



REPUBLIC OF KENYA



**KENYA LAW**  
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**GO v Republic (Criminal Appeal 26 of 2019)  
[2022] KEHC 18116 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 18116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL 26 OF 2019  
SM GITHINJI, J  
MAY 31, 2022**

**BETWEEN**

**GO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in Criminal Case No. 3 of 2017 of the Senior Principal Magistrate's Court at Garsen Law Court-Hon. E. Kadima dated 21st February 2018)*

**JUDGMENT**

1. The Appellant was charged with two counts.

Count 1: Sexual assault contrary to Section 5(1) (a) (i) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence as per the charge sheet were that on 18<sup>th</sup> January 2017 in Tana Delta Sub County within Tana River County, unlawfully and intentionally caused his finger to penetrate the genital organ (vagina) of JA a child aged 8 years.

Count 2: Incest by male person contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence herein being that on 18<sup>th</sup> January 2017 in Tana Delta sub county within Tana River County, he unlawfully and intentionally caused his finger to penetrate the genital organ (Vagina) of JA a child with the knowledge that she is his daughter.



2. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:
  1. That the learned trial magistrate erred in law and fact by failing to consider that no *voire dire* examination was conducted to the complainant (PW1) in breach of section 19 (1) of the *oaths and statutory declarations Act* Cap 15 Laws of Kenya.
  2. That the learned trial magistrate erred in law and in facts by failing to consider no certified copies of the prosecution exhibits being the birth notification p.exhibit mf-2, treatment notes as p.exhibit mf-3, the p3 form as p.exhibit -4 and the government analyst report exhibit mf-5 brought in evidence by PW1 and PW6 respectively in compliance to section 64 and 66 of the *Evidence Act*. (sic).
  3. That the learned trial magistrate grossly erred in law and facts by failing to consider that the underwear exhibit marked X-A and the buccal swab for JA marked X-B whose mode of storage and transportation of the prosecution exhibits by PW5 to the Government chemist for DNA analysis did not meet the threshold in quality assurance standard in that the exhibit were packed in an envelope instead of being stored and carried in a cooler box hence the failure or omission rendered the samples denatured and contaminated. (sic).
  4. That the learned trial magistrate erred in both law and facts by failing to consider that the mandatory minimum sentence under section 5 (1) (i) and 20 (1) of the *Sexual offences Act* No. 3 of 2006 contradicts the provision of Section 216 and 329 of the CPC and contravenes Article 27 (1) (2) (4) of the *Constitution* of Kenya 2010 hence the sentence imposed to the appellant is unlawful. (sic).

### **Evidence at Trial**

3. The prosecution called a total of six witnesses.
4. PW1- JA aged 8 years and a class three pupil at [Particulars Withheld] primary school in Mtopanga gave evidence that on a night whose date she couldn't remember while sleeping, his father went over to where she was sleeping with her brother, opened the net, sucked her mouth and using his middle finger, penetrated her vagina. She testified that her father was naked and he removed her shorts and panty before inserting his finger. That the episode lasted for five minutes.
5. She testified that when her mother woke up, her father pretended that he was going to urinate and it was until morning when her mother noticed blood stains on her panties.
6. She stated that her mother reported the incidence at the police station and her father was arrested. She was then taken to Garsen Health Centre where she was examined.
7. On cross examination by the appellant, she stated that it was the appellant who touched her and she was calling her mother when he was touching her.
8. PW2 – LM gave sworn testimony that on 18<sup>th</sup> February 2017 she was sleeping with the accused when she woke up to brush her teeth. That the complainant had removed her panties to pee when she noticed that they were stained and upon asking her she said that her dad (the accused) had kissed and fingered



- her. She stated that she did not examine the complainant but reported the matter at Garsen Police station.
9. She further stated that the complainant was born on 17th February 2008.
  10. On cross examination by the accused, she stated that it was the child who had made the allegations of sexual indecent act and she acted on it by reporting to Garsen police station. She also stated that she reported the first incident to the headman who advised the issue be settled at home. She added that they had been living peacefully even after the appellant took a second wife.
  11. PW3- MSB the headman testified that on 18<sup>th</sup> February 2017 the accused called him and asked him to go the Garsen police station where he was being held and needed intervention to secure his release. He added that the accused had a history of sexual cases before.
  12. On cross examination by the accused he stated that he was present at the police station when the child was being interrogated by the police.
  13. PW 4- Ali Bwana Mkuu a Clinical officer at Garsen Health Centre gave testimony that he examined and filled a P3 form in respect of the minor.
  14. His findings were; broken hymen, no bruises nor injuries nor discharge, HIV test negative, no spermatozoa and there is possibility that a finger could have been used as alleged by the minor.
  15. PW 5- P.C Samuel Ochieng of force number 63xxx the investigating officer told the court that on 19<sup>th</sup> January 2017, a report was made by a lady alleging that her husband had sneaked from bed and went to defile their daughter who was sleeping in a different bed.
  16. That he booked the report and took both the minor and the appellant to Garsen Health Centre for medical examination. He then issued a P3 form.
  17. On cross examination, he stated that he visited the appellant's house but never took any photographs.
  18. PW 6- George Lawrence Oguda Principal Analyst Government Chemist Mombasa stated that he made a report on 9<sup>th</sup> august 2017 from samples he had received from PC Samuel Ochieng on 24<sup>th</sup> June 2017. The two samples were a child under pant and a buccal swab to establish relation.
  19. His report was that the DNA profile generated from the underwear matched with the reference sample XB from the minor and that the said blood was not menstrual blood since menstrual blood has mucous while the sample had none.
  20. The accused person was placed on his defence and elected to give sworn evidence with no witnesses.
  21. DW1- G O O testified that on 18<sup>th</sup> January 2017, he never slept in the house as alleged and this was a conspiracy between his wife and daughter.
  22. He further stated that the wife wiped blood off the child's finger with her panty in order to frame him and he was certain the child had lost her virginity while cycling.

