



**EKM v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 21272 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E016 OF 2021
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

EKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Hon. M. KURUMBU
(SRM) delivered on 02/09/2020 in Kandara S.O Case NO. 24 OF 2016)*

JUDGMENT

1. The Appellant herein, 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 offence were that on June 23, 2016 at about 1800 hours at village location insub-county within county, the appellant intentionally and unlawfully did an act which caused penetration of his penis into the vagina of SWK, a female child aged 14 years who to his knowledge his daughter.
3. He was convicted and sentenced to 10 years in prison.

Petition of Appeal

4. Being dissatisfied with the conviction and the sentence, he lodged the present Appeal and set out the following grounds:
 1. The learned magistrate erred in Law and fact in finding that the prosecution had proved its case beyond reasonable doubt in circumstances where the evidence presented was clearly inconsistent and inadequate to sustain and prove the charges preferred.



2. That the learned magistrate erred in law and fact in relying on and giving due credence to prosecution evidence which was full of contradictions and loose ends incapable of proving the charges against the appellant.
 3. The learned magistrate erred in law and fact in finding the prosecution witnesses testimonies had been consistent when in fact there were glaring contradictions, exaggerations and misinformation in the whole case and evidence.
 4. That the learned magistrate erred in law and fact by reaching conclusions on facts and giving opinions not founded on or supported by the evidence tendered by any witness.
 5. The learned magistrate erred in law and fact in disregarding and failing to consider the sworn testimony of the appellant and that of his witness.
 6. The learned trial magistrate erred in law by shifting the burden of disapproving the charges to the appellant.
 7. The learned magistrate erred in law and fact by convicting the appellant of the charges by largely misconstruing the medical evidence to imagine an offence where none existed.
 8. The learned magistrate erred in law and fact by disregarding the defence of the appellant / accused which absolved the accused of the crime he was charged with.
 9. Without prejudice to all the foregoing, the learned magistrate erred in law and fact by imposing an excessive sentence.
5. The Appeal proceed by way of written submissions.
Appellant's submissions
6. It is the Appellant's submission that the evidence of the complainant, PW2 and PW3 was full of gaps and discrepancies to sustain a conviction.; that the medical evidence was inconsistent and, in any event, did not prove penetration. Finally, he submits that his family unit is still intact; that he is still paying school fees for the complainant and that the charges were simply meant to settle family scores.

Respondent Submissions

7. The respondent has submitted that all the ingredients of the charge of incest namely: proof of penetration, age of the victim ,identification of the perpetrator and proof of relationship between the offender and the victim were proved beyond reasonable doubt.
8. The respondent further submits that under section 20 of the Act ,proof of either indecent act or penetration are enough for purposes of the offence of incest. It is further submitted that the testimony of the victim coupled with the medical evidence overwhelmingly proved an attempt at penetration of the victim's vagina which amounts to an indecent act.
9. On the alleged contradictions and discrepancies on the evidence of the prosecution, it is the Respondent's submission that, the contradictions, if any, were minor and did not materially affect the prosecution's case.

Summary of the Evidence

10. PW1 was the complainant. She told the court that on June 23, 2016, she had come from school and found her father, brother and sister at home. Her father then sent her sister to the shop and called the complainant to go to his bedroom so that he could apply on her some medicine for skin irritation.



