



**WM alias M v Republic (Criminal Appeal E008 of 2021)
[2023] KEHC 18345 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E008 OF 2021
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

WM ALIAS M APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the chief magistrate's court at Muranga
in SO Case No. 11 of 2005, delivered by Hon. E. Nyaga on 13th may 2021)*

JUDGMENT

1. The Appellant was charged with incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006 (The Act)
2. The particulars of the charge were that on diverse dates between the month of December 2014 and February 2015 at [Particulars Withheld] area within Murang'a County, being a male person caused his penis to penetrate the vagina of BM aged 7 years a female person who was to his knowledge, his daughter.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act
4. The Appellant pleaded not guilty to the charge, and he was tried, convicted of the main charge, and sentenced to life imprisonment.
5. Being dissatisfied with the outcome, he proffered this Appeal.

Grounds of Appeal

6. The Appellant's grounds of Appeal, which I have paraphrased, are as follows:



- a. That the court erred in relying on the single Testimony of a minor
- b. That the complainant's evidence was inconsistent and contradictory.
- c. That the trial court erred in failing to take note of the fact that there was no medical evidence linking him to the offence.
- d. That the case was not proved beyond reasonable doubt.

The Appellant's submission.

7. The Appellant has submitted that the prosecution's case was full of inconsistencies and contradictions and that the said contradictions went into to the root of the case. He has pointed out for instance, that the complainant testified that she was defiled by her father on one occasion but her teacher (PW1) testified that she had been defiled by both her father and brother. PW3 on the other hand testified that he had been defiled by a boy.
8. It is his further submission that that he was not medically examined and the medical evidence provided in respect to the complainant was not sufficient to prove defilement of the complainant.
9. It is the Appellant's further submission that the age of the complainant was not proved.
10. He further alleged that his mother-in-law was using the child to merely distort money from him.
11. The Appellant's final submission is that the prosecution did not prove its case beyond reasonable doubt.

The Respondent's submission.

12. It is the Respondent's submission that all the ingredients of the offence of incest was proved as defined under section 20 of the Act.
On the relationship of the Appellant and the complainant, it is submitted that the complainant's testimony that the complainant was her father was not contested at all.
13. On the act of penetration, It is the Respondent's submission that the narration of what transpired by the complainant constituted acts of penetration. The Respondent also urges the court to take note of the lower court's observation on the demeanour of the witness, to the effect that the child was giving her testimony amid sobs. The respondent further submits that the evidence of PW5 corroborated the evidence of the complainant in that the medical examination of the complainant showed that there was vaginal penetration.
14. The respondent further submits that identification is a non-issue as the victim knew her father who lived and slept together in the same house.
15. On the age of the victim, it is submitted that an age -assessment report was produced showing that the complainant was 7 years old and thus the victim's age was proved.
16. On whether there were material and irreconcilable contradiction in the prosecution case, it is submitted that the discrepancies if any, were not prejudicial to the Appellant's case and therefore not fatal to the prosecution's case. The Respondents has cited several Authorities to buttress their submissions on the nature and effect of contradictions and inconsistencies on the prosecution's case.
17. The Respondent further submits that the Appellant's testimony was unsworn, was a mere denial and an afterthought. That the claim of extortion of money was raised in defence and was not substantiated.



It is further pointed out that there was no reason given as to why the Appellant's mother-in-law would want to frame him by using the Appellant's own child as alleged by the Appellant

18. It is finally submitted that the sentence passed is mandatory in law and the trial court cannot be faulted for complying with the law.

