to the police station where she found her husband the appellant in cells. They were then transferred to Londiani police station. She confirmed PW1's date of birth as 26th March, 2006, and identified the birth certificate (EXB 2).
 14. In cross examination she affirmed that the appellant had defiled PW1 whom he had told to lie that the saw-mill man was responsible for the pregnancy. She admitted that on the day of the abortion the three (herself, appellant and PW1) had gone to Chepseon. She was left at the market while PW1 went with the appellant.



15. She tried to change her story but later admitted that whenever she tried to ask who was responsible for PW1's pregnancy the appellant would become violent and assault both her and PW1 with a whip. She only became aware of the pregnancy and the abortion the day PW1 and the appellant fell out of each other. She denied carrying out any pregnancy test on PW1.
16. No. 112895 P. C Bonface Barasa Oshimong (PW5) of Londiani police station testified that on 28th May 2021 at 4 pm while at the station he was informed by the OCS of a couple that had been arrested together with their daughter. The complainant (PW1) narrated to them what had happened to her before running away from home. PW2 reported the matter. The appellant was then summoned to the police station.
17. PW1 was sent to Londiani sub-county hospital for examination and a P3 form filled for her. PW5 produced the birth certificate (EXB 2). In cross examination he said PW4 acted on the appellant's instructions hence no sufficient evidence to have her charged for abortion had been adduced. On examination at the hospital PW1 was found not to be pregnant.
18. Mr. Justus Oigo Moreu (PW6) a senior Clinical Officer at Londiani sub-county hospital gave a background to PW1's complaint. When she was presented to the hospital he did a pregnancy test vide a pelvic scan that showed some blood clots - retained as a product of conception. He said there was evidence of abortion, and PW1 was bleeding from her vaginal canal. She was placed on medication to stop the bleeding. He produced the filled and signed P3 form (EXB 1), Hospital receipts, Lab results EXB 3 & 4.
19. In cross examination he said PW1 stressed that she was defiled by the appellant. He was satisfied that an abortion had been carried out two weeks earlier because of the minimal blood clots and bleeding.
20. When placed on his defence the appellant elected to give an unsworn statement. He stated that on 26th May, 2021 he left for work in the morning and upon his return at 11.00pm he found PW4 outside the house. On asking her why she was there she said their eldest daughter had beaten up the younger children and run away from home that night. The next day they went everywhere to look for her in vain and she was not picking their calls. However, on being called on an Airtel number she picked the call but on hearing his voice she hang up. He reported to the Nyumba Kumi elder.
21. He stated that he continued looking for PW1 everywhere including PW2's home in vain. He received a call from a police officer and ongoing to charge his phone he was asked about PW1. It was then that he was told about her complaint against him. PW1 and PW4 later came and they were taken to Londiani police station, and he was later arraigned before the court. He did not know that PW1 had a phone and a boyfriend but her mother knew all these.
22. He added that PW1 had given birth to a baby by the boyfriend. The appellant after his defence filed written submissions. The trial court found him guilty and convicted him of the main count and sentenced him to 30 years imprisonment.
23. The appellant dissatisfied with the Judgment filed this appeal dated 7th October, 2022 through Kipkoech Terer advocate challenging both the conviction and sentence on the following grounds:
 - i. That the learned trial Magistrate erred both in law and in fact by convicting the Appellant on uncorroborated evidence of a child of tender years.
 - ii. That the learned trial Magistrate erred both in law and in fact by failing to appreciate that the prosecution case was not proved beyond any reasonable doubt as required in law.



- iii. That the learned trial Magistrate erred both in law and in fact in believing the prosecution evidence without a pinch of salt and without any iota of doubt.
 - iv. That the learned trial Magistrate erred both in law and in fact by failing to appreciate that the appellant's right to a fair hearing was grossly violated thus rendering it a prejudice.
 - v. That the learned trial Magistrate erred both in law and in fact in relying on defective medical examination report and holding that the prosecution has proved its case beyond any reasonable doubt yet the ingredients of incest are not proved.
 - vi. That the sentence of 30 years of imprisonment handed over by the learned trial Magistrate was manifestly harsh, excessive and draconian and had resulted in serious miscarriage of justice.
 - vii. That the trial court demonstrated open biases and prejudice against the appellant.
 - viii. That the conviction and sentenced cannot be supported by any evidence tendered before the trial court.
24. The appeal was canvassed through written submissions.

