



**JMB v Republic (Criminal Appeal E026 of 2024)  
[2024] KEHC 16863 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E026 OF 2024  
AN ONGERI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**JMB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. D. Wangeci (SPM) in  
Wundanyi Sexual Offence No. E013 of 2023 delivered on 3rd May 2024)*

**JUDGMENT**

1. The Appellant was convicted with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) on 3<sup>rd</sup> May 2024 at Wundanyi Law Courts in Wundanyi Sexual Offence Case No. E013 of 2023 and he was sentenced to serve life imprisonment.
2. The particulars of the charge were that on diverse dates in February 2023 in [particulars withheld] Sub County within Taita Taveta County, the Appellant intentionally penetrated the vagina of HM a juvenile with knowledge that she was his step-daughter.
3. The Appellant pleaded not guilty to the charge and the prosecution called six (6) witnesses.
4. The prosecution evidence in summary was that the Appellant defiled the complainant, a minor aged 10 years 3 times.
5. The complainant said she was defiled on her mother's bed, in a bar owned by the Appellant and at the shamba.
6. The complainant decided to run away from the Appellant's home. She was assisted by PW1 to report the matter and the Appellant was subsequently charged.



7. The Appellant denied the charge and said it was not the first time the complainant had run away from home.
8. The Appellant insinuated that the complainant was already engaging in sexual intercourse with other men.
9. The trial court found that the prosecution proved the following elements:-
  - i. The age of the victim.
  - ii. Proof of penetration.
  - iii. Identification of the perpetrator.
  - iv. Proof that the offender is a relative of the victim.
10. The trial court sentenced the Appellant to life imprisonment.
11. The Appellant has appealed to this court against both conviction and sentence on the following grounds:-
  - i. That the learned trial Magistrate erred in both facts and law in failing to appreciate the fact that she sentenced him to life imprisonment without considering the circumstances of his case.
  - ii. That the learned trial Magistrate erred in both facts and law in failing to appreciate the charges as laid out were not proved since the critical elements of defilement were not proved to the required standards.
  - iii. That the learned trial Magistrate erred in law and fact in failing to appreciate that the instant matter was materially contradicted and inconsistent hence insufficient to attain a conviction.
  - iv. That the learned trial Magistrate further erred in both law and facts in not considering that the Appellant's statement in defence was on point pragmatic, plausible and was not disloged hence still stands and seek its reinstatement rendering an acquittal.
  - v. That the Appellant do seek to be furnished with court records and the judgment to enable him amend other grounds during the hearing of this appeal.
12. The parties filed written submissions as follows:-
13. The Appellant submitted that the evidence of the prosecution witnesses was unreliable. He submitted that PW1 and PW6 were untrustworthy and of doubtful integrity.
14. The Appellant also submitted that the trial court gravely erred in finding that the evidence of the complainant was sufficient to convict him and by relying on Section 124 of the [Evidence Act](#).
15. The Appellant sighted the following:-
  - i. That the dates of the alleged defilements were not known.
  - ii. That the report of the said acts were made several months later.
  - iii. That the circumstance under which PW1 made the alleged sexual molestation raised issues in view of the Appellant's contention that the whole issue was made up by PW1.
16. The Appellant further submitted that penetration was not sufficiently proved. That the evidence by the medical officer (PW4) did not corroborate the dateless and timeless allegations by the complainant.



17. Further that the fact that the hymen was not intact was not proof that there was defilement.
18. The Appellant further submitted that the evidence of the prosecution witnesses PW1, PW6, PW4 and PW5 was at variance and the same rendered the charge defective.
19. The Appellant further submitted that the testimony of the Appellant was candid, plausible and unchallenged.
20. Further that the trial court ignored the testimony of PW3, the complainant's mother in which she stated that the complainant had run away from home on 13<sup>th</sup> March, 2023.
21. The Appellant urged the court to quash the conviction and set aside the sentence against the Appellant.
22. The Respondents on their part submitted that the prosecution called six (6) witnesses and proved the guilt of the Appellant beyond reasonable doubt.
23. Further that the sentence was lawful and in accordance with Section 20(1) of the *Sexual Offences Act* which provides life imprisonment.
24. The Respondent also submitted that all the 4 elements of the offence were proved by the prosecution witnesses.
25. The Respondent submitted that the Appellant did not point out the inconsistencies in the prosecution case.
26. Finally, the Respondent said that the sentence of life imprisonment meted by the trial court was legal, proper and deserved and the same should not be disturbed.
27. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
28. In the case of Kisumu Criminal Appeal 28 of 2009 *David Njuguna Wairimu v Republic* [2010] eKLR, the court of appeal stated that;

“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.”

29. The elements of the offence of incest are as follows:-
  - (i) Proof of the age of the victim.
  - (ii) Proof of penetration.
  - (iii) Identification of the perpetrator.
  - (iv) Proof that the offender is a relative of the victim.



30. I find that there is evidence that all the elements were proved. The Trial court relied on Section 124 of the *Evidence Act* and convicted the Appellant on the testimony of the complainant, a girl aged 10 years for reasons which are on record.

31. Section 124(2) of the *Evidence Act* provides as follows;

“124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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 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.”

32. The complainant was able to express herself and she knew the Appellant who is her step- father.

33. The complainant said that the Appellant defiled her three times and told her that he wanted her to get pregnant.

34. There was good reason to rely on the testimony of the complainant to convict the Appellant in this case.

35. I find that the conviction is safe and the sentence lawful.

36. Section 20(1) of the *Sexual Offences Act* provides as follows;

“(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.”

37. I dismiss the appeal and uphold both the conviction and sentence.

**DATED, SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024 IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Prosecutor: Evah Kanyuira

Court Assistant: Maina/Trizah

Mr. Atanda for the Appellant



Appellant present in person