## **Submissions on Appeal**

### **The appellant's submissions**

23. It was the appellant's submission that trial court did not conduct *voire dire* as prescribed by the law. That from the evidence on record, there is no proof that the learned magistrate followed the procedure of conducting *voire dire* as laid down in *John Muiruri Njoroge v Republic* [1983] eKLR.



24. It was further submitted that the age of the complainant was not proved to the legal standard required nor the aspect of penetration. He placed his reliance on the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR.
25. He further submitted that the samples sent to the government analyst were wrongly received by the government analyst as they were delivered in a khaki envelope.

### **The Respondent's Submissions**

26. The respondent submits that *voire dire* was rightly conducted thus the same is not illegal. They cited *Maripett Loonkomo v Republic* C.A No. 68 of 2015.
27. It was further submitted that the elements of sexual assault to a minor were proved as per the case of *Jeremiah Wachira Muchiri V Republic* HCCRA No. 35 of 2016 thus the conviction and sentencing was merited.

### **Analysis and Determination**

28. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make due allowance for that. See *Okeno v R* (1972) EA 32, *Eric Onyango Odeng' v R* (2014) eKLR.
29. Having looked at the submissions of the appellant and the material before the court, all the issues raised can be condensed into two issues for determination.
  1. Whether the offence of sexual assault was proved beyond reasonable doubt.
  2. Whether the offence of incest was proved

### **Whether the offence of sexual assault was proved; -**

30. Section 5(1) (a) (1) and (2) of the *Sexual Offences Act* provide as follows:
  - (1) Any person who unlawfully—
    - (a) penetrates the genital organs of another person with—
      - (i) any part of the body of another or that person; or
      - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
    - (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.



- (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
31. This provision was the subject of the determination in *John Irungu vs Republic* (2016) eKLR where the Court of Appeal expressed itself as hereunder:
- “Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”
32. The complainant told the court that her father inserted his left middle finger where she pees and pierced her. PW2 stated that he noticed that the minor’s panty was blood stained and upon questioning her she told her that the appellant had inserted his finger into her private parts. This was corroborated by the evidence of PW4 who examined the minor and his findings were that the hymen was broken and there was a possibility that a finger might have been used as alleged by the minor.
33. Having considered the entire evidence on record, I am convinced beyond reasonable doubt that an offence of sexual assault was proved against the appellant by the prosecution.

#### **Whether the offence of incest was proved**

34. The offence of incest is stated in Section 20(1) of the *Sexual Offences Act* as:-
- “(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 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.”
35. The above provision by virtue of Section 21 of the same Act, apply *Mutatis Mutandis* with respect to any female person who commits an indecent act or act which causes penetration with a male person who is to her knowledge her son, father, grandson grand father, brother, nephew or uncle.
36. Consequently, the ingredients for the said offence, that is, Incest, are:-
- a. Knowledge that the person is a relative and,
  - b. Penetration or Indecent Act
37. The Act proceeds to define penetration under Section 2 as “the partial” or complete insertion of the genital organs of a person into the genital organs, of another and defines Indecent act to mean
- “any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration.”



38. Furthermore, the Act identifies the test of relationship under Section 22 in the following manner:

“ 22.

- (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.”.

The issue of relation is not disputed in this case.

39. On the issue of penetration, it is well settled that penetration can be proved by the evidence of the complainant alone as provided by Section 124 of the *Evidence Act* which provides that:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

40. This position was succinctly held by the Court of Appeal in *Williamson Sowa Mbwanga v Republic* (2016) eKLR, where it stated that:

“The import of the provision to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in *George Kioji V Republic Cr App. No.270 of 2012 (Nyeri)*: “where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso of section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief”

41. From the evidence on record, I am not satisfied that the element of penetration was proved. The complainant’s testimony is that the appellant inserted his finger into her private part. There was no evidence on penile penetration or its attempt.

42. Having found that the conviction on this offence is unsafe, I now turn to the issue of sentence on the first count. The Court of Appeal sitting at Nyeri in the case of *Francis Nkunja Tharamba v Republic* [2012]eKLR held as follows with regards to sentencing:

“...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly



in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.”

43. From the provisions of Section 5 (1), and (2) the minimum sentence for the offence of sexual assault is ten years imprisonment. I do find that the sentencing was in line with the provision stated herein and thus no need for me to interfere with the same.
44. As regards the sentencing on the second count of incest, having stated that the offence of incest was not proved, the appellant is discharged of the same.
45. I have taken note that both sentences were to run concurrently therefore the same has no impact on the sentence imposed on the first count.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF MAY, 2022**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of:** -

1. The Appellant in Person
2. Ms Mkongo for the Prosecution