The Appellant's submissions

25. These were filed by Kipkoech Terer & Associates and are dated 21st March, 2024. Counsel gave a background of the case and identified five (5) issues for determination. The first issue was on whether the three elements of the offence of incest had been proved beyond reasonable doubt. He cited the case of Dominic Kibet Mwareng V Republic [2013] eKLR to outline the elements required for proof. Counsel submitted that there was no evidence to prove the act of penetration. That there was lack of bruises or hymen or laceration to the vagina. Further that the clinical officer's evidence on abortion did not rule out bleeding as an extension of monthly periods.
26. Counsel described PW1 as an untruthful and incredible witness. He referred to her escaping from home and spending a night at a mechanic's home on her own volition. That S ought to have been called to support PW1's evidence. He cited the case of *Bukenya & others V Uganda 1972 E.A 549* where the court held:
- “The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent the court has the right and the duty to call any person whose evidence appears essential to the just decision of the case where the evidence call barely is adequate the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution”
27. He contended that the medical evidence did not reveal anything, the act of sex, when and how it was done. That the failure to have any noise, immediate reporting to the other parent, neighbours, teachers etc left a lot to be desired. He argued that the clothes worn by PW1 were never taken for examination nor a DNA conducted. This to him violated section 36(1) of the *Sexual Offences Act*. That there was therefore nothing to link the appellant with the offence.
28. Relying on the case of *John Otieno Oloo Vs Republic [2009] eKLR* where the learned Judge quoted with approval the case of *Johnson Muiruru V Republic 1983 KLR* counsel submitted that PW1's evidence and that of the clinical officer did not run together since the examination was done way after the alleged act.



29. The 2nd issue is whether there were glaring inconsistencies and contradictions which vitiated the credibility of the prosecution evidence. On this he relied on the proviso to section 124 of the *Evidence Act*, the cases of Mohammed V Republic [2008] KLR and S V Trainor [2003] 1SACR (SCA). He dismissed PW1 as an unreliable witness, a wayward child who wanted to have her way in everything including boyfriends and owning a phone.
30. While relying on the case OKK v Republic 2021 Eklr, he dismissed PW1 as an unreliable witness. He submitted that there were also inconsistencies in the evidence of PW1 & PW2 and PW1 & PW4. All these inconsistencies should have led to the acquittal of the appellant he submitted.
31. The 3rd issue relates to the appellant's alibi defence. Counsel submitted that it was the duty of the prosecution to prove any falsity in the alibi defence of the appellant. Reliance was placed on the case of Victor Mwendwa Mulinge V Republic [2014] eKLR and Charles Anjare Mwamusi CRA No. 226 of 2002 where the Court of Appeal stated:
- “an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answers (sic) and it is sufficient if an alibi introduces into the mind of a court a doubt that is unreasonable”
32. Counsel submitted there was no corroboration of PW1's evidence as is required under section 124 of the *Evidence Act*. He argued that the investigating officer (PW5) did a shoddy job and relied on theories to charge the appellant.
33. The 4th issue is in respect of the mitigation which counsel argued was rejected by the trial Magistrate. In support of the importance of mitigation he relied on the case of Joseph Kaberia Kahinga & 11 others V Attorney General 2016 eKLR where the court held:
- “But what is mitigation in our context? Simply understood, the word mitigation means the act of lessening or making less severe the intensity of something unpleasant such as pain, grief or extreme circumstances. It is an act of making a condition or consequence case less severe and in our case, it is the act of making a punishment or sentence in a criminal case less severe (sic). In black's law dictionary free online legal dictionary 2nd Edition mitigation is defined as: “alleviation; abatement or diminution of a penalty or punishment imposed by law. ‘mitigation circumstances’ are such as do not continue a justification or excuse of the offence in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability”.
34. In highlighting the written submissions Mr. Wanjir stressed that PW1 was not a truthful witness and so her evidence was not reliable. That there were contradictions in the evidence of the prosecution witnesses and PW1 was revenging against the father who was against what she used to do. Further that the trial court never confirmed that the appellant had been supplied with all material before the case commenced. Finally, that the court disregarded the appellant's mitigation and gave him the maximum sentence.
35. Finally, counsel submitted that the trial court did not deliberate on the evidence in totality so as to accord the appellant his right to fair hearing as provided for in *the constitution*. Lastly that the burden of proof was not discharged in this case beyond reasonable doubt. He prayed for the appeal to be allowed.



