



**MKN v Republic (Criminal Appeal 23 of 2023)  
[2024] KEHC 13289 (KLR) (Crim) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL 23 OF 2023  
CM KARIUKI, J  
OCTOBER 31, 2024**

**BETWEEN**

**MKN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence of Honourable D Mikoyan  
Ag. Senior Principal Magistrate delivered on 5th December 2014 in the  
Chief Magistrate Court at Nyabururu criminal case No. 1266 of 2012)*

**JUDGMENT**

1. The Appellant was charged with the offense of Incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 and on an alternative charge in a decent act contrary to section 11(1) of the same [Act](#).
2. Particulars being that on the 21<sup>st</sup> day of June 2021 at [Particulars Withheld] in Nyandarua County, intentionally and unlawfully caused his penis to penetrate the virgin of BWW (B W W), aged 12 years, who is, to his knowledge, his sister. The Minor (herein referred to as (B W), aged 12 years, claims to have had sexual intercourse with a brother now appellant herein at [Particulars Withheld] of Nyandarua county. He pleaded not guilty. The Prosecution called six (6) witnesses to produce lab test results, P 3 form, while the appellant, who was represented, denied committing the said act.
3. The appellant was found guilty and sentenced to life imprisonment. He was aggrieved and lodged an instant appeal, which sets the following grounds for appeal.
  - a. The Principal Magistrate erred in law and fact by finding that offenses were proved while they were not.



- b. The offenses charged were not proved, and the complainant herself admitted that on the day of the offense, that did not happen.
  - c. The learned trial magistrate erred in law and fact by failing to give the appellant the benefit of the doubt.
  - d. The trial Magistrate wrongly found the offense proved while it was not corroborated as required by law.
  - e. The learned Magistrate failed to consider the defense witness's evidence, which created grave doubt as to whether the offence was committed.
  - f. The evidence from the doctor and clinician clearly established doubt as to whether the offence was actually committed and if it was by whom.
  - g. No medical evidence was adduced to link the appellant with the offence. No DNA or fluid samples were taken from the appellant to link him to the offence.
4. Brief facts of the matter
  5. BW complains that after the demise of their mother, the appellant came back to stay with them and, in the process, had coitus with the minor. BW ( PW 1) who is a sibling with appellant states to have lost their mother in the month of May 2012. Then, the appellant moved in to care for them. But from June to July 2012, BW ( PW 1) asserts that the appellant had carnal knowledge of her.
  6. On one occasion, on 21st June 2012, having been chased back home for lack of school fees, the appellant defiled her after ordering her to remove her pants as the appellant lowered his trousers and some other clothes up to the knees and then came on top, then BW ( PW 1) returned to school. Another occasion was when having washed dinner dishes at approximately 8 pm, the appellant again arrived when other younger siblings had slept and then, in the same fashion, sexually penetrated BW ( PW 1)
  7. Jedida Mbothe ( PW 2), one of the teachers where BW ( PW 1) was schooled, was called to a meeting on 22<sup>nd</sup> June 2012 at 3.10pm. BW ( PW 1) was the concern. Suicide was mentioned, and the witness was prompted to talk with BW ( PW 1). According to the witness, one ka B, a sibling, was alleged to have sexually assaulted the minor, while a report to a relative bore no fruits.
  8. The witness escalated the matter to the police and took the minor for medical exam treatment notes, P3 Form, and lab results (P exhibit 1a, 1b & 1c) prepared in confirmation of allegations.
  9. Dr Korir ( PW 3) from Nyahururu District Hospital produced all the P3 form prepared by a colleague who, by the time of trial, had been transferred to Coast Provincial General Hospital. In contrast, John Kwedeka ( PW 5), clinician, produced a treatment card and commented that sexual intercourse must have taken place for a while as no lacerations were observed at the time of the report.
  10. C Baraza ( PW 6) of Ndaragwa Police Station received an initial report, in which it was alleged that BW ( PW 1) had been exposed to house chores, which harmed their right to education.
  11. But in June 2009, a further report was filed about incest. He referred the victim for treatment, issued a P3 form, recorded the statement, and, since the appellant accompanied the reportee, then processed and hence the instant charge.
  12. The appellant, via unsworn defense, denied committing incest with WB ( PW 1) and related how, one evening when, she complained about being denied food. MWN (DW 2) makes two statements in the



appellant's defense. The Appellant slept in a separate house from the victim and, on 21<sup>st</sup> June 2012, went in search of casual jobs from 8 am and returned at 9 pm.

