



REPUBLIC OF KENYA



KENYA LAW
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**JMK v Republic (Criminal Appeal E009 of 2021)
[2023] KEHC 21665 (KLR) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E009 OF 2021
GL NZIOKA, J
AUGUST 16, 2023**

BETWEEN

JMK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence in the Criminal Case
Sexual Offence No. 100 of 2018, at the Chief Magistrate's Court at Naivasha
delivered by; Hon. K. Bidali, Chief Magistrate, delivered on 5th March, 2020,)*

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006 (herein 'the Act') in the main count and committing an indecent act with a child contrary to section 11(1) of the Act, in the alternative count.
2. The particulars of the offence are that, on the 1st and 2nd day of November 2018 within Naivasha Sub-County of Nakuru County, the appellant intentionally and unlawfully did cause his genital organ namely penis to penetrate or come into contact with the genital organ namely vagina of; BNM a girl aged 15 years old whom to his knowledge was his daughter.
3. He pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution case was led by the evidence of (PW1) BNM (herein 'the complainant') who testified that, the appellant is her father. That he told her to go with him upcountry and she refused. He then tried to force her to have sex with him but she refused.
4. That he then sent her a SMS message inquiring as to whether they could have sex and she responded and said it was okay. That although her mother locked the door, she opened it and went to bed. And when the appellant arrived home he opened and went to her bedroom and they had sex.



5. That at 2.00am her mother knocked and opened the door and she looked afraid and when her mother checked under the bed, she saw the appellant hiding there. That her mother was shocked and raised an alarm which attracted the neighbours. In the meantime the appellant ran away.
6. That the appellant's wife (PW2) PWN reported the matter to Naivasha Police Station and the complainant was referred to the doctor for medical examination which revealed that she had been involved in the sexual activity. The appellant was later traced, arrested and charged.
7. At the close of the prosecution case, the trial court ruled that, the appellant had a case to answer and placed him on his defence. In an unsworn statement, he stated that, indeed the complainant is his daughter and they lived together. That, she was brought into the case because, her mother had a fight with his first wife. That, he has grown up daughters and could not have done such a thing.
8. At the conclusion of the case, the trial court found that, the prosecution had established a prima facie case, proved the charged on the main count and convicted the appellant accordingly. Subsequently he was sentenced to serve (10) years imprisonment.
9. However, the appellant was aggrieved by the decision of the trial court and has appealed against it on the following grounds: -
 - a. The Learned Magistrate misdirected himself in fact and law by allowing the prosecution's case to proceed contrary to Article 50(2)(5) of the 2010 Kenyan Constitution
 - b. The Learned Magistrate misdirected himself in fact and law by admitting evidence obtained unlawfully contrary to Articles 50(4) and 31(c) and (d) of the 2010 Kenyan Constitution, in addition to sections 122 A(1), 122(c) (1) and 122 D of the Penal Code (Cap 63) of the Laws of Kenya
 - c. The Learned Magistrate erred in fact and law by failing to give the appellant enough time to prepare for his defence contrary to Article 50(2) (c) of the Kenyan Constitution.
 - d. The Learned Magistrate erred in fact and law by convicting the appellant on uncorroborated evidence.
 - e. That the prosecution failed to call critical eye witnesses during the hearing.
 - f. That the prosecution failed to serve the appellant with witness statements and the evidence that it relied on contrary to Article 50(2)(j) of Kenyan Constitution
 - g. That the conviction of the appellant was as a result of an irregular trial, bad judgment, bad conviction and therefore very unsafe.
 - h. The Learned Magistrate erred in fact and law by not directing himself to the mandatory requirements of sections 210 and 211 of the Criminal Procedure Code and misdirected himself when he ruled that prima facie case had been established sufficiently to warrant the appellant to be placed on his defence.
10. The reason whereof the appellant prays that, the court "sets aside" the conviction and sentence and in the alternative find that the custodial sentence 'issued' was manifestly harsh and excessive and against the set principles of law.
11. The appeal was opposed by the respondent vide grounds of opposition dated September 29, 2021 as here below reproduced:
 - a. That the respondent is opposed to grant of bond and bail terms to the applicant in this matter.



- b. That the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution was overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the Honourable court. The applicant has not tendered any evidence to the contrary.
 - c. That the applicant was properly identified as the perpetrator, Age was proved..... defilement was proved.....
 - d. That the applicant in facing a sentence of 10 years for the serious offence of incest
 - e. That due to the long sentence that the appellant is facing, his chances of absconding is extremely high; further the applicant will not have served a substantial amount of his sentence before his appeal is heard.
 - f. That the applicant has been convicted by a properly constituted court and is undergoing punishment because of that conviction, which stands until it is set aside on appeal.
 - g. That at this stage, bail pending appeal is discretionally as the applicant's innocence was compromised upon conviction.
12. The appeal was disposed of by filing of submissions. The appellant filed submissions dated; November 21, 2022 and argued that section 36 of the Act is clear on the procedure to be used while collecting DNA samples from an accused person. That an illegality was conducted in collecting his DNA samples and therefore any evidentiary information or document presented in the court in that regard was null and void ab initio
 13. Further, the prosecution did not prove the case as none of the four (4) witnesses called linked him to the alleged offence and their evidence was non-coherent and could not lead to a conviction.
 14. He argued that the Learned Trial Magistrate relied on bad, non-flowing and uncorroborated circumstantial evidence in convicting him. That there are three tests to satisfy when relying on circumstantial evidence; firstly, the inference of guilt sought to be drawn must be cogently and fully established; secondly, that the circumstances should be of a definite tendency unerringly pointing to the guilt of an accused meaning that the circumstances must be right, unswerving and compelling, and that the circumstances taken cumulatively should form a complete chain so that there is no escape from the conclusion that with all human probability, the crime was committed by the accused and no one else.
 15. That, in the trial court the evidence adduced by the prosecution was contradictory and therefore failed the first test. Further, the evidence was a sham as the witnesses could not recall who they were with at any moment and the flow of thoughts was unrelated. In addition, the circumstances in the trial court did not create a complete chain and thereby failed to establish the third principle.
 16. He relied on the case of *PON vs Republic (2017) eKLR* where the Court of Appeal held that in cases founded on circumstantial evidence, missing links create doubt that will in turn entitle the court to acquit due to lack of evidence to the required standard.
 17. The appellant submitted that the trial was a sham, vexatious, frivolous, raised no triable, issue, and was an afterthought brought for a malicious revenge mission to injure him. That the case had not been proved beyond reasonable doubt as the required standard in criminal cases and therefore the conviction was dangerous and infringed on his fundamental human right.



