



REPUBLIC OF KENYA



**JS v Republic (Criminal Appeal 40 of 2017)
[2023] KEHC 2670 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL 40 OF 2017
HK CHEMITEI, J
MARCH 30, 2023**

BETWEEN

JS APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON S O TEMU (SPM)
IN CRIMINAL CASE NO. 571 OF 2013 DATED 29TH NOVEMBER 2013)***

JUDGMENT

1. The appellant herein had been charged with the offence of Incest contrary to section 20(1) of the [Sexual Offences Act](#) no. 3 of 2006. The particulars of the offence were that on the 1st day of August 2013 in Baringo north district within Baringo county being a male person caused his penis to penetrate the vagina of CA, a child aged 5 years who was to his knowledge his niece.
2. The alternative count was Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the offence were that on the 1st day of August 2013 in Baringo north district within Baringo county intentionally and unlawfully did cause his penis to come into contact with the vagina of CA a child aged 5 years.
3. The appellant after full trial was sentenced and convicted to serve life imprisonment hence this appeal.
4. When the matter came up for hearing the court directed the same to be disposed by way of written submissions which the parties complied.
5. In his submission the appellant has argued that he was not accorded a fair hearing and his constitutional rights were trampled. That the medical evidence produced was done by unqualified person, namely a clinical officer and not a gynaecologist.



6. He submitted that he was taken to court after 72 hours contrary to the provisions of the law that he ought to be charged within 24 hours.
7. On the child's condition he said that she was admitted to the hospital because of kidney problems and not defilement.
8. The learned state counsel submitted that all the ingredients of the offence were satisfied and the trial court was right in finding guilt against the appellant. He submitted that there was no contradiction in the evidence it presented and the argument by the appellant concerning a grudge between the family members and him were spurious.
9. He said that the sentence meted against the appellant was lawful and in line with the Act. He however submitted that in line with the *Muruatetu case* this court could still exercise its discretion.

Analysis and determination.

10. This being a first appeal the court is enjoined to re-evaluate the evidence and come up with independent findings noting that unlike the trial court this court did not have the benefit of seeing the witnesses and in particular their demeanour. (See *Okeno v Republic* 1972 E A 32)
11. The ingredients of the offence herein are now easy to appreciate, namely, the relationship between the complainant and the appellant, whether there was defilement, who was the perpetrator and whether the victim did identify him.
12. In this case pw1 the mother to the child spoke as an intermediary. She said that the appellant was a brother to her husband and therefore an uncle to the child. This was not opposed by the appellant herein.
13. On the question of whether the child was defiled the trial court was convinced that it occurred. The same was supported by the evidence of the mother and the clinical officer. The mother testified that she found the child in a bad state when she came home from a merry-go-round meeting. The child told her that she had been done bad manners by the appellant in his house when she took lunch to him.
14. She said that she went to the appellant's house where she saw the food (githeri) which the appellant had not eaten. She raised alarm and pw3 came and she took the child to the hospital.
15. The clinical officer confirmed the injuries suffered by the child which were corroborating what her mother had stated. He concluded that the child had been defiled and her private parts was in a bad state.
16. Taking the evidence above this court easily agrees with the trial court that the minor was actually defiled.
17. Was the appellant the perpetrator? The evidence of the child though through the intermediary in my view was believable. The major connection herein is the food that the child had taken to the uncle to eat. Apparently by the time the child's mother arrived the appellant had not eaten the food which was still in his house.
18. The appellants alibi defence in his unsworn evidence that he was not at the scene does not shake the respondent's case. The same does not hold much as it was not tested in cross examination and at any rate nothing alibi was raised during the evidence in chief or at least during cross examination. In short it is not of much probative value.
19. This goes with the appellant's argument that his rights were breached when he was not presented before court within 24 hours but on the contrary he was charged after 72 hours. This according to him breached article 50 of the *Constitution*.



20. This argument ought to have been raised as of first instance during trial. This in my view is a very weak argument as the matter as per the proceedings proceeded to its finality without any objection from the appellant.
21. The other argument concerning the fact that the child was suffering from kidney conditions is incorrect. As stated by the clinical officer, it was the defilement that caused the child to have some kidney infection and it is easy to conclude that the cause was therefore the defilement.
22. The examination and the production of the report by the clinical officer was lawful. There is no provision of the law that a gynaecologist must produce the same or must be the only one examining the patient suffering from such unfortunate condition.
23. This court does not find any reason to doubt the veracity of the child's evidence. The issue of contradictions raised by the appellant in his submissions does not hold much. The thread connecting the whole respondent's evidence was not broken.
24. Although the certificate of birth of the minor was not produced I do not think the same was an issue considering the findings of the trial court when it conducted voir dire examination and arrived at the conclusion to allow an intermediary. The medical evidence as well supports the fact that the child was of tender age.
25. In the premises, I do not find merit in the appeal. The period from the occurrence of the incident to the child being taken to the hospital where she was admitted for 4 days was not broken at all.
26. As regard sentencing the appellant was rightfully handed the life sentence by the trial court. However, after the Muruatetu case by the Supreme Court of Kenya, and other cases flowing thereafter, i think the court probably would have considered a definite period for the appellant to serve the sentence.
27. All in all, this court shall consider the same which it hereby does and set aside the life sentence meted out against the appellant and substitute it with a period of Thirty (30) years from 6th August 2013 noting that he has been in custody since then. The Appeal is otherwise dismissed.

DATES SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 30TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE

