



**FKK v Republic (Criminal Appeal E067 of 2021)
[2023] KEHC 18230 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 18230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E067 OF 2021
SM MOHOCHI, J
JANUARY 26, 2023**

BETWEEN

FKK APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Judgement, conviction and sentence in CMCC SO No. E027 of 2021 - Kabarnet, Republic v FKK, delivered by V. O. AMBOKO, R.M. delivered on 22.9.2021.)

JUDGMENT

1. FKK (the appellant) was sentenced to serve 20 years in prison in Sexual offences case number E027 of 2019 at the Chief Magistrate’s Court at Kabarnet for of the offences of Defilement contrary to Section 8 (1) as read together with Section 8(3) of the *Sexual Offences Act*. There was no finding on the alternative count of committing an indecent act with a child.² He seeks to upset the said conviction and sentence citing 4 grounds of appeal as follows.
 - (1) was the offence of incest was proved to the required standard.
 - (2) did the court shift the burden of prove to the appellant.
 - (3) was the appellants defence considered.
 - (4) did the learned magistrate properly record the proceedings.

2. This court has a legal obligation to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the four witnesses testify.³³See *Okeno v Republic* [1972] EA , 32at page 36, *Pandya v Republic* {1957} EA 336, *Shantilal M. Ruwala v Republic* [1957] EA 570 & *Peter v Sunday Post* {1958}EA 424.



3. The complainant, VS, aged 21 years. She recalled that on 23rd September 2019 at 10pm she went to her grandmother's house and upon knocking the door, the appellant opened for her and told her he will show her where to sleep. She said he took her to a kitchen where he forcefully sexually assaulted her. The following morning, she reported to her grandmother but she told her she did not want to hear such things. She told another woman who also said she did not want to hear such things. She told a village elder who took her to Bura Police Post and a female police officer took her to Mwatate Sub-county Hospital, but the staff were on strike, so she was taken to Jordan Hospital at Voi where she was attended and given medication to prevent pregnancy and her P3 form was completed. She said the appellant is her uncle on her mother's side.
4. The complainant's mother, HMS stated that on 23rd September 2019 the complainant told her that the accused raped her.
5. PW3, William Sigei Birir, a Clinical Officer at Mwatate Police Station examined PW1. He testified that the PRC showed that her hymen was broken, that she had fresh bruises on her outer genitalia indicating forced penetration. He said pregnancy test was negative, pus cells were seen meaning she had some kind of infection. Syphilis test was negative. He produced her PRC Form dated 10th October 2019, the P3 Form and her discharge summary.
6. PW4, Peris Nyakimwe, also a Clinical Officer previously working at the River Jordan Hospital testified that he wrote the complainant's medical report which he produced in court. He said she was brought from Bura Police Post with a complaint of sexual assault. He testified that genital examination showed bruises on the external genitalia/vaginal wall on the outer side. She had a whitish smelly discharge. He said he gave her antifungal medication, antibiotics and PEP. Vaginal swab showed she had puss cells. He confirmed that the victim came a day after the incident.
7. PW5 PC Damaris Gacheru, stationed at Bura Police Station, was the Investigating Officer. She recalled that on 23rd September 2019 at 10am a girl came to the station and complained that her uncle, (the appellant) had raped her. She recorded her statement and she accompanied her to Bura Dispensary, but they found that the health officials were on strike, so, they proceeded to Mwatate sub-county hospital, but also, the staff were on strike. They went to River Jordan at Voi where she was attended. She also visited the scene and recorded witness statements. She said she found the complainants pants at the scene which she produced as an exhibit. She charged the appellant.
8. Upon being put on his defence, the appellant elected to give sworn evidence. His defence was that the complainant is his sister's child with whom they were not in good terms, so, he blamed her mother for framing up the charges to punish him and his children. He said on the material day, his house girl texted him and told him the complainant was knocking the window, so, he texted back and told her to pretend not to hear. So, they slept but the next day he was called by the police between 3-4pm and asked to report at the station. He reported at the Station where he was told he raped PW1. He denied raping her.
9. He said he was not in good terms with his sister who used to live with a man at his house that he used to send money to her for his mothers' upkeep only for him to find that his mother was suffering. He said he was not medically examined to connect him with the offence, and that the charges were fabricated because he chased his sister away.
10. The appellant called DW2, GM, his wife as a witness. The crux of her evidence was that her husband is person of good character and that he was framed. He also called his mother, DW3 ET whose testimony was that on the material day, they slept after supper; that there is only one entry door next to her bedroom; that did not hear the door being knocked/opened; that the door is made of iron sheets, so



if it was knocked/opened, she could have heard. She said the complainant came in the morning and started crying saying she was raped by her uncle. She said the complainant had a bad character, and that they did not get along well and that she has since been married and she has two children.

