



**BNS v Republic (Criminal Appeal E031 of 2021)
[2023] KEHC 1751 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E031 OF 2021
FA OCHIENG, J
FEBRUARY 28, 2023**

BETWEEN

BNS APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, B N S was convicted for the offence of Incest contrary to Section 20(1) of the [Sexual Offences Act](#). He was then sentenced of Life Imprisonment.
2. He has lodged an appeal in which he cites the following grounds of appeal;
 - “1. That the trial court failed to observe that the sentence imposed is/was manifestly harsh due to its mandatory nature.
 2. That the trial court failed to consider that my fundamental constitutional rights was/were violated and thus no ample time was (given to) the appellant to defend himself.
 3. That the trial court did consider (sic!) that the investigation tendered was shoddy.
 4. That the trial court failed to consider that the subject was based on fabrication and afterthought.
 5. That the appellant hereby beseeches the superior court to indulge into the same and/or be pleased to consider the appellant’s defence.



6. That I wish to be present at the hearing of this appeal and/or be supplied with trial record to enable me erect more grounds.”
3. The petition of appeal which embodies those grounds was filed in court on 16th July 2021.
4. Thereafter, on 14th March 2022 the appellant filed his written submissions. In the said submissions he stated that he had received and perused the trial record, and that he would;

“ ... embark in erecting the following merits solely based on the sentence imposed by PM Hon. Onzere E. M. at Tamu, as follows:”
5. Notwithstanding the express statement by the appellant, his submissions were not limited to the issue of the sentence only. Therefore, being the first appellate court, I will re-evaluate all the evidence on record, as is required of me.
6. In deriving conclusions from my analysis, I will give an allowance in respect to the findings which the learned trial Magistrate made based on her observation of the demeanour of the witnesses. I am constrained to make that allowance because I did not have the benefit of seeing the witnesses when they were testifying.
7. But before I delve into the analysis, I note that the appellant submitted that there had been no direct evidence tendered by the prosecution. In his view, the evidence tendered was circumstantial.
8. He also drew the attention of the court to the fact that there had been some misunderstanding between him and the members of his family. Therefore, he attributed his tribulations to the said misunderstandings.
9. He could not understand how the complainant’s mother never saw any evidence on the daughter, yet they lived in the same house.
10. In any event, he believes that the pregnancy of the complainant was the result of her relationships with some boda boda riders.
11. As regards the DNA test, the appellant submitted that the results were not reliable because there was no evidence to prove that the samples were handled properly from the time when extracted, until the same was tested.
12. It was the view of the appellant that the investigations were shoddy, and could thus not sustain his conviction.
13. On the issue of the sentence, the appellant submitted that the mandatory nature thereof, was unconstitutional.
14. Whilst he appreciates that an offender should be punished, the appellant submitted that an appropriate sentence should not be excessive. He therefore invited this Court to take into account the circumstances in which the offence was committed, as well as the mitigation which he had placed before the trial court.
15. He reminded this court that he was a first offender, who used to be the sole breadwinner. He said that he was remorseful, and asked this court to give him a second chance.
16. Finally, the appellant asked the court to direct that the period which he had spent in custody whilst he was still on trial, should be taken into account when computing the actual duration of the period he is to serve the sentence. This plea was based upon Section 333(2) of the Criminal Procedure Code.



17. After the trial court had heard the case, it acquitted the appellant on count 2, but convicted him on count 1.
18. PW1 was the complainant in count 2. The appellant confirmed, in his evidence that PW1 was his daughter.
19. PW1 testified that her mother (PW3) had sent her to Kipsamwe where the appellant lived. PW1 and PW3 lived in Muhoroni.
20. On the material day the appellant's wife (DW2) had gone to the posho-mill, and she left PW1 at home, together with the appellant and the appellant's other children. PW1 testified that the appellant sent the other children out of the house, instructing them to go and chase away birds from the farm.
21. According to PW1, it is when the appellant remained alone with her, that he defiled her.
22. However, PW1 did not tell anybody about the incident because the appellant had threatened to kill her if she revealed what had happened.
23. The truth about the incident only came out months later, when an elderly lady observed PW1 at a time when the complainant had accompanied her mother (PW3) to attend the burial of the appellant's father.
24. The said elderly lady observed the complainant in count 1, and told PW3 that the young girl was pregnant. After PW2 was examined by a doctor, the said doctor advised PW3 to take PW1 to the hospital when PW3 was taking PW2 back for review.
25. When the medical examination confirmed that PW1 was pregnant, the complainant told her mother that the person responsible for the pregnancy was the appellant.
26. During cross-examination, the appellant suggested to PW1 that she had been sexually active with other men. The implication was that the pregnancy was not attributable to the appellant.
However, PW1 emphatically denied the suggestions. She said;

“I am sure the accused is the one who made me pregnant. It is not possible that the results will show the accused is not responsible for the pregnancy. If it is found that the pregnancy was not for the accused, I will be held responsible. That's all.”
27. The testimony of PW2 has no relevance to this appeal, as the appellant was acquitted on count 1, in respect to which PW2 was the complainant.
28. PW3 is the mother of PW1 and PW2. She testified that PW1 was her daughter; and that the appellant was the father of PW1.
29. According to PW3, it is the doctor who examined PW2 at the hospital in Muhoroni, who advised her to take PW1 to the hospital. After PW1 was examined at the hospital, it was confirmed that she was pregnant.
30. PW3 told the court that it is PW1 who told her that the appellant was responsible for her pregnancy.
31. When PW3 attended the funeral of the appellant's father, she talked to the mother of the appellant, who told her it was possible that the appellant had impregnated his own children, “since the accused is of bad behavior.”
32. During cross-examination, PW3 denied the suggestions that PW1 used to visit men for sex.