Summary of the Evidence

19. PW1 was the complainant's teacher. She testified that on February 13, 2015 at about 1.00 pm while at school, she received information that there were children in class two who were touching their private parts. When she called them and inquired where they learnt the behaviour from, they informed her they learnt from BM, the complainant. The complainant was however absent in school on that day.
20. She waited until the following Monday to interrogate the complainant. she told the teacher that both her brother and father do that to her especially at night as they sleep together. She stated that the act had been going on for a while. PW1 informed the head teacher about the incident. The two resolved to report to the police. They escorted the child to the children's office, then the police station. The complainant was later taken to Murang'a hospital where she was examined, treated and discharged.
21. On cross examination, she stated that she did not know the complainant's brother since he was in another branch of their school and the girl informed them that she had had sex with the brother and the father. She clarified that although the hospital records indicate February 17, 2014, they were in hospital on February 16, 2015 and that the p3 form is dated February 18, 2015.
22. The next witness was the complainant. A voire dire examination was conducted on the minor and she gave an unsworn testimony. She stated that she was a student at [Particulars Withheld] primary school, in class two; that the Accused was her father and she had one brother called B . She further told the court that her mother does not stay with them. She confirmed that she told her teacher C that her father did bad manners to her at home where she stayed with her father and her brother. That her mother died when she was in Nursery school.
23. She stated that she used to sleep in her own bed but in the same room as her father since their house had one room. She testified that her father used to call her and do bad manners to her. She stated that her father would remove her clothes and insert his 'thing' in a bad place, where she used to urinate. she told the court that she was now living with her grandmother.
24. On cross examination, she stated that she is a student at [Particulars Withheld] primary school and when shown her statement, she confirmed that she did not write it and that the date on the document was February 16, 2015. She stated that B did not do anything to her in the year 2014. She stated that B did not do any bad things to her and that it was her father.
25. PW3 was the children's officer. He testified that on February 16, 2015 a teacher from [Particulars Withheld] Primary School called C came to the office accompanied by the complainant. When he interviewed her on the allegation against her father, she stated that she was defiled severally by the father. He reported the matter to the police and the child was placed at [Particulars Withheld] Children's home. The accused was arrested and charged. He affirmed that he did not interview the Appellant but met him later.
26. On cross examination, he confirmed that he interviewed the minor and later reported to the police. That the teacher had earlier reported to the police. That he later learnt that a boy defiled her.
27. Pw4 was police Corporal Mwanabili Cuonjo attached to Murang'a Police station. She recalled that on February 16, 2015 while at work, she received a report from teacher C that one of her pupils aged 7



years who had accompanied her to the station was defiled by her father between December 2014 and February 2015. They went with the children's officer, Ms Gachui and fellow officers and took the child to Murang'a hospital. That the girl was treated then discharged and the father was arrested on April 9, 2015. She confirmed an age assessment report was done on the child, and produced the report as PEXB 3. she was found to be 7 years old.

28. On cross examination, she stated that she did not know the family. That they took the girl to the hospital and that she was informed that the girl had been defiled. She stated that she did not know the HIV status of the girl but the defilement was confirmed by the complainant.
29. Pw5 was the in-charge at the clinical department of Murang'a Level 5 Hospital. She told the court that the complainant was brought to the hospital and was examined by his colleague Mr Mwaura who had since retired. He stated that he was conversant with his hand writing and produced the treatment note and the P3 form. The medical documents showed that the girl was aged 7 years, her Labia Majora was swollen, the hymen was perforated which was evidence of vaginal penetration. He stated that there was no evidence of spermatozoa.
30. On cross examination, she stated that the child informed her that her father defiled her. That the hymen tags were old and the penetration was by a blunt object
31. The Appellant was put on his defence and he opted give an unsworn statement. He did not call any witnesses. He stated that he arrived at Nairobi on February 16, 2015 where he was working at Nazareth[Particulars Withheld] Hospital. In the evening his mother called him and informed him that BMM had not come from school; that he was informed that the minor was staying at the children's home and that he was needed there. On February 17, 2015, he travelled home, did not find his mother, and he decided to go to the child's school and eventually to the children's home . He told the court that he was arrested for no reason and was later informed that he had defiled his daughter. He was taken to the OCS office and found his mother- in- law whom he owed her Kshs 100,000/=.; That he was given 2 months to look for the money. That he gave Kshs 5,000/= for his freedom and was informed that the girl would stay at home until he produced the money. He testified that on April 8, 2015 he was called by the OCS and when he failed to turn up a arrest warrant was issued. He claimed that he met the teacher in the evening and on April 9, 2015 he was arrested and taken to the police station. He was charged on April 13, 2015 and he denied the charges.

Determination

32. This court's duty as the first Appellate Court is to review the evidence, re-evaluate it and come to its own conclusions, without ignoring the conclusions made by the lower court as was held in the case of *Okeno v Republic 1972 EA 32*). The court stated: 'An appellant on a first appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination (*Pandya V R 1975*) EA 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala V R [1957] EA 570*). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post 1978*) EA 424.'
33. I have considered the grounds of appeal, the record and the respective submissions of the parties. The only issues for determination, in my view, is whether the offence of incest was proved beyond reasonable doubt and whether there were contradictions that went into the root of the prosecution's case.



