



**WS v Republic (Criminal Appeal E037 of 2022)  
[2023] KEHC 24816 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E037 OF 2022  
WM MUSYOKA, J  
OCTOBER 31, 2023**

**BETWEEN**

**WS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Kakamega CMC SO No. E080 of 2020, by Hon. JR Ndururi, Principal Magistrate, PM, of 26th April 2022)*

**JUDGMENT**

1. The appellant, WS, was convicted of incest, contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006, and was convicted and sentenced to imprisonment for life. The particulars of the charge against the appellant were that on 23<sup>rd</sup> October, 2020 in Kakamega County, he caused his penis to penetrate the vagina of SM, aged 17 years, a female person, who, to his knowledge, was his daughter. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the alternative charge against the appellant were that on the 23<sup>rd</sup> October, 2020 in Kakamega County, intentionally touched, with his penis, the vagina of SM, a child aged 17 years. The appellant pleaded not guilty to both counts. The matter proceeded to trial, and the prosecution called 5 witnesses in support of its case against the appellant.
2. PW1 was Mary Savi, a volunteer children's officer, working with the Kenya Alliance for Women Empowerment. She stated that she had received intelligence that the complainant was being abused by her parent. She visited the home, on 26<sup>th</sup> October 2020, where the complainant stayed with her stepmother and her father, the appellant. The complainant informed her that the appellant had defiled her several times, since when she was 10 years old, after her own mother left the home. She testified that the complainant informed her that whenever her stepmother was away from the home, the appellant would defile her on her bed. She said that the complainant informed her that the appellant



had threatened her, and even though she made a report of the defilement to her aunt, no action was taken. The witness was allowed by the stepmother to take the complainant to hospital, whereupon she escorted her to Shamakhokho Health Centre, that same day, 26<sup>th</sup> October 2020. From the health centre she was referred to Shamakhokho police station. The police handed the complainant over to her biological mother, and the appellant was arrested. She said that the complainant was born in 2003, and was around 17 as at 26<sup>th</sup> October 2020. She was in Standard 6 at [Particulars Withheld] primary school.

3. Brenda Anami testified next, as PW2. She was a clinical officer at Shamakhokho health centre. She testified that she was the one who attended to the complainant, on 26<sup>th</sup> October 2020. The allegation was that she had been sexually assaulted by her father, with the last episode happening on 20<sup>th</sup> October 2020. Upon examining her, she found that her hymen was not intact. She had no vaginal discharge. She stated that she assessed the age of the complainant to be 17 years. She stated that as at the time she was examining the complainant, on 26<sup>th</sup> October 2020, the matter had not been reported to the police, although the P3 form had been issued on 25<sup>th</sup> October 2020. She testified that the P3 form did not indicate that the complainant had been treated. She said that the P3 form indicated that there was a whitish vaginal discharge, indicative of vaginal cadilitis. She said that lack of a hymen was indicative of habitual penetration. She said that she could not tell when the complainant last had sex, although she had told her it was on 20<sup>th</sup> October 2020.
4. No. 237787 Inspector of Police Stella Langat testified next, as PW3. She took over the investigation file from the investigating officer, Winfred Kamati. The complaint was defilement by her father. She was 17 by the time, having been born on 8<sup>th</sup> August 2003. The complaint was filed with the police on 29<sup>th</sup> October 2020. The complainant was escorted to the police by PW1. By then she had already been examined at the Shamakhokho health centre, and a P3 form was duly issued, and filled. She stated that she did not interview the complainant, and her evidence was based on her perusal of the investigation file. During cross-examination, she stated that the report was made to the police on 28<sup>th</sup> October 2020, and that only 2 civilian witnesses recorded statements, PW1 and the complainant.
5. The complainant testified next, as PW4. She stated that she was born on 8<sup>th</sup> August 2003. She stated that the deceased used to defile her at night, after leaving her stepmother sleeping. She reported to the police, who referred her to a hospital, where she was examined. She stated that medical evidence established that she had been defiled, and she was given medication. She stated that she was defiled by the appellant for the first time in 2016, at Kitale, when she was 12 years old. She was defiled several times thereafter. She stated that sometimes the appellant would send her to the shops to buy something, then he would follow her, take her to the bushes or a banana farm, and defile her there. She got tired of it, and decided to report.
6. The appellant was put on his defence, in a ruling delivered on 19<sup>th</sup> January 2022. He gave a sworn statement on 7<sup>th</sup> March 2022. He denied the charges. He stated that the complainant was not consistent in attending school, and often disappeared from home, and spent nights out, visiting a boyfriend. He described her as disobedient to her and her stepmother.
7. The trial court was convinced that the complainant had given a truthful account of what happened, and convicted the appellant on the principal charge. He was sentenced on 26<sup>th</sup> April 2022, to life imprisonment.
8. The appellant was dissatisfied with the judgment of the trial court, and has filed this appeal citing grounds, around the conviction being against the evidence adduced by the prosecution, placing undue weight to the evidence adduced by the prosecution, there being material contradictions and lack of corroboration of the evidence, the evidence departing from the particulars in the charge, and rejecting



the evidence adduced by the defence. He asks the court to allow his appeal, quash the conviction, and set aside the sentence.

