



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wekesa v Republic (Criminal Appeal E066 of 2022)  
[2023] KEHC 26780 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26780 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E066 OF 2022  
REA OUGO, J  
DECEMBER 18, 2023**

**BETWEEN**

**IW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the original conviction and sentence by Hon. G.P. Omondi (P.M) in Bungoma Chief Magistrates Court Sexual Offences Case No.78 of 2020 delivered on 7/4/2022))*

**JUDGMENT**

1. This is an appeal against the appellant's conviction and sentence of life imprisonment for incest under section 20(1) of the Sexual Offences Act No.3 of 2006. The particulars of the Offence were that the appellant on 17<sup>th</sup> July 2020 at [Particulars Withheld] village in [particulars withheld] sub-location within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of BH a child aged 6 years.
2. The appellant's appeal is on the following grounds:
  1. That I am a first offender.
  2. That the learned trial magistrate erred in law and fact by failing to consider the evidence tendered by the prosecution was not corroborative.
  3. That the learned trial magistrate erred in law and fact to consider that the appellant's right to a fair trial was grossly violated as stipulated under Article 50 (2) of the Constitution.
  4. That the learned trial magistrate erred in law and fact by failing to put into consideration that the forensic evidence did not adhere to the provisions of section 36 of the Sexual Offence Act No.3 of 2006.



5. That the learned trial magistrate erred in law and fact by failing to consider the circumstantial evidence that was fabricated.
6. That the learned trial magistrate acted inhuman by convicting the appellant on the weakness of his defence thus rejecting his alibi defence which was cogent to overturn the same.
3. As a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.
4. BHW (Pw1) testified that on 17/7/2020 her mother made mandazi and left to look for firewood, leaving her with Fabi and her father. Pw1 wanted to play with F but the appellant told her not to. F went to play and the appellant closed the door and put her on the chair. He opened the zip of his trousers and did '*tabia mbaya*' to her. Pw1 testified that the appellant raped her. Pw1 felt pain and cried. The appellant left and went to help the person who was digging the well. Pw1 testified that people came and asked what was wrong with the child and the appellant told them that a piece of metal had pricked her. Pw1 testified that she was in pain and oozing blood from her private parts. Pw1 put on her panty after the act and the appellant told her to remove it. He then went to the bedroom and made a hole in the panty. The appellant covered Pw1 with F's blanket and told her not to tell anybody what happened. The appellant told her to tell people that she was pricked by a metal. The appellant told Florence and she came and took her to the hospital. At Webuye Hospital, she told the doctor what happened. On cross-examination, she testified that the appellant had instructed her to tell the doctors at Dawa Med that she was pricked by a metal.
5. Pw1's mother, ENW (Pw2), testified that the appellant is her husband. She informed the trial court that Pw1 was born on 5/2/2014- and is 7 years old. She recalled that on 17/7/2020 after preparing mandazi and tea, she entrusted the children to their father, the appellant, and went off to search for firewood. When she came back home at 1:00 p.m. she was informed that Pw1 had been injured and was taken to the hospital. Pw2 went Dawa Med Hospital in Bungoma and found Pw1 bleeding from her vagina. The doctors recommended theatre and they were to pay Kshs.60,000/-. They did not have the money so NOK (Pw3) did some first aid and after 2 days Pw1 was taken to Webuye Hospital.
6. Pw3 testified that the complainant is her granddaughter. She testified that on the material day, she was informed that Pw1 fell on a piece of metal that pricked her on her private part. She came to Bungoma and found Pw1 with her parents at Dawa Med Hospital. The hospital performed first aid and they took Pw1 home. The child was then taken to Webuye Hospital. When they left the hospital, she was given a note to take to Nzoia Police Station as the child had been defiled. She was then given a P3 form after reporting it at the Police Station. Pw3 asked Pw1 what happened and she told her that her father committed the act.
7. The Clinical Officer, Dr. Festus Kipprop Ngetich (Pw4), testified that he is a clinical officer based at Webuye County Hospital. Pw1 was referred from Dawa Med to Webuye Hospital. She was taken to hospital with vaginal bleeding. She was examined her and it was established that she had a tear on the vaginal wall. According to the diagnosis of Dawa Med, the injury was caused by a metal box. They brought her to Webuye County Hospital on 21/7/2020 and Pw4 examined her. The child was not able to speak in the presence of her grandmother therefore he asked the grandmother to step out. Pw1 then told him that she was defiled by the appellant on 17/7/2020 during the morning hours. She explained that she had not told anyone as the appellant warned her not to. Pw1 was then counselled so that she could open up. Pw4 produced the form filled by the counsellor as Pexh5. They admitted



