



**BMM v Republic (Criminal Appeal E043 of 2021)  
[2023] KEHC 17995 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17995 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E043 OF 2021  
AK NDUNG’U, J  
MAY 31, 2023**

**BETWEEN**

**BMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nanyuki  
CM Sexual Offences Case No 42 of 2019 – L Mutai, CM)*

**JUDGMENT**

1. The Appellant in this appeal, BMM, was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006 (count I), alternative count of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the same Act, committing an indecent act with an adult contrary to section 11(A) of the same Act (count II) and grievous harm contrary to section 234 of the Penal Code (count III). He was however convicted on count I of incest and Count III of assault causing actual bodily harm contrary to section 251 of the Penal Code after the trial court found that the charge of grievous harm was not proved.
2. The particulars for count I were that on 31/05/2019 in Laikipia Central sub county, intentionally touched the vagina of AM with his penis who was to his knowledge his grandmother. He was sentenced to serve ten (10) years imprisonment for count 1 and 1½ years imprisonment for assault causing actual bodily harm. Both sentences were to run concurrently.
3. The conviction and sentence have been challenged upon the following grounds –
  - i. The trial magistrate erred by failing to note that the case was not proved beyond reasonable doubt.
  - ii. The prosecution evidence was inconsistent, un-collaborating and full of contradictions.



- iii. That the learned magistrate failed to note that DNA was not conducted to link him to the semen found in the complainant's genitalia.
  - iv. That the evidence tendered by the prosecution was insufficient to secure a conviction.
  - v. That the medical report did not link the Appellant to the alleged crime.
  - vi. The learned magistrate erred by rejecting the Appellant's defence without any convincing reason.
4. The Appellant filed written submissions and raised further grounds of appeal as follows;
- i. That the learned magistrate erred by failing to note that the charge sheet was totally defective for duplicity.
  - ii. The learned magistrate erred by not according the Appellant a fair trial as provided under Article 50(2)(c)(j) and (g) of *the Constitution*.
  - iii. The learned magistrate erred by failing to note that the report on DNA samples extracted from the Appellant was not availed before court.
  - iv. The learned magistrate erred by failing to note that the forensic report from the government chemist was not produced.
  - v. That identification was not conclusively proved to implicate the Appellant as no nexus was created between him and the charges.
  - vi. The learned magistrate erred during sentencing for not complying with section 333(2) of the Criminal Procedure Code.
5. In his written submissions, the Appellant submitted that the charge sheet was defective as sexual assault was an alternative count to incest; that the charge was duplex for lumping up the charge of incest and sexual assault in the same charge sheet; that the particulars of the count of incest and alternative count were also defective for the omission of the term penetration. He submitted that Article 50(2) (c) (g) and (j) of *the Constitution* were violated in that, he was not informed of his right to be represented by a counsel; that he was compelled to cross examine PW1 without being supplied with her witness statement and a copy of the investigation diary. That the identity of the perpetrator was in dispute since DNA report that could have connected the Appellant to the commission of the crime was not produced despite the fact that he was subjected to a DNA test; that the circumstances surrounding identification were not positive hence, identification was not proved; that the weapons mentioned that he used to attack the complainant with were not produced; that the prosecution failed to displace his alibi defence and that the trial court failed to consider the time he had spent in custody in line with section 333(2) of the Criminal Procedure Code.
6. The Respondent through the state counsel opposed the appeal. In her written submissions, counsel stated that the prosecution proved its case to the required standard. On the issue of duplicity of charges, counsel submitted that the charge was not duplex as the charge is only said to be duplex where one count contains more than one offence which was not the case in this matter since the two counts were charged in two different counts. It is submitted that the missing of the word penetration in the main count was not fatal since the offence of incest includes either proof of indecent act or penetration; that the error was also curable under section 382 of the Criminal Procedure Code. Further, that the Appellant on his own admission admitted that he had been supplied with PW1's statement before she testified and that the Appellant's claim for non-disclosure was an afterthought for the Appellant was