11. He asked her to undress but she did not. He went ahead and removed her clothes and applied a cream all over her body. He stood behind her and started doing “*tabai mbaya*” to her. She felt pain and she started crying. He did “*tabia mbaya*” while she was bending. She further stated that she had refused to bend but he forced her. When he saw the complainant’s sister returning from the shop, the Appellant walked out.
12. In the evening, her mother came home but she did not tell her. The following day she went to school, and while in the parade the recollection of the previous day’s events came over her and she went to the pit latrine to cry. A friend looked for her, found her crying and questioned her. She told her what had happened. The information was escalated up to the deputy head -teacher. Her mother was called. She narrated what happened in front of her mother and four teachers. She was taken to Gatura dispensary then to the police station. She further told the court that the bedroom was located upstairs and the father defiled her while at the door. She identified her father at the dock. After the incident they moved out to another house with her mother and siblings.
13. On cross- examination, she told the court that prior to the incident, she had had no problem with the Appellant. That her younger brother was playing outside when the incident took place. That she cried in school on recollection of what had happened (at this point the magistrate make a note that the girl continues sobbing as she answers questions.) She did know if her parents were having differences.
14. PW2 was the head teacher at [Particulars Withheld] Primary school. He told the court that on 24/6/2016, he was addressing the pupils in the parade when the complainant went to the pit latrine. She took so long, so he instructed her class teacher to check on her. The teacher found her crying and upon interrogation she told her about the incident. He got the report in his capacity as the headteacher.
15. He had met the Appellant before in his office, so he knew him. He identified him on the dock.
16. On cross examination he stated that there was nothing wrong about the complainant going to the toilet, what was unusual was the fact that she had taken long. That he got the report from the class teacher after the parade had ended. That the complainant’s mother came and they talked. He is the one who gave instructions for the complainant to be taken to hospital. He further stated that the girl moved to Juja after the incident but later came to do her examination in his school (KCPE)
17. PW3 was a teacher at the complainant’s school. She told the court that she was asked by the head -teacher to check out on the complainant who appeared to have taken long in the toilet. she found her squatting and crying. The complainant told her what happened. She made the reported to the deputy head- teacher and head -teacher. She was instructed to take her to hospital. She took her to Gatura health centre.
18. On cross examination she told the court that after the mother was informed, she went back home and later joined them at the health centre.
19. On re-examination she denied that the case was fabricated by the teachers
20. PW4 was the Assistant chief of Gatura. On 24/6/2016, she was called by the chief and told to go to Gatura health centre where a man who had allegedly defiled his daughter was being held. They found the man at the maternity ward. The police had also arrived, and the Appellant was arrested.
21. On cross examination, she told the court that she overheard the man asking for forgiveness.
22. PW5 was the investigations officer. On the material day he was told that there was a suspect at Gatura health centre and he went there. On arrival he met the Assistant chief, doctors and the suspect. He arrested the man. He identified the man on the dock as being the man he arrested that day.



23. On cross – examination he insisted that he was the arresting, not the investigations officer; that he found both the suspect and child in the hospital
24. PW6 was a clinical officer at kirwawa hospital. She produced a medical report on behalf of Dr. Gachanja. The test showed that the complainant had epithelial cells and few pus cells, that the presence of the epithelial cells is an indication of an injury or trauma on the affected site.
25. On cross examination, she opined that in her assessment, there was attempted defilement; that there was no penetration. she further told the court that the complainant also reported to her a case of attempted rape by her brother, which took place about a month earlier. She however stated that a rape which occurred a month before, could not account for the presence of epithelial cells. She concluded that the complainant was sexually assaulted.
26. PW7 presented the investigations officer’s statement. He stated that the Appellant did not record any statement
27. The Appellant was put on his defence and opted for a sworn statement. He testified that on June 23, 2016, he was coming from work at about 2pm when he was called by the school teacher who informed her that his child, SW was sick in hospital. when he arrived at Gatura Health Centre, he was arrested and taken to Ndakaini police station. He alleged that he was there for 4 days and was brought to court on June 27, 2016. He told the court that he was not allowed to see anyone include his daughter. That he was arrested immediately he reached the health Centre and he was not informed of the reasons for his arrest and that he heard of the charges on June 27, 2016.
28. He further testified that on 26th, which was on Sunday he was taken to Kiwara Health Centre for a HIV test. He stated that he had raised all his 6 children and that the complainant was the 4th Born.
29. He attributed his arrest to a land dispute with his step- brother. He also stated that he did not know why he was being charged. That his wife and children left after he was arrested
30. On cross examination, he maintained that he did not know the reason for his arrest and he did not understand why his daughter would lie to the court.
31. He testified that he did not have any dispute with the teachers and did not know why they would lie and that it was possible that he had enemies he did not know about.
32. On re-examination, he testified that the only thing he could attribute to his charges was the land dispute which he had won and that the co-administrator was dissatisfied and that he had gone back to court.
33. DW2 testified that he knew the accused and his wife as well as his children. He did not know anything about the case. On cross- examination he stated that he did not know who the complainant was in the case.