33. PW3 also denied the suggestion that she attended the funeral of the appellant's father because she wanted to organise a gang to kill him or that she wanted to burn down his house.
34. PW4 is a Clinical Officer at Muhoroni County Hospital. He examined PW1 and PW2 at the hospital. Both of them were pregnant. And both of them told him that it is the appellant who made them pregnant.
35. During cross-examination, PW4 said that if DNA was carried out, it would show who the father of the babies was.
36. PW5 was the Investigating Officer. After the incidents were reported at the Koru Police Station, PW5 escorted the girls to the hospital, where they were examined.
37. After it had been established that the girls were pregnant; and because the complainants implicated the appellant, PW5 arrested him.
38. After the investigating officer testified, the prosecution closed its case.
39. When the appellant was put to his defence, he testified and he also called one witness.
40. The appellant testified that he was arrested at Rachar Hospital, after being lured there, to go and visit his daughter who was allegedly sick.
41. The appellant was taken, first, to Muhoroni Police Station. Whilst he was there, PW1 and PW3 arrived, and the appellant heard them saying that they had to frame him.
42. He denied committing the offences he was charged with. He attributed his tribulations to the grudge which PW3 had against him, after he refused to repay the loan of Kshs. 30,000/- which she had given him. The appellant said that PW3 wanted him to chase away his current wife (DW3).
43. However, during cross-examination the appellant admitted that he never told the police about the alleged demand from PW3.
44. He denied committing the offences, even though he said that his two daughters used to visit him at his home, where they would sometimes stay.
45. DW2 is the wife of the appellant. She married him after the appellant had separated from his first wife (PW3). According to DW2, the appellant informed her that he was arrested because he had declined to settle the bill at Rachar Hospital.
46. After the appellant closed his case, the Government Analyst testified, at the behest of the court. He testified that he conducted DNA tests on blood samples of the appellant, PW1 and of the foetus who had been evacuated from PW1. The foetus was dead.
47. This is what the analyst said;

“We were expected to (conduct) an analysis of the foetus to establish who the father of the foetus was. The foetus was dead. I did an analysis and found that Benard Simali is the biological father of Jane O, who is the complainant.

There was also proof that Benard Ngonga is the father to a child born by Jane O, and the child is now deceased.

The deceased foetus is the daughter of Jane O.”



48. During cross-examination, the analyst said that he was sure that the blood sample was taken from the foetus. He explained that the said blood was from a male child, which meant that the blood sample was different from that of Jane O, who is a female.
49. The analyst categorically said;
- “The child born by Jane O. is the child of Benard Ngonga.
- Even if one is a grandfather to a child, all their samples and alleles cannot match. A grandson and a grandfather cannot have all the alleles matching.”
50. Having re-evaluated all the evidence on record, I find that there is no dispute concerning the relationship between the appellant and the complainant (PW1). The appellant confirmed to the court that the complainant was his daughter.
51. The age of the complainant was proved beyond any doubt. The proof was through the testimony of the complainant’s mother and also the Birth Certificate.
52. The nexus between the appellant and the complainant was proved through the evidence of the complainant. She was his daughter, and the two of them knew each other very well.
53. The incident in question took place in the home of the appellant, in circumstances that were anything but difficult.
54. This was clearly a case of recognition; in which I find no possibility of mistaken identity. But why did not the complainant notify her mother or any other person?
- I note that the appellant was a herbalist.
- Before he had sex with PW1;
- “My father went to the bedroom and came back with a bottle which had water. He also had a powder substance in his hands. He mixed the items and sprayed them all over my body.
- My father lay on top of me and had sex with me. He had sex with me several times. After he was through, he took a knife and told me that if I tell my mother what happened, he would kill me. My father is a herbalist and I feared for my life.”
55. The evidence is explicit and plain. It shows that the appellant instilled fear in the complainant. She was scared to report the incident, because the appellant had threatened her with death.
56. During cross-examination, the appellant does not appear to challenge any of the factual evidence tendered by the complainant.
57. And, contrary to the appellant’s contention, the evidence of the complainant and of the government analyst were not circumstantial.
58. When he was cross-examining PW3, the appellant did not make any reference to the alleged grudge which stemmed from his refusal to pay the loan of Kshs. 30,000/-. He had alluded to his arrest being linked to his refusal to pay the hospital bill at Rachar Hospital.
59. And whatever differences there might have been between the appellant and the complainant’s mother, I find that none of that, (if it existed) could have caused the complainant to give birth to the appellant’s child (albeit dead).



60. The line of cross-examination which the analyst was taken through suggested that the DNA said to have come from the foetus, had actually been extracted from the complainant. The analyst put paid to that assertion, when he explained that the blood was from a male child, as opposed to the mother. Therefore, there is no merit in the contention that the results from the DNA analysis was unreliable.
61. I find that the conviction was founded upon solid evidence.
62. In relation to the sentence, the record of the proceedings shows that the appellant was given an opportunity for mitigation.
63. After the appellant had given his mitigation, the learned trial Magistrate called for a pre-sentencing report.
64. When handing down the sentence, the learned Magistrate took into account both the aggravating circumstances, such as the psychological trauma to the complainant.
65. The appellant had committed an act which the community deemed as taboo.
66. The trial court described the actions of the appellant as vile and despicable; and they are!
67. The reason why the trial court handed down the sentence of life imprisonment is because the appellant's actions deserved to be condemned in the strongest terms possible;
- “... and the condemnation by this court will be expressed in the sentence imposed.”
68. I hold the view that the sentence was not only lawfully, but it was also commensurate to the offence committed.
67. In the result, there is no merit in the appeal, and it is therefore dismissed. I uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