The Respondent's submissions

36. These were filed by Mr. Edwin Konga Senior Prosecution counsel and are dated 9th May, 2024. Counsel reduced the issues to two. On whether the inconsistencies and contradictions in the evidence of PW1 and PW4 was fatal to the prosecution case, he answered in the negative. In his submission that the issue relating to the awareness of the pregnancy and participation in the abortion is not related to the material facts and is not substantial. That the issue of pregnancy was not disputed by PW1 and PW4. Counsel supported the trial court in its observation that PW4 feigned ignorance of PW1's pregnancy and the issue of the procurement of abortion in order for her not to incriminate herself. He relied on the case of *MIG V Republic Criminal Appeal No. 67 of 2021*, KEHC 189 (KLR) where Mativo J (as he then was) noted that contradictions in evidence of a witness that would be fatal must relate to material facts, and must be substantial. It is therefore his contention that the contradictions in the evidence between the 2 witnesses, was not fatal to the prosecution case and will not affect the conviction.
37. On proof of the offence of incest counsel referred to the evidence of PW1 which he contended was not contradicted. That PW1 explained what the appellant who was confirmed to be her father did to her. Additionally, that the fact of defilement was further proved by the medical evidence of PW6, the P3 Form and PRC form. He further relied on the case of *MTG V Republic* (supra) where the court held that in a charge of incest, for one to establish an offence under the section, among the elements to be proved is indecent act, or an act which causes penetration and to which the same has been established vide the medical forms that had been tendered. Counsel further submitted that the appellant does not dispute the fact of PW1 being his daughter. He urged the court to disallow the appeal in its entirety.

Analysis and determination

38. This being a first appeal this court has a duty to look at the evidence adduced before the trial afresh, re-evaluate and re-assess it and reach its own independent conclusion. However, it must warn itself of the fact that it did not have the benefit of seeing nor hearing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor. It must therefore give an allowance for that. See: *Okeno V Republic* 1972 E.A 32, *Kiilu & another V Republic* [2005] 1KLR 174 & *Simiyu & another V Republic* [2005] 1KLR 192.
39. I have carefully considered the evidence on record, the grounds of appeal, the parties' submissions and cited authorities plus the law. The main issue I find falling for determination is whether the charge of incest was proved against the appellant, and whether the sentence of thirty (30) years imprisonment should be upheld.
40. The offence of incest is defined under section 20(1) of the *Sexual Offences Act* which provides:
- 20 . Incest by male persons
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.
41. From the above definition, four ingredients can be identified. These are:



- i. Age of the victim
 - ii. Relationship between victim and culprit.
 - iii. Act of indecency or penetration of the female organ by the male organ
 - iv. Identification of the person who caused the penetration.
42. On the age of PW1 the available evidence is that of PW1, PW4 and the birth certificate, which was produced by the investigating officer PW5 as EXB2. Her date of birth was given as 26th March, 2006. This is confirmed by the birth certificate (EXB2). The offence is said to have occurred on 20th February, 2021 when PW1 was fifteen (15) years of age. She was therefore below the age of eighteen (18) years as stated in the proviso to section 20(1) of the [Sexual Offences Act](#). There was however no dispute by the defence on the age of PW1.
43. There was also no dispute in respect of the relationship between the appellant and PW1. This was confirmed by PW1 – PW4 and the appellant himself. It was therefore confirmed that the appellant is the father to PW1.
44. The next issue is the one in respect of the penetration of PW1’s vagina by a male organ. Counsel for the appellant has submitted that no evidence was placed before the court in support of this allegation. He dismissed PW1 as an untruthful witness whose evidence should not be relied on by this court. He further stated that the appellant was not given a fair hearing because the trial court only relied on the evidence of the prosecution ignoring that of the appellant.
45. The victim in this offence (PW1) was the only eye witness. She testified that the incident occurred on 20th February, 2021 at 4.00pm in her parents’ bedroom as she arranged clothes. Section 124 of the [Evidence Act](#) provides as follows

Corroboration required in Criminal Cases

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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 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”

46. The said provision stresses on corroboration of evidence in criminal cases. It however has a proviso when it comes to sexual offences. In this case the victim was a minor aged 15 years. From the Judgment by the learned trial Magistrate, the court was well aware of this. The court analyzed all the evidence by PW1 and that of the senior Clinical Officer (PW6), and came to the conclusion that indeed PW1 had been sexually defiled. PW6 stated this:

“I did a pregnancy test vide a pelvic scan that showed some blood clots – retained product of conception. There was evidence of an abortion. She was bleeding from the vaginal canal”.