11. After analysing the evidence, the submissions, the law and the ingredients of the offence and authorities, the trial court was persuaded that the prosecution had proved its case as required. It convicted the appellant and sentenced him to serve 5 years in prison.
12. The appellants counsel submitted that PW1 gave contradictory evidence on the occurrence of the offence. He questioned why the lady mentioned by the complainant was not called as a witness nor did they call a one Asha who PW1 said she was in her house. He urged the court to accord weight to the testimony of the appellant's mother who was in the house. He also argued that no spermatozoa was detected on examination. Counsel submitted that the appellant's defence was solid. He questioned why the appellant was not taken for medical examination. He faulted the investigating officer for not visiting the scene and the trial court for according too much weight to PW1's evidence who was a person of doubtful character. He also argued that the learned Magistrate did not consider the appellant's defence and submissions. He also argued that the learned Magistrate failed to appreciate that the investigations were faulty, and, that the appellant was not examined by a doctor. Lastly, he argued that the complainant's mother and the appellant were not in good terms.
13. The Respondent did not file submissions despite being accorded the opportunity to do so.
14. A reading of the appellant's advocates submissions shows that his submissions are on five grounds. On, that PW1's evidence was contradictory on the occurrence of the event. This line argument was not elaborated to demonstrate the alleged inconsistencies nor was it suggested that her evidence contradicted other witnesses' evidence. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. As was held in *Twebangane Alfred v Uganda*,⁴ it is not every contradiction that warrants rejection of evidence. It subtly stated: -⁴Crim. App. No 139 of 2001, [2003] UGCA, 6. "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."
15. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.⁵The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria*⁶ that:-⁵See *Uganda v Rutaro* {1976} HCB; *Uganda v George W. Yiga* [1979] HCB 217.⁶{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."
16. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not



affect the credibility of a witness and cannot vitiate a trial.⁷ It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.⁸⁷See *Osetola v State* {2012} 17 NWLR (Pt1329) 251.⁸See *Theophilus v State* {1996} 1 nwlr (Pt.423) 139.

17. Applying the above tests to this case, I find no contradictions in PW1's evidence and even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge.⁹ Further, the evidence in question is to be considered together with the rest of the evidence including the defense. Accordingly, the argument that PW1's evidence was tainted by inconsistencies and contradictions fails.⁹Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.
18. The appellant's counsel submitted that the lady who the complainant complained to that she had defiled and a one Asha were not called. This argument is attractive. However, it brings into view section 143 of the *Evidence Act*¹⁰ which provides: - "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." The Court of Appeal in *Julius Kalewa Mutunga v Republic*¹¹ stated: -¹⁰Cap 80, Laws of Kenya.¹¹Criminal Appeal no. 31 of 2005 "... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."
19. Perhaps the leading authority on this issue is *Bukenya & Others v Uganda*¹² where the East African Court of Appeal held that: -¹²{1972} EA 549.
 - i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
 - ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
 - iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.
20. The court in the above case was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.
21. Upon evaluating the evidence, I find that this is not a proper case for the court to make an adverse inference on account of the failure to call the alleged witnesses. In fact, if there is any one who left himself exposed for failing to call a crucial witness, it is the appellant. This is because he failed to call the house girl who claimed heard PW1 knock the widow and who claimed he texted telling her to ignore