- Pw1 on 21/7/2020 and gave her antibiotics and medication to stop the bleeding. She was discharged on the following day. Pw4 also produced an age assessment report which shows that the child was approximately 6 years. Pw4 filled the P3 form and noted that the nature of the offence was incest or defilement. Pw4 further testified that he noted that Pw1 had tears on the vaginal wall and that her hymen was also broken.
8. 231474 P.C Harriet Sohera, the investigating officer (Pw5), testified that she is stationed at Nzoia Police Station and deals with gender-based cases. On 26/7/2020 Pw1 and her grandmother came to make a report at the police station. Pw5 questioned Pw1, who revealed that she had been defiled by the appellant. However, he had cautioned her not to disclose the truth and advised her to say that she had accidentally fallen on an iron rod. The appellant was arrested on 31/7/2020 at his residence. Despite the absence of a metal rod at the location, the authorities requested the appellant to avail the object that caused the child's injury, but he was unable to do so.
  9. When the appellant was placed on his defence, he testified that he has issues with the parents of his wife because he has not paid dowry. On the material day, as he dug the well, he heard the child crying and found that she had been pricked by a nail. They took the child to hospital and she received treatment and further treatment in Webuye. He was arrested on 31/7/2020 and charged with defilement.
  10. FNM (Dw2) testified that on the material day, she was packing maize. She testified that the complainant was removing maize from the bedroom and taking it outside. Pw1 fell on an iron rod which pricked her and that is when Dw2 heard her cry. She testified that she was the first to hear her cry and called the appellant who was near the road. She saw the iron rake that pricked Pw1 on the anus, vagina and near the vagina. She also explained that the appellant's father-in-law had a grudge as he had not paid the dowry.

## Submissions

11. The appellant in his submissions argues that the trial court failed to consider the evidence of Dw2 who was at the scene when the incident took place and take into account the grudge that existed within the family. He argued that it was not normal for a family such as theirs to live together with the mother-in-law. He therefore accuses Pw3 of having hatched the plan to have him arrested and further questions her intention of taking the child to a hospital in Webuye as opposed to Bungoma where there exists a referral Hospital. He argues that the child was coached to give her evidence to frame the appellant. Therefore, the prosecution failed to meet the burden of proof as discussed in *Pius Arap Maina v Republic* [2013] eKLR. He discredited the evidence of Pw3 because she did not witness the offence. He also faulted the trial court for ignoring the finding of Dawa Med Hospital.
12. The respondent submits that the prosecution was required to prove: the identity of the perpetrator; the relationship between the perpetrator and the victim; and whether there was penetration. On identification, the respondent submits that the appellant was well known to the victim as the appellant was her father. It was also submitted that there was sufficient evidence of penetration. Pw1 narrated in detail how her father, the appellant assaulted her. Therefore, all the ingredients for the offence were proved. The respondent called the court to look into the fact that the appellant was below the age of 18 years. They argue that the trial magistrate considered the defence of the appellant in her judgment and are in total agreement with its finding. It was further argued that the appellant had not demonstrated that the court acted on a wrong principle to warrant the sentence being set aside and relied on the decision of *Abmad Abolfathi Mohammed & another v Republic* (2018) eKLR.



## Analysis And Determination

13. Having considered the submissions of the appellant and the evidence before the court, the issues for determination are whether the case against the appellant was proved beyond reasonable doubt and whether this court should interfere with the life sentence imposed on the appellant. Section 20 (1) of the [Sexual Offences Act](#) provides as follows:

20.

(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.

14. In this case, there is no doubt that the prosecution proved that the appellant was the father of Pw1. Pw1 testified that the appellant was her father. The appellant's wife, Pw2 also confirmed that the appellant was her husband having been married for 5 years and the father to Pw1. The complainant's grandmother, Pw3 also testified that the appellant was the father of Pw1. The prosecution therefore proved beyond reasonable doubt the father-daughter relationship between the appellant and Pw1.

15. The main issue that was challenged by the appellant was penetration. The evidence of the prosecution was that penetration was caused by the appellant while the appellant in his defence maintained that penetration was a result of the child falling onto a metal rake.