13. The court gave directions on the hearing of the appeal via submissions, but only the Appellant filed.

### **Appellant's Written Submissions**

14. It is submitted that it is clear from the evidence in the case that apart from the minor's words, nobody was able to give evidence to corroborate that it was the appellant who defiled her on the 21<sup>st</sup> of June 2012 or any other date.
15. Considering the fact that the appellant denied the offense and even called evidence in defense, it is the word of the minor against that of the appellant as far as the alleged offense is concerned. The fact that the medical evidence revealed that she had had penetration on various occasions cannot be taken to corroborate the offense. Penetration could have been by anybody else apart from the appellant. This doubt should have favored the appellant, and the trial court erred in failing to find so and give him its benefit
16. A look at the medical evidence: PW II doctor Korir Kimotho produced the P3 form, which Doctor Kamau had filled. He also produced laboratory results. On cross-examination, he said the incident was reported on 22<sup>nd</sup> June 2012. He also stated that the hymen could have been torn in other activities like sports, not necessarily penetration. He also stated that the documents produced do not state which penetration was done. He also stated that the documents did not indicate whether the torn hymen was fresh or old. He also said that Doctor Lydia did not come to any conclusion on the P3 form.
17. This evidence clearly puts a lot of doubt on whether there was penetration on the 21<sup>st</sup> of June 2012. The fact that the doctor states that the hymen could have been broken by other means apart from penetration is telling. The fact that Doctor Lydia did not make any conclusion further puts doubt on the minor's story of the events of 21<sup>st</sup> June 2012. All this doubt should have been considered to conclude that the offense was not proved to the required standards.
18. PW5, the clinical officer, testified that the minor came to him on the 29<sup>th</sup> of June, 2012. This is eight (8) days from the date of the alleged offense. He stated that if there was sexual intercourse, it must have been for a long time or was prepared for sex. He also said that the recent date of occurrence was not given to her.
19. This evidence does not in any way support that any penetration took place on June 21<sup>st</sup>, 2012, or indeed any specific date. It does not support the charge as it also does not connect the penetration to the appellant person. It could have been anybody else.
20. In defense, the appellant stated that on the 21<sup>st</sup> of June 2012, he saw the sister when she came back after being sent from school. He sent her to her aunt, who gave her money, and she returned to school. He also saw her in the evening when she left the kitchen crying. He did not admit that he defiled her on the date or any other date.
21. DWII also testified under oath and stated that on the 21<sup>st</sup> of June 2012, the appellant did not defile the minor. Considering all the evidence, it is clear there is a lot of doubt that the appellant defiled the minor on 21<sup>st</sup> June 2012. The trial court wrongly assessed the evidence and arrived at the wrong conclusion. The evidence does not establish the offence to the required standards. This court should so find and set aside the conviction and sentence.



22. The authorities relied on by the trial court are also not applicable in this case. The fact that the minor's hymen had been broken is not contested. Indeed, the evidence of the doctor and the clinical officer corroborates the point of the minor as far as penetration is concerned.
23. However, the real issue is who did the breaking/penetration and when? The only legation in answer to this is by the minor herself. No other witness said that the appellant person did the penetration on the 21<sup>st</sup> of June 2012 or, indeed, on any other date. The evidence of the two doctors did not corroborate that of the nor as far as who did the penetration is concerned. This is material.

#### 24. Issues, Analysis And Determination

25. This being the first appellate court, its duty is to reconsider and reevaluate the evidence adduced before the trial 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] e KLR where the court of appeal stated:

The duty of the first appellate court is to analyze and re-evaluate the evidence that was before the trial court and 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.”

26. I have considered the evidence adduced before the trial court, the grounds of appeal, and the respective rival submissions. I have narrowed the issues for determination to be:
- a) Whether the offence of incest was proved.
  - b) Whether the sole evidence of the Complainant was sufficient to convict the Appellant.
  - c) Was the appellant's defense considered?

27. The offence of incest is defined in Section 20(1) of the [Sexual Offences Act](#) as:

“(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.”

28. Thus, the ingredients for the offence of incest are: Proof that the offender is a relative of the victim. Proof of penetration or indecent Act. Identification of the perpetrator. Proof of the age of the victim.
29. On consanguinity or kinship, the PW1 testified that the appellant was her brother, a fact not contested by the appellant. Under section 20(1) of the [Sexual Offences Act](#), a brother and a sister are within the prohibited degree of consanguinity or kinship of those banned from having sex.



30. 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.”

31. PW1 testified that the Appellant defiled her. She complained that after the demise of their mother, the appellant came back to stay with them and, in the process, had coitus with the minor. BW ( PW 1) who is a sibling with appellant states to have lost their mother in the month of May 2012. Then, the appellant moved in to care for them. But from June to July 2012, BW ( PW 1) asserts that the appellant had carnal knowledge of her.