- PW1. These important text messages were not produced in evidence. This piece of evidence (if at all it existed) was so crucial to the defence that it could have upset the prosecution evidence.
22. I now turn to the question whether the offence of incest was proved. For starters, the Black's Law Dictionary¹³ defines incest as the crime of sexual intercourse or cohabitation between a man and woman who are related to each other within the degrees wherein marriage is prohibited by law. Section 20 (1) of the *Sexual Offences Act*¹⁴:¹³2nd Edition edition.¹⁴Act no. 3 of 2006.20 (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 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.
 23. In other words, if the parties to sexual intercourse are within the prohibited degrees of consanguinity listed in the above section, then the male may be convicted of incest, even though he accomplished the act without consent of the female and against her will. Similarly, a single act of intercourse between persons within the prohibited degree of relationship is sufficient to constitute the crime of incest by intercourse. It is to be noted that the testimony of the victim of a sex offense alone is sufficient to prove the elements of the offense, even if a state does not introduce medical, scientific, or physical evidence to prove the commission of the offense. However, general intent to commit the prohibited act must be proved. Therefore, whether the accused entertained an amorous design toward the victim and was predisposed to engage in sexual intercourse with her, or whether the victim consented to sexual intercourse with him, is irrelevant.
 24. To establish an offence under the above section, the prosecution must prove the elements of the offence. There must be an indecent act or an act which causes penetration. The complainant narrated how the appellant took her to the kitchen and defiled her. The P3 form, the PRC form and the medical report confirmed that there was evidence of penetration. The appellant denied committing the offence. He called his own wife who was not present at the material time, so her testimony was not sufficient to dislodge the testimony of the complainant. The appellant also called his own mother who said she did not hear any one knock the door, and owing to the fact that the door is made of iron sheets, if at all it was knocked, she could have heard. However, the appellant said PW1 knocked the widow and texted her telling her that PW1 was at the door. As mentioned earlier, the appellant did not call this house girl or produce the text messages. The learned Magistrate had the advantage of seeing the witnesses in court. She was not persuaded by the testimony of the appellant's mother nor did the appellant's mother dispute that PW1 complained to her in the morning that the appellant raped her. Conscious that the trial Magistrate had the advantage of seeing and observing the witnesses and evaluating their evidence first hand, I find no basis to fault her findings on this issue.
 25. The second ingredient is that the victim must be a female person who is to the knowledge of the assailant, his daughter, granddaughter, sister, mother, niece, aunt or grandmother. It is common ground that the appellant is the complainant's uncle, so this ingredient was proved. In fact, the appellant admits this relationship. It is also common ground that the complainant is a female person within the meaning of Section 20 (1) of the Act and that the appellant is her uncle and that he knew her to be his niece. These basic truths which are essential ingredients of the offence of incest were not contested at all.
 26. The third test is whether an indecent act was committed. An indecent act is defined in Section 2 of the Act as follows: - 'Indecent act' means an unlawful intentional act which causes: -



- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration.
 - b.‘Act which causes penetration’ means an act contemplated under this Act.’
27. The prosecution bears the onus of proving that an “indecent act” or “act which causes penetration” has been committed in addition to proving the relationship between the accused/appellant and the complainant as well as the age of the complainant. In support of “indecent act” and “act which causes penetration” is the evidence of the complainant who narrated the appellant first inserted his finger in her genitals and proceeded to insert his male organ into her genitals. Penetration is defined in the act as ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person.’ In fact, it is not necessary for ejaculation to take place, so, the argument that no spermatozoa was detected is immaterial.
 28. PW1’s testimony was corroborated by the Clinical Officers who examined her. The fact that the sexual assault allegedly took place the previous day is irrelevant. It is my view that the medical evidence sufficiently corroborated PW1’s evidence. Also, it is immaterial that the appellant was not examined by a doctor.
 29. Next, I will address the question whether the trial Magistrate erred in failing to appreciate that there existed a grudge between the appellant and his own sister. A reading of the lower courts’ judgment and analysis of the evidence leaves no doubt that the Magistrate considered all the evidence including the defence. In fact, there was nothing startling about the defence to support the alleged malice by the appellant’s sister other than the allegations made by the appellant against his sister and the assertion that the complainant was a difficult child.
 30. In addition, the appellant’s suggestion of a possible motive to falsely implicate him, must be inferred from the evidence on record, and the circumstances must lead a reasonable person to the conclusion that the motive is so probable to be rejected for being out rightly false. A distinction should be drawn between a situation where an accused is proved by the totality of the evidence to have established ill motive. In such a case, the conviction cannot be allowed to stand. However, where the court finds the surrounding circumstances and probabilities excluded any reasonable possibility that someone other than the accused perpetrated the offence – the court will be right in rejecting allegations of ill motive. The evidence before the learned Magistrate viewed in totality pointed towards the appellant.
 31. In my view, the appellant’s submission on this issue amounts to nothing more than a suggestion of a possible motive as to why the state witnesses would falsely implicate the appellant in the commission of the offence. The suggestion is not grounded on evidence. This being so, the trial court was not entitled to draw an adverse inference against the prosecution evidence when no cogent evidence was tendered to suggest ill motive. The magistrate correctly placed reliance on the available evidence in rejecting the appellant’s defence. Furthermore, in summing up his findings that led to conclusion that the state succeeded in proving its case beyond reasonable doubt, the Magistrate listed her reasons for so finding. In my mind, this shows the level of importance that the Magistrate attached to his findings. I find that the Learned Magistrate did not misdirect herself on this issue.
 32. In determining whether the appellant’s defense was considered, this court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.¹⁵ An appellate court will not interfere with or temper with the trial court’s judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the



