



REPUBLIC OF KENYA



**KENYA LAW**  
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**PMM v Republic (Criminal Appeal E023 of 2022)  
[2023] KEHC 1049 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E023 OF 2022  
GMA DULU, J  
FEBRUARY 21, 2023**

**BETWEEN**

**PMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. Benson N. Ireri in Makindu Senior Principal Magistrate's Court SPMCR (S.O) Case No.10 of 2020 pronounced on 19th August 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of offence were that on December 23, 2019 in Kibwezi Sub-County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of YMM a juvenile aged 13 years who was to his knowledge his granddaughter.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(A) of the [Sexual Offences Act](#), the particulars of which being that on the same date and at the same place intentionally and unlawfully touched the vagina of YMM a child aged 13 years.
3. He denied both charges. After a full trial, he was convicted on the main count of incest, and sentenced to ten (10) years in jail.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. That the case was fabricated on him by the complainant's parents.
  2. That there was a land dispute between his cousin and himself.



3. That he was charged, convicted and sentenced when no plea of guilty was entered.
4. That he prays that this appellate court would come with a new decision on appeal.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I will start by stating that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. – See *Okeno vs Republic* (1972) E A 32.
7. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional defence witnesses.
8. This being a case of incest the prosecution had the burden of proving each of the elements of the offence beyond any reasonable doubt. The appellant had no burden to prove his innocence, but could only raise same doubts. This in my view is the meaning of the provisions of section 107 of the *Evidence Act* (Cap.80) that he who asserts must prove, and the legal principles stated in English case of *Woolmington –vs- DPP* (1935) AC 462.
9. The elements of the offence of incest are firstly, the relationship of the complainant and the alleged accused. The second element is penetration of a sexual nature even if partial. The third element is the identity of the culprit. In the present case also, since the complainant was said to be a child, the age of the complainant had to be proved, as it would affect the severity of the sentence.
10. With regard to the relationship of the complainant and the appellant the evidence of Pw1 IM was that the appellant was her step-grandfather. Pw2 MM a brother of Pw1 also said in evidence that the appellant was their grandparent. The appellant did not challenge the evidence of these two witnesses on that relationship. In my view, the prosecution proved beyond any reasonable doubt that the appellant was a step grandfather of the complainant.
11. With regard to penetration of a sexual nature Pw1 stated that she was sexually penetrated on that day. Pw2 also stated in evidence that he saw the complainant Pw1 in the act with a man engaging in sexual intercourse in broad daylight, at the back of a house. The medical evidence from Pw5 Dr. James Mbiyu who testified on behalf of Dr. Masila was that lacerations were found in the vaginal area of Pw1 when she went to hospital same day, of the incident. In my view, the prosecution proved beyond any reasonable doubt that sexual penetration did occur on the complainant on the alleged date.
12. I now turn to the identity of the culprit. In this regard, Pw1 stated in evidence that she was defiled by the appellant when she went to borrow salt from him. Pw2 also stated that he saw the appellant in the very act behind the house in broad daylight, and immediately reported the incident to Pw3 JMM who reported the incident to the government authorities. I note that in his defence, the appellant alleged existence of a grudge due to theft of his phone and money by Pw1 and Pw2 from his house.
13. In my view, the above defence of the appellant was an afterthought. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit.
14. With regard to the age of the complainant Pw1, a birth certificate was relied upon. It was not controverted or challenged. I find that the prosecution proved beyond any reasonable doubt that the complainant Pw1 was 13 years old at the time of the alleged incident. I will thus uphold the conviction.



15. Coming now to the sentence, the appellant was sentenced to 10 years jail. He was 71 years and in mitigation asked for forgiveness. In my view, the sentence imposed was justified in the circumstances of the case, where an old man took advantage of a relatively young girl to commit the sexual offence. I will thus also uphold the sentence.
16. Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.

**DELIVERED, SIGNED & DATED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**

