



**COJ v Republic (Criminal Appeal E003 of 2020)  
[2023] KEHC 24134 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24134 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E003 OF 2020  
WM MUSYOKA, J  
OCTOBER 27, 2023**

**BETWEEN**

**COJ ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence by Hon. T Madowo, Resident Magistrate, RM, in Busia CMCCRC No. 43 of 2018, of 27th July 2020)*

**JUDGMENT**

1. The appellant, COJ, had been charged before the primary court, of the offence of incest, contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and 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 charge were that within the month of February 2015, within Busia County, he caused his penis to penetrate the vagina of RA, a female person, who to his knowledge, was his stepdaughter. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.
2. PW1, Edwin Imoo, was the clinician, who attended to the complainant, at Amukura health centre. He found her to be 28 weeks pregnant, and concluded that there was penetration. He said that she was 14 years old at the time. PW2, RA, was the complainant. She was 18 at the time of her testimony, having been born on 17<sup>th</sup> July 2001. She stated that the appellant, who she identified as her stepfather, had sexual intercourse with her in the course of February 2015. He summoned her to his bedroom, forced her to his bed, and forced her to undress, after which he had sex with her. She said that he did so twice that month. She began to feel unwell, and when she went to hospital, it was established that she was pregnant. She reported to her mother, who took her to a children's officer, who referred them to the police. She later gave birth to a girl. A deoxyribonucleic acid (DNA) test was subsequently conducted. PW3, CA, was the mother of PW2. She identified the appellant as her husband, and the stepfather of PW2. She told the court that PW2 fell ill, missed her monthly periods and confessed that



she was pregnant, and disclosed that the appellant had defiled her. He reported the matter to the police. PW4, Pamela A. Okello, was from the Government Chemist. She produced the DNA report, which identified the appellant as the father of the child of PW2. PW5, No. 48663 Police Constable Josephat Kiala, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 22<sup>nd</sup> January 2020. He made an unsworn statement. He stated that he had met PW2, lived with her for some time, she became pregnant, and he took her in as a wife. He was later arrested on claims that he had defiled her. He said that she had told him that she was 22 at the time, and not 14 years old.
4. In its judgment, delivered on 29<sup>th</sup> July 2021, the trial court found the appellant guilty, as all the elements of the offence had been positively proved, and it sentenced him to 20 years imprisonment, on 26<sup>th</sup> August 2020.
5. The appellant was aggrieved, and brought the instant appeal, essentially only on sentence. In the petition of appeal he has not set out grounds of appeal, instead he has given what he calls mitigation grounds, revolving around having been in custody since the date of his arrest on 7<sup>th</sup> September 2015, and he was a sole breadwinner for his family. He asks the court to consider the period that he spent in custody pending trial.
6. Directions were given on 22<sup>nd</sup> September 2023, for canvassing of the appeal by way of written submissions. The written submissions on record were filed by the respondent, which I have read through, and taken note of the arguments made. The respondent submits that the sentence is legal, and that the appellant was entitled to benefit from the discretion under section 333(2) of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya.
7. 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 or subsumed in incest, 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, a maximum of life imprisonment. 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 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 sympathy to the perpetrators, by way of heavy penalties, for deterrence purposes.
8. In addition, it should also be pointed out that incest overlaps with defilement, where minors are involved. The perpetrator would essentially have committed 2 offences. He would have had sexual connection within forbidden relationships, and he would have defiled a minor. The penalty, where a minor is involved, would be stiffer, to punish the offender of the incest, and of the defilement.
9. The victim of the defilement was just 14 years old, a schoolchild. The appellant took advantage of the relationship that there was between him and the mother of PW2, to prey on the minor. He made her pregnant, that is putting her in the family way, with the consequence that her studies were disrupted, with a possibility that her schooling permanently came to a premature end. He also pushed her into motherhood and parenthood well ahead of her time. Having a child outside wedlock is still a source of social stigma, and it invariably diminishes the chances of the girl finding a husband. The life of PW2 was pretty messed up in numerous ways. The appellant was a stepfather to PW2, and what he did to her was a breach of trust. He deserved what he got, by way of sentence, and perhaps more, in my view.



10. In view of the above, I do not find merit in the appeal herein. The same is for dismissal. Should I interfere with the sentence, to the limited extent conceded by the respondent, that is the reckoning of the period that the appellant spent in remand pending trial, in the calculation of the total number of years to be spent in prison? I do not think I should exercise discretion in favour of the appellant, for I consider that the sentence he got was fairly lenient. The maximum penalty for defilement, within incest, is a life in prison. The appeal is, accordingly, dismissed. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. COJ, the appellant, in person.

**Advocates**

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