law.¹⁶¹⁵See *Okeno v Republic* [1972] EA , 32at page 36, *Pandya v Republic* [1957] EA 336, *Shantilal M. Ruwala v Republic* [1957] EA 570 & *Peter v Sunday Post* [1958] EA 424.¹⁶See *R v Dhlumayo & Another* 1948 (2) SA 677 (A). The principle was also restated in *S v Mlumbi* 1991 (1) SACR 235(SCA) at 247g.

33. The ambit for the interference by a first appellate court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong.¹⁷ Factual errors may be errors where the reasons, which the trial Magistrate provides, are unsatisfactory or where he/she overlooks facts or improbabilities. In addition, where the finding on fact is not dependent on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court.¹⁸¹⁷See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) t 645e- f.¹⁸Ibid.
34. What must be borne in mind, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.¹⁹ The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.²⁰¹⁹ As Nugent J (as he then was) in *S v Van der Meyden* 1999 (1) SACR 447 (W) stated at 450.²⁰As was stated in *S v Singh* 1975 (1) SA 227 (N) at 228:.
35. However, by requiring the trial court to consider and weigh all evidence and submissions is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.²¹ This court must determine, what the evidence of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.²²²¹*Mofokeng v S* (A170/2013) [2015] ZAFSHC 13 (5 February 2015)²²Ibid.
36. In other words, this court must consider whether the Magistrate considered all the evidence, that is, the prosecution and defence evidence, and whether it weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a scrutiny of the evidence of each witness within the context of the totality of evidence, and, what the trial court's findings were in relation to such evidence.²³ In order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, including whether the appellant's defence was considered, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.²⁴²³Ibid.²⁴Ibid.
37. This means that if this court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or



cumulatively together with any other misdirections, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.²⁵²⁵Ibid.

38. The crux of the appellant's defense was that the charges were a frame up by his own sister whom they were in bad terms. Confronted with this defense and prosecution evidence, the trial Magistrate believed the prosecution evidence. Weighing the two versions and considering the probabilities and improbabilities, I am persuaded that the trial Magistrate did not err or misdirect himself in failing to believe the defense. Put differently, the accused defense did not cast doubts on the prosecution evidence. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. However, considering the prosecution evidence and the defense, I am not persuaded that this was a proper case for the appellant to be given the benefit of doubt.
39. The appellant's defense did not cast any doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.²⁶ In view of my analysis and determination of the issues discussed above, the conclusion becomes irresistible that I find no merit in the argument that the learned trial Magistrate misdirected himself on the law or the evidence nor do I find any basis to hold that he erred in arriving at the conviction and the sentence. The up-shot is that this appeal against both conviction and sentence is dismissed.

²⁶Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

Right of appeal 14 days

SIGNED, DATED AND DELIVERED VIRTUALLY AT VOI

THIS 26TH DAY OF JANUARY 2023

MOHOCHI S.M JUDGE