18. That he had served four (4) years imprisonment based on a faulty conviction ab initio and that it is in the interest of justice the appeal be allowed and conviction quashed.
19. The respondent's submissions on record dated September 29, 2022, relate to the appellant's application seeking bail pending appeal. There are no submissions relating to the appeal before court and therefore the appeal is unopposed.
20. Having considered the appeal in total, I gather from the grounds of appeal, the issues for determination are:
 - a. Whether, the trial court erred by failing to observe the provisions of the Constitution of Kenya referred to herein and in particular Article 50(2) and (5) and section 122(A)(C) and (D) of the Penal code.
 - b. Whether the trial court convicted the appellant on uncorroborated evidence and/or failure to call critical, eye witness or failure to supply the appellant with witness statement.
 - c. Whether the appellant court failed to comply with section 210 and 211 of the *Criminal Procedure Code*.
21. Be that as it may, the role of the 1st appellate court is to re-evaluate the evidence adduced afresh and arrive at its own decision. In that regard the Court of Appeal in the case of; *Okeno vs Republic (1972) EA 32*, stated as follows: -

' An appellant on a first appeal is entitled to expect the evidence as a 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.'
22. Taking into account the aforesaid, the issue to determine is whether, as a sum up of the aforesaid issues is whether the evidence adduced was sufficient to sustain a conviction. To address the subject issue, the court need to establish whether the ingredients of the offence of incest were established.
23. In that regard, section 20(1) of the Act states: -

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.
24. In a nutshell, the ingredients are proof of:
 - a. The relationship between the victim and offender



- b. Penetration
 - c. Victim's age that she was a minor
 - d. Identity of the perpetrator
25. As regards the relationship between the parties, the Act under section 22 of the Act defines the relationship based on the degree of consanguinity and affinity and states as follows: -
- ' (1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.'
26. In that instant matter, the complainant testified that, the appellant is her father. The appellant confirmed the same in his evidence in chief. Therefore the relationship between the two is of father and daughter which fall under section 22 of the Act.
27. As regards the age of the complainant, she stated that, she was 15 years old, a school going child in form three. The prosecution produced her birth certificate which showed she was born on April 3, 2003, the offence was allegedly committed on 1st and 2nd November, 2018, so she was indeed 15 years old, and a minor or child as defined under the Children's Act.
28. As regards penetration it was the complainant's evidence that, the appellant had sex with her on several occasions. In addition upon examination, PW3 Benjamin Kuria a clinical officer who filed and produced a P3 form indicated that the complainant had ecchymosis of the posterior forchette, a bruise on her vaginal walls.
29. It is noteworthy that, section 2 of the Act, defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Therefore, based on the medical evidence herein penetration was proved.
30. The last issue to determine is whether, it is the appellant who committed the offence. The evidence of PW1 is that, her father asked her whether they could have sex and she said 'Okay.' She is actually the one who unlocked the door which her mother had locked to allow her father access her bedroom. Therefore, she was not forced into the sexual act, as it were. She testified that, the appellant had done it on several other occasions. She did not tell her mother.
31. As such had her mother not 'busted' her, and discovered the defilement the incest would have persisted. The question is; in the given circumstances is the complainant lying when she states that it is the appellant who defiled her? I find the answer in the negative.
32. Even more so, if it is not the appellant who defiled her who did it? I note that during cross-examination the appellant never questioned her on her evidence that he defiled her. Furthermore she confirmed that the appellant was caught in her bedroom under the bed at 2am. What had he gone to do there?
33. Yet against all this evidence, he merely denies the offence and alleges that, the wife was fixing him up. That defence is an afterthought as it was never advanced throughout the prosecution case. I dismiss it as such.
21. Thus taking into account the entire evidence I find that, all the ingredients of the offence of incest were proved. The appellant's grounds of appeal do not hold water. First and foremost, he did not expound on them at all. At the submission stage, he departed completely from the grounds of appeal



and advanced different arguments. He submitted on DNA, circumstantial and/or tangible evidence, and whether the appeal be dismissed. As such the grounds of appeal are not supported and/or tenable. Therefore I find no reasonable cause to quash the conviction and I confirm the same.

22. As regards the sentence, I find that, the sentence provided for under section 20 of the Act is that; the convict will be liable to life imprisonment, if the victim is a female of less than 18 years irrespective of whether the act of penetration was obtained with or without consent of the female person. In the given circumstances, the sentence meted out of ten (10) years, is proper, regular, lawful and correct, therefore I confirm the same. The ten (10)years' sentence will take effect from November 27, 2018 when the appellant was arraigned in court.

23. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 16TH DAY OF AUGUST 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Atika for the respondent

Ms. Ogutu: Court assistant