Determination.

34. This is the first appeal and the role of this court is to relook at the evidence, re- evaluate it and come to its own conclusion, whilst bearing in mind the fact that it did not have the benefit of observing the witnesses as they testified as per the Court of Appeal’s decision in the case of *Okeno v Republic* (1972) EA 32 . In the pertinent part, it was held: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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 magistrates' findings can 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."

35. Section 20 of the *Sexual Offences Act* deals with incest by males. It provides as follows:

"incest by male persons

(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: 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."

36. Thus for the offence of incest to be established, the prosecution must prove: the commission of an indecent act or an act which causes penetration with a female; the female subjected to penetration or indecent act was to the accused's knowledge related to him within the degree set out in the Act ; and finally the identification of the perpetrator.

37. The testimonies of the witnesses were fairly straightforward. PW1 spoke clearly and simply of what befell her in the hands of the Appellant. She positively identified him as her father. The Appellant too in his defence stated that

"he did not know why his daughter was lying". (Emphasis added).

Thus, they knew each other and the relationship between the two was not and is not an issue at all.

38. In any event according to section 22(3) of the *Act*

"an accused person shall be presumed, unless the contrary is proved to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest".

39. Consequently, the identity of the perpetrator as well as the relationship between the two was proved beyond any reasonable doubt. It is also instructive that these two elements of the offence are not in contest in this Appeal.

40. On the commission of an indecent act or penetration, the complainant gave a terse explanation of what transpired. When she arrived from school, the Appellant send the complainant sister to the shop, then he called her to the bedroom in the name of applying an ointment on her skin. He forced her to undress; forced her also to bend and penetrated or attempted to penetrate her. The Appellant saw the complainant's sister coming, and he walked out. That fairly straight- forward and brief testimony was not contested at cross- examination.

41. Further the medical evidence presented by PW6 show that an indecent act was committed on the complainant. PW6 told the court that "there was no penetration, that there were epithelial cells in her vagina. That the presence of epithelial cells is indicative of injury or trauma to the affected site. She then concluded that the complainant had been sexually assaulted. Thus, though there was no evidence of penetration, there was evidence of an indecent act, indicated by the injury to the victim's vagina.



42. The Act defines indecent act as:
- (a) any unlawful intentional act which causes 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)
43. On the alleged contradictions and gaps that the appellant has pointed out the same were too minor to cause any dent on the prosecutions case. For instance, the allegation that the prosecution failed to produce the ointment which the Appellant was allegedly applying on the complainant, has no bearing on proving the offence against him, Equally the issue of whether the complainant had been defiled by her brother is irrelevant to the Appellant’s own culpability. It does not lessen or wipe out his crime.
44. Am satisfied that the Respondent proved its case beyond reasonable doubt and the Appellant was lawfully convicted.

Whether the sentence was excessive

42. The offence of incest carries a maximum sentence of life imprisonment. where the victim is under 18 years as in this case (see the proviso to section 20(1) of the Act).
43. Sentencing is an act of discretion of the trial court. In Bernard Kimani Gacheru v Republic [2002] eKLR the court set out the grounds of intervention as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

44. I have found no reason to interfere with the trial court’s discretion in this regard.
45. In conclusion, the entire appeal is without merit. It is hereby dismissed.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023

S. CHIRCHIR

JUDGE

In the presence of:

Susan- Court Assistant

Appellant in person

Ms Muriu for the Respondent.