34. The offence of incest is provided under Section 20(1) of the Act which provides that:

' 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:

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.'

35. In the case of *HKK v Republic [2017] eKLR*, Korir J stated that: -

'The charge has four components namely, the sex of the perpetrator and the victim, the relationship between the two, penetration and the age of the victim for purposes of sentencing.'

36. On the relationship between the Appellant and the complainant, Section 20 (1) of the [Sexual Offences Act](#) (SOA) outlines relationships that are considered incestuous and includes that which is between a father and a daughter.

37. In the present case, the relationship between PW1 and the Appellant is not in dispute. PW2 the complainant told the court that the Appellant was her father. The Appellant too admitted that the complainant was his biological daughter. Their relationship therefore was one within the prohibited degree of consanguinity.

38. On the complainant's age, the Appellant submitted that there was no documentary proof produced to determine the age of the minor and that all the witness called did not prove the age of the minor. However PW4, the investigating officer, produced the age assessment report (PEXH.3) which confirmed that the complainant was 7 years' old.

39. In the case of [Joseph kieti seet -VS- Republic \[2014\] e KLR](#), , it held as follows:

' It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No 2 of 2000. It was held thus:

'In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense'

In the present case the age of the child was therefore proved, by way of an age Assessment report and I have no reason to fault the trial court's finding in this regard.

40. On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant corroborated by medical evidence to prove penetration. In this case, the complainant explained to the court how her father defiled her on various occasions. That she would sleep in the same room as him and he would do bad manners to her. she testified that the appellant would remove her clothes and insert his thing in a bad place, where she uses for urinating. PW4 produced the complainant's P3 form (Ex1)



and treatment note (Pexh 2) which indicated the victim had a swollen labia majora and a perforated hymen which he concluded, was evidence of vaginal penetration.

40. Section 124 of the *Evidence Act* provides that: -

' 124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth'.

41. From the proviso to section 124 of the *Evidence Act* (above), it follows that the evidence of the victim does not require corroboration for it to form the basis of a conviction. In the present case, the complainant not only gave a clear narrative of what the Appellant used to do to her, but her evidence was also corroborated by medical evidence as presented by PW4. Am satisfied that the act of penetration was proved beyond reasonable doubt.

42. On identification, the identity of the perpetrator was not in doubt. The complainant identified the Appellant in court as her father and the Appellant admitted as much that the complainant was his daughter.

Whether there were contradictions that went into the substance of the case

43. The Appellant submitted that there were several contradictions in the evidence of the complainant. He stated that PW5 gave a history of defilement on various occasions, while PW2 testified that she had been defiled once. He further submitted that PW1 testified that the girl had been defiled by both the father and the brother while PW2 testified that it was only the father who had defiled her.

44. The other contradiction which he points out is that while the laboratory request form was dated February 17, 2014 the alleged offence occurred on February 14, 2015, and the patient referral form was undated.

45. The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic (2017) eKLR* where the court cited with approval the Ugandan case of *Twahangane Alfred -Vs- Uganda CR Appeal No 139 of 2002 (2003) UGCA,6* where it was held that 'with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually, but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case'.

46. On the number of times the complainant was defiled was defiled, it could just have been a question of forgetfulness or not being very keen since she was just a child. It does not in my view point to an act of deliberate untruthfulness on her part. On the varying dates on the medical records I accept the explanation given to the effect that it could have been a clerical error. What is important is that the



document answered the question of whether or not the complainant had been defiled at the material time. It is my finding that the contradictions did not affect the substance of the prosecution case.

47. Am satisfied that the case against the Appellant was proved beyond reasonable doubt and the Appellant was rightfully convicted.
48. The sentence was not an issue in this Appeal and thus I will not address myself to it. It suffices to state however that the sentence is founded in law.
49. In conclusion the entire appeal is unmerited. It is hereby dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST MAY 2023

S. CHIRCHIR.

JUDGE.

In the presence of:

Susan- Court Assistant

Appellant- present.

Ms Muriu for the Respondent.

