



**PMW v Republic (Criminal Appeal 94 of 2023)  
[2024] KEHC 15905 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 94 OF 2023  
DR KAVEDZA, J  
DECEMBER 18, 2024**

**BETWEEN**

**PMW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Hon. W. Lopokoyit (S.R.M) on 30th March 2023 at Kibera Chief  
Magistrate’s Court Sexual Offences Case No. E011 of 2022 Republic v PMW)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to twenty (20) years imprisonment. The particulars of the offence as per the charge sheet were that on 16<sup>th</sup> January 2022 at (Particulars withheld) village in (Particulars withheld) sub-county within Nairobi County, being a male person caused his penis to penetrate the vagina of E.W a child aged 3 years who to his knowledge was his daughter
2. Aggrieved, he filed the present 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. He complained that the trial court failed to consider his defence. Finally, the sentence imposed was harsh and excessive.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration to that. (See *Okeno v Republic* [1972] EA 32).



4. The prosecution called five (5) witnesses in support of their case. PW1, E.W (name withheld), the claimant, gave unsworn evidence. She recalled that her father, the appellant, poked her, all while pointing to her private parts. She proceeded to tell Mama S, PW2 about it. She stated that she lives with the appellant and PW2.
5. PW2, PM, the complainant's aunt testified that she was taking care of the complainant since her mother had passed on and her father was in prison. When the appellant' was released he would visit the child from time to time. On 16th January 2022, the appellant took the complainant to church and returned her to PW2's house at 8:30 p.m. PW2 noticed that the complainant was not okay and was crying when she began changing her diaper. She observed some discharge from the complainant's vagina that resembled semen. She inquired from the appellant who told her that he had been with the child for the whole day. When she inquired from the complainant, she said that the appellant had inserted something in her.
6. She took the complainant to Nairobi Women's Hospital where she was examined and treated. She then reported the incident to Mutuini Police Station.
7. At Nairobi Women's Hospital, the complainant was examined on 16<sup>th</sup> January 2022 by John Ongeru who was no longer at the institution and was not available to testify. His evidence was produced by John Njoroge a clinical officer. Upon examination, the complainant had whitish discharge on the vulva, injury on the vagina at 3 O'clock, and lacerations noted on the vaginal wall. It was his evidence that the injuries were consistent with penel penetration. He produced the P3 and PRC forms.
8. PW4, PC Brenda Muthui, the investigating officer, testified that on 17th January 2022, PW2 arrived at the police station in the company of the complainant. PW2 reported all that had occurred. She issued a P3 form and recorded their statements. The appellant came willingly to the station where he was charged and arrested. When questioned, he recalled that while he was with the child, they went to church, after which they proceeded to a children's home in Karen and gave the child back to PW2 in the evening. PW4 took samples of the appellant and complainant and sent them to the government chemist, as well as the complainant's clothes, who at the time had not yet submitted the results. Additionally, she was given a copy of the complainant's birth certificate, which indicated that she had been born on 8th March 2019 and that the appellant was her father.
9. PW5, Joyce Kihero, the government chemist prepared a report on 21st January 2022 after analyzing the samples from Mutuini Police Station. She recounted that she did not find blood or semen from the trouser nor a high vaginal swab.
10. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his sworn defence, the appellant testified that on the material day, he took the complainant to church and then to a children's home to visit his other children. He later took her to PW2, who remarked that the complainant was dirty and required medical attention. At the hospital, it was determined the child was fine. The following day, he was summoned to the police station, where he was arrested and charged. The appellant claimed he was framed by relatives attempting to encroach on his land and maintained his innocence throughout.
11. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. 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.
12. The first issue for consideration is the relationship between the victim and the perpetrator, and whether he was positively identified. In her testimony, PW1 stated that the appellant was her biological father.



The birth certificate produced on record confirms that indeed the appellant was the complainant's father. The appellant himself did not dispute this evidence and admitted that the complainant was her daughter.

13. On the age of the age of the complainant, the birth certificate produced by PW4 confirmed that the complainant was born on 8<sup>th</sup> March 2019. She was therefore 3 years old at the time of the commission of the alleged offence. She was below 18 years which is the age described in law in the offence of incest.
14. On the evidence of penetration, the complainant testified that the appellant inserted something inside her private parts. The medical evidence tendered by PW3 was that the complainant had fresh lacerations on her vaginal wall as well as a hymen injury, which was consistent with penile penetration. Penetration was therefore proved beyond reasonable doubt.
15. Regarding the appellant's culpability, the complainant testified that the appellant inserted something into her vagina. The medical evidence affirmed this, confirming that the injuries were fresh. Additionally, the appellant was in the complainant's company when the offence occurred. No plausible explanation was provided to counter or disprove the allegation that he was the perpetrator. The chain of evidence, including the complainant's testimony and the medical findings, supports the conclusion that the appellant committed the offence. The appellant's failure to provide an alternative explanation further strengthens the prosecution's case against him. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant.
16. Having found that the appellant was positively identified, coupled with the finding that he was culpable for the offence committed against the complainant who is his daughter as registered in the birth certificate, I hold that the prosecution proved its case against the appellant beyond reasonable doubt. I accordingly affirm the trial court's conviction.
17. On sentence, the appellant was sentenced to serve twenty (20) years imprisonment. During sentencing, the court considered the appellant's mitigation, that he was a first offender and the time spent in remand custody.
18. In this respect, the trial court did not err in imposing the sentence of 20 years imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed. The appeal is dismissed for lack of merit.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF DECEMBER 2024**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present

Mburugu for the Respondent

Achode Court Assistant.