47. The medical evidence through PW6 and the P3 form clearly corroborates PW1's evidence that there was penetration of her genital organ by a male organ leading to conception which ended in an abortion. I am therefore satisfied that PW1 was defiled.
48. The final issue is the identification of the person who defiled PW1. Mr. Wanjir for the appellant argued that the prosecution should have called other witnesses to back up PW1's evidence on identification. He faulted the prosecution for not calling S to whom PW1 reported the incident, not availing the clothes worn by PW1 and the medical report for that day or an undertaken DNA. He also submitted that there were contradictions and inconsistencies in the evidence of the prosecution witnesses.
49. In response the respondent through counsel Mr. Konga argued that contradictions in the evidence of a witness that would be fatal must relate to material facts and must be substantial. Reference was made to the case of *MTG V Republic* (supra).
50. The issue now is whether the appellant is the person who defiled PW1. The appellant in his unsworn defence denied committing the offence. He narrated what transpired on 26th May, 2021 when he arrived home after 11.00pm and learnt that PW1 was not at home. He explained the action he took up to the time of his arrest. All he said about the charge was that he did not commit the offence. He never told the court where he was on the material day and time, as stated by PW1.
51. From the evidence on record both PW4 (PW1's mother) and the appellant organized for the abortion of the baby that PW1 was carrying, though PW4 denied her participation in it. She however confirmed there was a day PW1 herself and the appellant went to Chepseon. She denied any knowledge of PW1's pregnancy. Her evidence was not reliable as she kept on changing sides to suit her.
52. On the issue of identification, the court was therefore left with the evidence of PW1. When PW1 ran away from home she went to PW2's home and reported to her what the appellant had taken her through. PW2 accommodated her and reported the matter to the village elder who escalated it to the chief's office. The incident of defilement took place in broad day light and on familiar ground (parents' bedroom). The circumstances for a positive identification were quite clear and reliable.
53. The question one poses is if indeed the appellant knew that his daughter (PW1) was in a relationship with the sawmill man and a mechanic man in whose house PW1 allegedly slept, what steps did he as a father take to stop it? There is no evidence of any report he made for the arrest of the said men. If anything, the only thing they (Appellant & PW4) did was to have PW1 undergo an abortion, a fact both the appellant and PW4 have denied.
54. Why would PW1 lie against her own father? The learned trial Magistrate who saw and heard the witness (PW1) found her to be reliable. This is what the trial court stated:
- “I therefore find that the complainant's version of the events was the one holding the truth in this matter. As such I do find that these inconsistencies as pointed out did not affect the veracity of the complainant's evidence”
55. Mr. Wanjir for the appellant referred to the case of *AMM V Republic* [2023] KEHC 25436 (KLR) (17 November, 2023) Judgment) on contradictions in the evidence of the victim (7 years old) and her mother. A reading of the said Judgment shows that the contradictions were so glaring and they related to the very act of penetration and the findings on the panty. This is quite different from the matter before this court. The contradictions herein have nothing to do with the issue of the act of penetration and the findings of the medical examination and report. The said case of *AMM V Republic* (supra) is therefore not applicable here.



56. Upon considering the above I am satisfied that the trial court analyzed the evidence well and arrived at the right decision which this court will not interfere with. The appellant has also contested the sentence meted out against him. Section 20(1) of the *Sexual Offences Act* which I have quoted at paragraph 39 of this Judgment sets out the sentence.
57. The appellant argued that the trial court rejected his mitigation and awarded him a 30-year sentence. The *Sexual Offences Act* under section 20 provides for a sentence of life imprisonment for the offence of incest with a female relative below 18 years. The victim herein was aged 15 years old. The court in sentencing the appellant stated:
- “I have considered the mitigation by the accused person. Considering the age of the complainant the court has power even to impose a life imprisonment but in view of mitigation I sentence the accused person to thirty (30) years in prison”.
58. I have considered several decisions on this, the latest being Supreme Court of Kenya case of Republic V Joshua Gichuki Mwangi and Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) Petition No. E018.2923. It is clear that in sentencing him to thirty (30) years imprisonment, instead of the life imprisonment sentence the trial court considered his mitigation. I will therefore not interfere with the sentence.
59. The upshot is that the Appeal lacks merit and is dismissed. The lower court Judgment and sentence are confirmed.
60. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.

**H. I. ONG’UDI
JUDGE**

