



**JNO v Republic (Criminal Appeal 128 of 2023)
[2024] KEHC 13285 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 128 OF 2023
DR KAVEDZA, J
OCTOBER 28, 2024**

BETWEEN

JNO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by Hon. M. Maroro (PM)
on 22nd November 2022 at Kibera Chief Magistrates Court Sexual Offences NO. 17 of 2015)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that on diverse dates between 3rd June 2015 and 11th June 2015 at Kajiado North District in Kajiado County, being a male person caused his penis to penetrate the vagina of S.N a female juvenile who was to his knowledge his daughter. The appellant was sentenced to serve 20 years imprisonment.
2. Being dissatisfied, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant contended that the trial court failed to consider his mitigation and that the sentence imposed was harsh and excessive.
3. The appeal was canvassed by way of written submissions, which I have considered.
4. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse 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 but bearing in mind that it never saw the witnesses testify.



5. With the above, I now proceed to determine the substance of the appeal. The critical ingredients for the offense of incest as defined in section 20 (1) of the Act are that; the victim and the accused fall within the prohibited degrees of consanguinity, the age of the complainant, proof of penetration, and positive identification of the perpetrator.
6. The prosecution case was as follows. The Complainant, S.N., gave sworn testimony following a voir dire examination. She informed the court that she was a pupil in Class Six and that the appellant was her father. She recounted that on 2nd June 2015, her mother had left their home to visit her grandparents, leaving her in the care of her father. On 3rd June 2015, after returning from school, she prepared dinner. The appellant arrived home at around 9 p.m. and appeared to be intoxicated. He asked her to open her room which was locked from inside. He then told her that he wanted to sleep with her. He removed her pantie leaving her with a top. He then undressed himself and inserted his penis into her vagina. When he was finished, he left. This occurred again on the nights of 4th, 5th, and 6th June 2015.
7. The complainant disclosed the incident to her teacher, Mrs. Onyari, who, in turn, informed her uncle, as her mother was unreachable by phone. When her mother returned on 7th June 2015, she reported the matter to the police. The complainant was also taken to hospital for examination and treatment.
8. During cross-examination, the complainant told the court that her uncle had also defiled her after her father's arrest, though this was never reported to the police station.
9. The first issue for consideration is the relationship between the victim and the perpetrator, and whether he was positively identified. In her testimony, the complainant stated that the appellant was her biological father. This evidence was not disputed by the appellant. On identification, the complainant gave clear and graphic testimony of the ordeal. She recalled how the appellant sexually assaulted her for four consecutive days while her mother was away. Though it was at night, the appellant was someone well-known to the complainant. I therefore hold that the Appellant is not only the complainant's father but also the one who committed the act of sexual assault.
10. The complainant's testimony did not require corroboration in accordance with the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. In this case, the trial magistrate noted that the complainant's testimony was not shaken on cross-examination and that it was consistent, as she told the others notably PW2, PW3, PW4, and PW6 the same story.
11. Regarding additional corroborating evidence, the prosecution called PW2 Gladys Ombuna. She testified that she was the complainant's teacher. She testified that the complainant confided in her, stating that her father had been abusing her. The teacher attempted to contact the complainant's mother, but her phone was unreachable. She then called the complainant's uncle, who provided the mother's alternative number. The mother promised to come and collect the complainant but instead sent another person to do so. The teacher later recorded a statement with the police regarding the matter.
12. The complainant's mother, PW3, testified that her daughter was born on 7th August 2003, and the appellant was her husband. She recalled that on 2nd June 2015, she left the complainant in the care of the appellant and travelled upcountry. While there, she received a call from the complainant's school, informing her that the appellant had abused the complainant.
13. She rushed back to Nairobi, visited the teacher's residence, and took the complainant to the hospital. She also reported the incident to the police. She observed that the complainant was withdrawn and appeared to be in pain. PW3 later identified the appellant to the police.



14. Lastly, two Clinical Officers, John Njuguna (PW5) and Kilu Shako (PW6) testified regarding their medical examination of the complainant. Their findings indicated that the outer genitalia appeared normal, but the hymen was broken. There was also tenderness and an old tear on the part of the hymen. Both the Post-Rape Care (PRC) Form and the P3 medical report were submitted as evidence.
15. The conclusion drawn from the examination was that penetration had occurred. This medical evidence corroborated the complainant's account. I find that the medical opinion is consistent with the evidence of penetration and supports the complainant's testimony that the appellant defiled her.
16. In his defence, the appellant denied ever defiling his daughter. He argued that the allegation arose from a dispute between himself and his wife, PW3, insisting that he was innocent. The appellant claimed that PW3 had framed him as part of their ongoing conflict.
17. The trial court considered the defence and found it to be unbelievable. Having found that the appellant was positively identified, coupled with the finding that he defiled the complainant who is his daughter, I hold that the prosecution proved its case against the appellant beyond reasonable doubt. I accordingly affirm the trial court's conviction.
18. While age is a crucial factor in sentencing as provided for in section 20(1) of the Act, it is only required to prove that the victim was under 18 years old. In this case, the PW3, the complainant's mother testified that the complainant was born on 7th August 2003. She was therefore 12 years old at the time of the incident. Section 20(1) provides that a person who commits incest with a person below the age of 18 years shall upon conviction be sentenced to life imprisonment.
19. The prosecution proved that the child was 12 years old, and the trial court while exercising its discretion imposed a sentence of 20 years imprisonment. During sentencing, the trial court considered the appellant's mitigation and that he was a first offender.
20. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 Republic v Joshua Gichuki Mwangi. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Ms. Omurokha for the Respondent

Achode Court Assistant