- always ready to proceed with the hearing and he extensively cross examined the prosecution witnesses showing that he was supplied with the said witness statements.
7. On identification of the perpetrator, counsel submitted that the complainant reported her assailant to be the Appellant; that she testified that she recognized the Appellant who was her grandson and that the Appellant identified himself by stating his name when he sought entry into the house before he broke in. She testified that she was able to see his face through the light from her mobile phone. On non-production of DNA report, counsel while relying on several cases submitted that, even though DNA report was important, it was not necessary in the circumstances of this case. It is urged that the Appellant did not raise a defence of alibi for he failed to give an account of his whereabouts during the attack of the complainant.
  8. On non-compliance with section 333(2) of the Criminal Procedure Code, counsel submitted that the Appellant was not a remandee but a convict having been convicted in another offence on 19/10/2020. On violation of Article 50(2) (g), it is submitted that the Appellant did not raise the issue of legal representation during the trial and the proceedings did not indicate that he did not understand the proceedings and that he needed legal representation. That in case this court finds that his rights were infringed, a retrial should be ordered.
  9. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
  10. In conformity with that duty, I have painstakingly perused and considered the evidence as recorded by the trial court. I have given due allowance to the fact that I neither saw nor heard the witnesses testify. I have put into account the respective submissions by the parties and the case law cited.
  11. The issues for determination are
    - a. Whether the charge in count I is duplex.
    - b. Whether the omission of the word penetration in the particulars in Count I rendered the charge defective and fatal to the prosecution's case.
    - c. Whether the identification of the Appellant as the perpetrator was proper.
    - d. Whether lack of medical evidence made the conviction unsafe.
    - e. Whether the Appellant's rights under Article 50 of *the constitution* were infringed.
    - f. Whether the trial court complied with section 333(2) of the Criminal Procedure Code in sentencing the Appellant.
  12. The first issue to consider is whether the charge sheet was defective for being duplex. The Appellant's claim is that sexual assault cannot be an alternative charge to incest and charging the two offences on the same charge leads to duplicity. Further, the particulars of the charge sheet were defective for omitting the term penetration.
  13. A duplex charge is one which charges more than one offence in the same count (see the case of *Pope v. R* (1960) EA 132, 138 and *Cherere v. R* (1955) 22 EACA 478). The charge of incest and sexual assault were charged as a main count and an alternative count and therefore the allegation of duplicity is not founded. A major ingredient of the offence of incest is the knowledge by the perpetrator of the degree of consanguinity within the limits particularised in Section 22 of the *Sexual Offences Act*. In my view, a conscientious prosecutor will be spelt on to have the charge sheet include an alternative charge



of sexual assault/defilement or rape and with an alternative count of indecent assault as a fall-back position should the prove of the test set in Section 22 fail but evidence of sexual assault/defilement or rape abounds. There would be nothing illegal in having all the counts and the alternative charges in the same charge sheet. That ground of appeal fails at the outset.

14. As to the effect of omission of the word penetration in the charge of incest in Count I, the particulars were that he;

...intentionally touched the vagina of AM with his penis who to his knowledge was his grandmother”.

15. The offence of incest is provided under section 20(1) of the [Sexual Offences Act](#) which state as follows;

“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.”

16. An indecent act is defined under section 2 of the Sexual Offence Act as follows;

“indecent act” means an unlawful intentional act which cause

- 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 that causes penetration.
- b) Exposure or display of any pornographic material to any person against his or her will;

17. From the above, the prosecution may prove incest by either showing that an indecent act or penetration was perpetrated against a female person if that female person is to the perpetrator a daughter, granddaughter, sister, mother, niece, aunt or grandmother.

18. It is noteworthy that the particulars in count I were at variance with the evidence on record. Count I stated that the Appellant intentionally touched the vagina of AM with his penis. It is a well-established and a fundamental tenet of the criminal justice system that an accused person ought to, at the very outset, be informed of the charge with sufficient detail to answer it and our constitution echos this requirement at Article 50(2)(b).

19. The court of Appeal in *Benard Ombuna v Republic* [2019] eKLR put this requirement plainly as follows;

“It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person’s right to a fair trial contrary to Article 50(2) (b) of [the Constitution](#). This is the rationale behind Section 134 of the Criminal Procedure Code which stipulates:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with



such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

20. In the instant case, the evidence on record reveals that there was penetration. The complainant testified as PW2 and stated that the Appellant tore her petticoat and the inner wear and raped her. PW3, the clinical officer testified that upon examination, the complainant’s vagina had bruises with blood stain, she had a foul smell, HVS had blood stain, moderate pus cells and her conclusion was that from the history and examination, there was evidence of rape. From the foregoing evidence, there was thus evidence of penetration and the trial court found as much when it stated “Accordingly, the court is convinced that the accused was at the scene of crime and that he sexually penetrated the complainant who is his grandmother”.
21. The question therefore is whether the variance between the evidence and the particulars of the charge in respect of Count I were fatal to the prosecution case. I am guided by the Court of Appeal decision in *Benard Ombuna v Republic* (supra)[2019] where the court held that;
- “In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here? Looking at the record and the evidence as a whole we cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross-examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with NNA and that there was no penetration. Therefore, in as much as the particulars did not disclose the offences he was charged with or coincide with the evidence to the extent that there was no penetration on NNA, in our view, did not render the charge sheet fatally defective. We say so because it is clear from the evidence that the appellant had inappropriate sexual contact with NNA and to hold otherwise simply because the particulars in the charge sheet were defective would be an affront to justice. Our position is reinforced by the following sentiments of the Supreme Court of India in the...Consequently, we find that the defect was curable under Section 382 of the Criminal Procedure Code which provides in part...”
22. Section 20 (1) of *Sexual Offences Act* creates the offence of incest and provides that;
- (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:
23. The ingredients for the offence of incest are:
- (i) Proof that the offender is a relative of the victim.
- (ii) Proof of penetration or indecent Act.
- (iii) Identification of the perpetrator.
24. A proper reading of count I and the particulars thereon reveals no omission but rather that the charge is predicated on one of the legally sanctioned limb of the offence which is the commission of an indecent Act (The other being penetration) on a female who is a relative to the degrees set in section 22 of the *Sexual offences Act*. To the extent that the particulars read “...intentionally touched the vagina of