32. On one occasion, on 21st June 2012, having been chased back home for lack of school fees, the appellant defiled her after ordering her to remove her pants as the appellant lowered his trousers and some other clothes up to the knees and then came on top, then BW ( PW 1) returned to school. Another occasion was when having washed dinner dishes at approximately 8 pm, the appellant again arrived when other younger siblings had slept and then, in the same fashion, sexually penetrated BW ( PW 1)

33. She was taken to the hospital, where she was treated. After that, a P3 form was filled. The evidence of John Kwedeka ( PW 5), clinician, corroborates BW ( PW 1), that as of 29th June 2012, the minor's hymen was missing a clear sign of penetration and in sexual intercourse, causing penetration. This is in line with the principle in [Peter Wekesa Mwambi v. R](#) (2006) eKLR in proving penetration.

34. In this case, there was clear evidence on record by way of a medical (p3) report, which demonstrated that the Complainant was a minor. In any event, it was not contested. In the case of Francis Omuroni v. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

“In defilement cases, medical evidence is paramount in determining the age of the victim, and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.”

35. Closer home in the case of [Kaingu Elias Kasomo v. Republic](#) in Malindi, the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

“The 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 the same way as penetration in the cases of rape and defilement. It is, therefore, essential that the same be proved by credible evidence for the sentence to be imposed, which will be dependent on the age of the victim.

36. BW ( PW 1) report of the incident was brushed aside until, through another medium, Mrs. Mbothe, the class teacher, was brought to the know; hence, the present steps were taken to address this concern.

37. The other ingredient of the charged offense is BW ( PW 1) assertion against the appellant person's identification as the defiler. Kinship is not disputed, nor is the presence of both BW ( PW 1) and the appellant in the same homestead. ( PW 1) was firm and clear in her narration, showing her forthrightness while handling some unpleasant experiences early in her childhood, which is evidence considered by the trial court in line with the dictum in [Oketch V R](#) Cri App no 198 of 1990 (Kisii) while assessing sole eye witness account to a fact in dispute. The P3 form, as well as the treatment card,



places the age of BW B ( PW 1) at 12 years at the time of the present violation, for which evidence has not been disputed.

38. The Appellant submitted that the learned trial magistrate erred in relying solely on the evidence of PW1 to convict him. It is almost evident that sexual assault cases, especially those involving minors, are committed to the exclusion of eyewitnesses. 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).

39. The proviso stipulates that a court can convict an accused person in a sexual assault case 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 consider 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 soon after 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 after the demise of their mother to take care of his minor sibling PW1.

40. I need not, therefore, emphasize that the Appellant’s identification was by way of recognition. He was a person well known to PW1 and, besides, a relative/sibling.

41. 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 P3 form, as well as the treatment card, places the age of BW B ( PW 1) at 12 years at the time of the present violation, for which evidence has not been disputed.

42. The appellant raised the issue that no medical evidence was adduced to link him to the offence. No DNA or fluid samples were taken from the appellant to link him to the offence.

43. Turning on to Section 36 of the *Sexual Offences Act*, which provides for DNA testing, it is couched not in mandatory but permissive terms. The Court of Appeal, in Criminal Appeal No. 109 of 2014 *Williamson Sowa Mbwanga v Republic* [2016] eKLR, stated:

“...A DNA test of the appellant would at most determine whether he was the father of PM’s child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See *TWehangane Alfred V. Uganda*, Cr. App. No. 139 OF 2001).”

It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing.” [Emphasis my own]

44. In the present case, the evidence of PW1 coupled with that of medical documents produced was sufficient to establish the offence charged. There was no need for further evidence of DNA analysis. It is not a mandatory requirement. PW1 spoke the truth and the truth vindicated her. I dismiss this ground of appeal for want of merit.



45. In defense, the appellant stated that on the 21<sup>st</sup> of June 2012, he saw the sister when she came back after being sent from school. He sent her to her aunt, who gave her money, and she returned to school. He also saw her in the evening when she left the kitchen crying. He did not admit that he defiled her on the date or any other date. He did not say there was a grudge between him and his sister PW1 and suggested even why such a complaint came from his young sibling.
46. Given the relationship between the appellant and the minor and noting that the allegation covers more than one incident, the trial court was inclined to accept her evidence incriminating the appellant person as the defiler. This court, after going through the record, finds no error with the conclusion arrived at by the trial court.
47. Thus, this court finds that the trial court's decision to return a verdict of guilty against the appellant as charged with Incest contrary to section II (l) of the *Sexual Offences Act* No 3 of 2006 and conviction under section 215 CPC cap 75 laws of Kenya was justified thus same upheld. Therefore, this court finds no merit in appeal and makes the orders;
  - i. The appeal is dismissed, and the conviction and sentence are upheld.

**JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**CHARLES KARIUKI**

**JUDGE**