9. Directions were given on 5<sup>th</sup> December 2022, for canvassing of the appeal, by way of written submissions. I have carefully and scrupulously pored through the file of papers herein, and I have not come across written submissions by either side.
10. I have considered the testimonies recorded from the witnesses by both sides, and I agree with the trial court, that the complainant sounded convincing, when one considered the detailed account that she gave of what had happened to her in the hands of the appellant, some of what she narrated to court went back to the time when she was 12 years. I am persuaded that she gave a detailed account, that would persuade that she was in fact defiled by her father, the appellant herein, for a considerable period of time.
11. However, much as the narrative given by the complainant sounded very convincing, the prosecution let her down, for the evidence tendered did not conform or align with the particulars of the charge. The allegation was that the incest happened on 23<sup>rd</sup> October 2020, and that the complainant was aged 17 at the time. No concrete evidence was tendered regarding defilement on 23<sup>rd</sup> October 2020, or some date close to that, when the complainant was 17. The testimony by the complainant was general, not specific, in terms of not indicating the time when the events she was narrating happened. She did not testify on what happened on 23<sup>rd</sup> October 2020, for none of what she told the court came close to describing what happened on 23<sup>rd</sup> October 2020, or any date close to that. Her witness, PW2, said she had told her that the appellant last defiled her on 20<sup>th</sup> October 2020. The complainant made no reference to that date when she took to the stand. What the prosecution should have done, should have been to amend the particulars of the charge, to cover the period when the alleged defilement or incest allegedly happened, according to the narrative given in court, from when the complainant was 12 to when she was 17. As it is, there is such a huge variance, in the evidence tendered and the particulars given, so much so that it would be unjust to convict based on that evidence. The case presented by the prosecution in court, by way of evidence, was different from that stated in the charge sheet. The appellant could only face a fair trial based on the facts alleged in the charge read out to him, and to which he answered at arraignment. An accused person aligns his defence to the facts alleged in the charge that he faces at the trial, and having to answer to alternative facts presented at trial, not disclosed in the particulars of the charge, would render the trial unjust and unfair.
12. Secondly, there are numerous notable inconsistencies and contradictions in the testimonies given by all 4 witnesses on the events of October 2020, when PW1 got involved in the matter, and escorted the complainant to hospital and to the police. The witnesses testified a year later, when the facts were still fresh in their memories. The events were, no doubt, documented, in medical and police records, and inconsistencies or contradictions in the oral narratives should not be excusable. They could provide basis for inferring that the witnesses were not truthful, or the events in question were contrived.
13. Regarding sentence, the offence charged was not defilement, but incest, which is defined in section 20(1) of the *Sexual Offences Act*. However, defilement is also covered in the offence, where the victim of the offence is a minor. The penalty for defilement of a minor, by a close relative, in the context of incest, is very stiff, life imprisonment, regardless of the age of the minor time at the material time of commission. It would be a mandatory sentence. Why would the law prescribe such a stiff penalty? To protect abuse of minors within the family setting. This is a zone where children should expect nurture and protection within the warm and friendly environment or sanctuary provided by their parents, and other close blood relatives. Unfortunately, and sadly, sexual abuse often happens within this zone. It is the worst form of abuse of trust. It is also a zone which enables the perpetrators to get away with it,



as they often get succour and protection from other family members, in a code of silence to protect family honour. Therefore, where defilement happens within the family setting, and it is brought out in proceedings such as these, it must be dealt with without any form of mercy to the perpetrators, by way of heavy penalties, for deterrence purposes.

14. Section 20(1) of the *Sexual Offences Act* provides 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:

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.

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.”

16. There has been some development in the jurisprudence though, taking the form of the decision of the Court of Appeal, in Julius Kitsao Manyeso vs. Republic, Malindi CACRA No. 12 of 2021, (Nyamweya, Lesit & Odunga, JJA), which declared the sentence of life imprisonment unconstitutional. In that respect, the sentence imposed herein cannot hold any more.

17. In view of what I have stated in paragraphs 11 and 12 of this judgment, it is my conclusion that the conviction of the appellant herein was not safe. The respondent could have done better, with charges that were more precise, and properly aligned to the evidence that it proposed to place before the court. As the said conviction was not safe, I shall not affirm it, nor confirm or vary the sentence, instead I shall quash it, as I hereby do, and set aside the sentence. The appellant shall be set free, unless he is otherwise lawfully held.

**JUDGMENT PREPARED, DATED AND SIGNED AT BUSIA THIS 6<sup>TH</sup> DAY OF OCTOBER 2023**

**W MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 1<sup>ST</sup> DAY OF OCTOBER 2023**

**S CHIRCHIR**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Advocates**

N/A, Advocate for the appellant.



Ms. Osoro, from Office of the Director of Public Prosecutions, for the respondent.