Anastacia Mugure with his penis who to his knowledge was his grandmother”, the charge is properly framed and even without indication of penetration in the particulars and/or prove of penetration, the charge is provable by evidence of the accused’s penis touching the vagina of the Complainant and prove that the Complainant was his grandmother.

25. My review of the evidence leads me to the conclusion that there was overwhelming evidence of penetration as concluded by the trial magistrate. The court however fell into error by convicting for the offence of incest based on the evidence of penetration without amending the charge to re-align it to the evidence. (See *Furo versus Uganda* [1967] EA 632,). The trial court too, had the option to convict on incest based on an indecent act on the complainant on the strength of the evidence of the Appellant’s penis touching the vagina of the Complainant since there was adequate evidence in that regard. I note that this error is predicated on the misconception by the trial court of the ingredients to be proved in a charge of incest. The court listed ingredients to be proved as, inter alia, “intentional indecent Act resulting in penetration of the victims genitalia”. The operational word under Section 20(1) is ór’ which means prove of either an indecent act or penetration would suffice.
26. My analysis of the charge, the particulars of the charge, the evidence on record and the applicable law leads me to a finding is that by relying on the alleged defect of the charge and the variance of the particulars with the evidence, the Appellant is clutching at straws. There was no prejudice visited on the Appellant. He was aware of the nature of the charges facing him and he was in a position to put up an appropriate defence. Looking at the record and the evidence as a whole I cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross-examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with his grandmother and that there was penetration. Indeed, the particulars of the offence disclosed one limb of the offence (indecent act) which if proved was enough to convict on the offence of incest. The fact that the particulars did not disclose penetration which came out in evidence did not render the charge fatally defective. I reach this conclusion because the evidence on record clearly shows that the Appellant had sexual contact with his grandmother and, as guided by the Court of Appeal in *Benard Ombuna v Republic* (supra), to hold otherwise simply because the particulars in the charge sheet were defective would be an affront to justice. And as noted in that case by the Court of Appeal, that position is reinforced by the following sentiments of the Supreme Court of India in the *Willie (William) Slaney* case :
- “ We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.
- To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”
27. This takes me to the next issue; the identification of the Appellant. It is the Appellant’s case that his identification as the perpetrator was not proper. The Appellant submitted that the DNA report was not produced in court to connect him to the offence despite the fact that he was subjected to a DNA examination. He further submitted that the circumstances surrounding identification were not positive as it is unusual for culprits to announce their identities; that it was dark; that considering the illumination of light from the light of the mobile phone, the complainant’s mental disposition due to terror and trauma, it cannot be ruled out that such conditions were ideal for a positive identification. Reliance was placed on the cases of *Wamunga vs Republic* (1989) KLR 426; *Republic vs Turnbull* (1976) ALL ER 549; *Oluoch vs Republic* (1985)eKLR and *R v Hanemaayer*, 2008 ONCA 580.
28. The Respondent counsel on the other hand submitted that DNA report was not necessary in the circumstances of this case. On identification, counsel submitted that identification was proved by the



statement of the complainant who recognized the perpetrator when he stated his name and that she was able to see the Appellant with the aid of the light from her mobile phone.

29. The principles to be followed when determining whether identification was proper and free from error were set in the case of *R vs Turnbull* [1976] 3 ALL ER 549, it was stated by the Lord Chief Justice of England and Wales as follows:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"(emphasis added).

30. The principles enunciated in this case have been applied in Kenya in several cases. In *Cleophus Otieno Wamunga vs. Republic* (1989) KLR 424, the Court of Appeal held that;

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

31. The circumstances surrounding identification in the instant case were that the complainant PW2, testified that she was attacked at night. She testified that on the material night she heard someone calling out ‘chuchu’ and upon asking who the caller was, the person said it was MM, the Appellant. She checked her phone and noticed that it was 4:00am in the morning. The caller told her that her daughter W and her son N had sent him to kill her. She did not open and the caller removed two pieces of the timber from the wall and entered the house and went where she was.