16. Immediately after the incident, Pw1 was taken to Dawa Meds Hospital where it was observed that the complainant had sustained a vaginal/perineum tear. Both Pw2 and Pw3 testified that Pw1 did not receive medical treatment at the said hospital other than first aid for reasons that the hospital asked for Kshs 60,000/- for her treatment. However, Pw1 was referred for a gynaecologist review. Pw1 was then taken to Webuye Hospital. Pw4 testified that the child could not talk about what happened to her with the grandmother in the room and Pw3 was asked to leave the room. The child then told the clinical officer that it was her father who had defiled her. Pw1 in her evidence before the trial magistrate gave a clear and detailed narration on how she was assaulted. Pw1 testified that:

“*Baba* then closed the door and carried me and put me on the chair. He then opened his trouser zip removed my pant and did me ‘*Tabia mbaya*’.

*Baba* opened his zip and did *tabia mbaya*. He raped me. He raped me here (witness pointing at her private part). He raped me using his thing which is here (witness points at her private part).

I felt pain and cried. I screamed. He left me and went to help the person who was digging some well for water.....

People came and asked what was wrong with the child and *Baba* said that a piece of metal pricked her. I was in the sitting room when *Baba* was addressing the people who came.

I was lying on the chair in the sitting room and *Baba* covered me with F's blanket and told me not to tell anybody.”



17. Despite the serious injuries inflicted on Pw1 by her father, the appellant further threatened her by warning her not to tell anybody what happened. The evidence of Pw4, an impartial witness who had no affiliation with the appellant's family, indicates not a coached child but rather a frightened victim. The child was in a state of fear and refrained from communicating with the doctor in the presence of her grandmother. It was only after Pw3 was asked to leave the room that the child began to express herself. Pw4 then recommended that the child be counselled so that she could further open up. After counselling, the comments on the Non-clinical Referral Form, Pexh 5, were that:

“The above child was defiled by the father; as the child states; and had been threatened by the same father; after exploration and counselling; The father is not aware of the consequences/ whether the child had disclosed; Kindly intervene and lets support/rescue this child...”

18. In my view, I find that there was no evidence that the appellant was framed. The prosecution evidence reveals that Pw1 was threatened by the appellant and initially did not disclose what had transpired because she was a distressed and fearful victim. Further, Pw5 testified that when they went to the appellant's home and asked him to show them the metal that pricked the child he failed to do so. In my view, if the child had been pricked by a metal rake as alleged by Dw1 and Dw2, then the appellant ought to have availed the said rake to the investigating officer. The absence of the purported metallic rake implies that the child's injury was not caused by that specific tool.

19. Pw4 testified that upon examination of the child, he noted that the hymen was broken and that Pw1 had tears on the vaginal wall and indicated in the P3 form that the child was defiled. In my view penetration was proved by the prosecution beyond reasonable doubt. There was evidence that the penetration was caused by the appellant. The incident took place at 10:00 a.m. when there was sufficient lighting and therefore, I find that the appellant was properly identified by Pw1, who was her daughter.

20. Although the appellant also submitted that the prosecution case was marred with contradictions and inconsistencies, he did not point to any inconsistencies in the prosecution evidence. Similarly, I find that the prosecution case did not rely on forensic evidence as suggested by the appellant. The prosecution therefore proved its case beyond reasonable doubt.

21. I now turn to consider whether the sentence meted by the trial court was excessive in the circumstance. The Court of Appeal in *M K v Republic* [2015] eKLR stated:

“17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?”

18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and



wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of *Opoya -v- Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death.” The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James -v- Young* 27 Ch. D. at p.655 where North J. said:

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.
21. Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.
22. The appellant was sentenced to life imprisonment by the trial court and I must agree with the finding in the above decision that the sentence stipulated in the proviso to section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. In my view, the sentence meted against the appellant was lawful and I find no reason to interfere with the finding of the subordinate court. Indeed, the appellant had been given the responsibility to safeguard the child, yet he exploited her. I have also considered the child who was only 6 years was seriously traumatized as a result of the assault. She had also sustained very serious physical injuries as a result of the appellant’s actions.
23. However, I am aware of the Court of Appeal decision sitting at Kisumu, *Evans Nyamari Ayako v Republic*, Criminal Appeal NO. 22 OF 2018 where the court held that life imprisonment in Kenya does



not equate to the entirety of the convict's natural life, rather, it signifies 30 years' imprisonment. The court stated:

- “26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.
27. In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years imprisonment”

24. The appellant sentence of life imprisonment is affirmed, however, it shall translate to 30 years imprisonment running from 3/8/2020.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF DECEMBER 2023.**

**R.E. OUGO**

**JUDGE**

In the presence of:

IW / Appellant - Present

Miss Mwaniki -For the Respondent

Wilkister -C/A

