



REPUBLIC OF KENYA



KENYA LAW
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**EOO v Republic (Criminal Appeal E036 of 2022)
[2023] KEHC 2404 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E036 OF 2022**

**KW KIARIE, J
MARCH 28, 2023**

BETWEEN

EOO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No.12 of 2021 of the Senior Principal Magistrate's Court at Oyugis by Hon.C.A Okore-Principal Magistrate)

JUDGMENT

1. EOO, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence were that on 13th day of June 2021 at Rachuonyo Sub-County within Homa Bay County being a male person caused his penis to penetrate the vagina of FAO, a female aged 2 years who to his knowledge was his daughter.
3. The appellant was sentenced to serve thirty (30) years' imprisonment. The appellant was in person. He has appealed against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the sentence of 30 years imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the less severe punishment under article 50(2) (p) of the [Constitution](#).
 - b. That the trial magistrate erred in law and facts by failure to analyze that mandatory minimum sentence of 30 years imprisonment meted out to me is unconstitutional and amounts to unfair trial and hearing.
 - c. That the trial magistrate failed to analyze that the prosecution did not prove the case to the required standard and that it lacked probative values.[Sic]



- d. That the doctors report was uncorroborated since I was not examined to prove penetration or indecency.
4. The appeal was opposed by the state through Mr Samuel Mwangi Thuo, learned counsel on grounds that:
 - a. The conviction was based on the evidence on record.
 - b. The sentence was proper in accordance with the law.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okenov Republic* [1972] EA 32.
6. Section 20 (1) of the *Sexual Offences Act* provides:

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:
7. Flowing from the provisions of this section, the ingredients of incest are as follows:
 - a. The accused must be a male;
 - b. The victim must be a female;
 - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
 - d. He must have knowledge of the relationship; and
 - e. There must be penetration.
8. FAO (PW1) the complainant herein is a child aged two years and six months at the time of the offence. When she was taken before Arnest Omollo (PW1) a clinical officer at Kendu Bay sub County hospital on June 16, 2021, he made the following findings:
 - a. That the child had received treatment at Matata Nursing Home on June 15, 2021; and
 - b. Fresh bleeding from the vagina with torn hymen.

He therefore concluded that she had been defiled.
9. On June 13, 2021 at about 2 pm HAO (PW2) left home to collect her debt. She is the complainant's mother. She left the complainant sleeping. The appellant who is her (complainant's) father was left clearing grass around the house. Her evidence was that when she returned and opened the door, she found her baby crying. She noticed blood mixed with fecal matter in her undergarments.
10. While taking food with the appellant, it was noticed that she had stained her pair of shorts. She checked her private parts and noticed that blood was oozing from her vagina. When she informed the appellant of her finding, he told her that women in the family bled from the vagina. She suggested to take the child to the health Centre but the appellant told her not to take the child anywhere including the hospital.
11. She subsequently took the child to hospital and on returning home, the appellant quarreled her on learning she had been to the hospital.



12. The appellant in his defence contended that he was falsely implicated by Chief A over some land sold to him by his stepmother and grandmother.
13. The evidence that was adduced against the appellant was circumstantial. In the case of *Mobamed & 3 others v Republic* [2005] 1 KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

Earlier the Court of Appeal in the case of *Republic v Kipkering Arap Koskei & another* (1949) 16 EACA 135, had held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

14. Before the complainant's mother left for a brief mission, she left the appellant around their home. She asked him to be checking the child when she was away. When she returned, she found their house locked and the key was where they usually kept it. She picked it and opened the house. After she had discovered the bleeding of the child from her genitalia, the appellant told her that that was normal with the women in the family. He forbade her from taking her anywhere including to the hospital. When he learnt that she had taken the child to the hospital, he quarrelled her.
15. The evidence on record excludes any other person from defiling the complainant. His conduct is incompatible with his innocence, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
16. In his defence the appellant contended that he was falsely implicated. He did not confront his wife or the chief with this evidence. This was in spite of his evidence that his wife was forced to record a false statement against him. This was clearly an afterthought. The learned trial magistrate was therefore justified to dismiss his defence.
17. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nilsson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James c Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershevsity* (1912) CCA 28 TLR 364.

18. The proviso to section 20 (1) of the *Sexual Offences Act* states:

Provided that, if it is alleged in the information or charge and proved that the female person 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.

19. In the instant case, the victim was aged two years at the time of the offence. In the circumstances of this case the appellant must count himself lucky for the prosecution did not apply for the enhancement of the sentence.
20. The appeal is dismissed for lack of merits.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