32. He grabbed her by the neck and bit her right ear. He punched her on her mouth, bit her on the nose bridge, raped her and stabbed her on both shoulders and back. He hit her twice on the head with a rungu and she lost consciousness. At 6:00 am after gaining consciousness, she crawled out of the house and called upon the children who were going to school and she sent them to call her daughter, PW1 who took her to hospital.

33. She testified that she saw the Appellant well through the light from the mobile phone screen when the Appellant took it to check whether it had money and she was able to see his face well. She testified that she had known the Appellant since he was a child and she had not differed with him.



34. On cross examination, she maintained that she saw the Appellant's face well when he was checking her phone. That it had taken her a while before seeing him and that he identified himself by his name after calling her out.
35. PW5, the investigating officer testified that the complainant reported the attack at the station. She had visible injuries. In this first report she stated that it is her grandson BM, the Appellant, who had raped her. She testified that the Appellant was arrested at Thigithi area.
36. The Appellant gave unsworn testimony. He testified that he was a boda boda operator and in May 2019, he woke up at 6:30 am and went to work. At 2:00pm, he ferried a customer to Sweetwaters and on his way back, he met other boda boda operators who alleged that he was at Tigithi in the morning and that he had raped his grandmother. He was beaten up and he was rescued by the police who took him to police station.
37. I have reviewed this evidence. I note that the evidence is of a single identifying witness. The complainant stated she was able to see the assailant's face through the screen light of her phone when he was running through it checking if she had money in her account. The complainant knew the assailant before. He was her grandson. Just like the trial court, my review of the evidence leads me to conclude that the complainant positively identified, indeed, recognized the Appellant at the time of the commission of the offence. The light from a phone screen and the fact that the Appellant was running through it, meaning that his eyes and face were directly fixated on it, made the conditions of recognition favourable, especially, recognition of a person the complainant knew from his childhood. I warn myself that am relying on the evidence of a single identifying witness. I am however satisfied that favourable conditions and adequate opportunity for the identification of the Appellant existed at the time and scene of the offence. The identification was positive and free from error.
38. On whether the failure by the state to tender DNA evidence vitiated the conviction, that ground of appeal is based on a misapprehension of the law. It is trite law that a sexual offence can be proved and conviction obtained based on evidence other than medical evidence. In *Fappyton Mutuku Nguvi v Republic* [2014] Eklr the Court of Appeal held that;

“The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.”

In *Aml v Republic* [2012] eKLR (Mombasa), this Court upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

This was further affirmed in the case of *Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)* where the court stated:

“... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.”



**This ground fails.**

39. Moving on, the Appellant claimed that his rights under Article 50 of *the Constitution* were infringed. More specifically, he submitted that Article 50 (2)(c) and (j) were infringed for he was not supplied with PW1's witness statement and a copy of the investigation diary which amounted to trial by ambush. The said Article 50 (2) (c) and (j) provides;

“Every accused person has the right to a fair trial, which includes the right-

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

40. The record reveals that the Appellant took plea on 03/06/2019 and after taking plea, the court ordered for the supply of the copy of the charge sheet and copies of the prosecution witness statement. The matter was mentioned severally and on 05/08/2019, the matter proceeded for hearing. The prosecution had one witness, PW1 and the Appellant indicated to the court that he was ready to proceed. He did not inform the court that he was not supplied with the said witness testimony. The matter was adjourned and on 02/09/2019, the matter was coming up for hearing and the prosecution indicated to the court that he was ready to proceed with one witness. The Appellant responded by stating that he was only supplied with the statement of one witness who had already testified.

41. It therefore follows that the Appellant in his own admission stated that he had been supplied with PW1's witness statement hence he lied to this court that the same was not supplied to him. His claim of non-disclosure therefore fails.

42. Did the trial court comply with the provision of Section 333 (2) in sentencing the Appellant? The question of non-compliance with section 333(2) of the Criminal Procedure Code by the trial court does not arise in the circumstances of this case as the Appellant was not a remandee awaiting trial at the time of sentencing since he was a convict serving a prison term having been convicted in Sexual Offence Case No. 56 of 2019 and sentenced to serve 30 years imprisonment on 19<sup>th</sup> October 2020. That ground of Appeal fails.

43. With the result that the appeal herein lacks in merit and is dismissed.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 31<sup>ST</sup> DAY OF MAY 2023**

**A. K. NDUNG'U**

**JUDGE**

