



**IMM v Republic (Criminal Appeal 32 of 2019)
[2022] KEHC 11943 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 32 OF 2019**

RK LIMO, J

MAY 30, 2022

BETWEEN

IMM APPELLANT

AND

REPUBLIC PROSECUTOR

*(Appeal against the Judgement and conviction of life imprisonment by
Hon. M. Kimani on the 28th of August, 2019 in the CM's Court at Kitui)*

JUDGMENT

1. IMM, the appellant herein, was charged with the offence of incest contrary to section 20(1) of the [Sexual Offence Act](#) No 3 of 2006.
2. The particulars as per the charge sheet presented to the trial court are that on 28th day of July, 2018 at 0700 hours at [Particulars Withheld] Village, Wikililye Location, Katulani within Kitui County, he intentionally caused his penis to penetrate the vagina of (name withheld) a child aged 11 months.
3. The appellant denied committing the offence and the prosecution called 6 witnesses to prove their case. I will give a summary here below of the evidence tendered by the witnesses at the trial.
4. MNM (PW1) the complainants mother testified on behalf of the 11 months' infant, a vulnerable witness, and the subject of defilement. She informed the trial court that her daughter was born on August 22, 2017. She identified a birth notification certificate dated August 22, 2017 which however was not tendered in evidence perhaps due to some inadvertence by the prosecution or omission.
5. The mother to the complainant testified that she was cohabiting at the material time with the appellant who, according to her was the father of the minor. She testified that on July 28, 2018 at 7:00 am she woke up and headed to the shops leaving the infant with the appellant. She recalled that she returned at 7:30 am and lit fire to make porridge for her child and tea for the family. She recalled that the child was



crying and kept crying for a while until she decided to check on her. She added that on checking on her she found her lying down raising her legs and when she examined her, she found some discharge from her genitalia which was whitish and pus like. She stated that she asked the accused what had happened but he feigned ignorance. She stated that she then went and consulted her aunt called MN who advised her to take the child to hospital but due to her financial constraints, she could not take her immediately and was only able to take her on Tuesday the following week as the incident took place on Saturday.

6. She testified that the child was examined at Wii Dispensary and found to have been sexually assaulted. The witness stated that she used to stay alone with the appellant at the time and that at the time, they had not fallen out with him she added that it was only her aunt who was a regular visitor.
7. EMN (PW2) stated that she was an aunt to the complainant's mother. She confirmed that on July 31, 2018 she was called to the Chief's Office where she was notified about the defilement of MN's child. She testified that the appellant and the complainant's mother were cohabiting though she had not met him and only heard that his name was safari. The witness stated that she accompanied the mother on Tuesday to the police station to report the incident.
8. MKN (PW3) told the court that PW1 took the child to her on July 28, 2018 and asked her to examine her. She added that she examined the child but did not notice anything because the child had been washed. She testified that she advised the mother to take her to hospital.
9. PC Selestine Opete (PW4) from Itoleka Police Station stated that PW2 went to the station on July 31, 2018 and reported that she had observed a discharge oozing from her child's genitalia after leaving her with the appellant on July 28, 2018. The officer averred that she escorted PW1 and the child to Kitui General Hospital where the child was examined and a PRC form filled. She testified that after examining the child, the doctor indicated that the child's hymen had been broken.
10. Augustine Nyamai (PW5) a children's officer Kitui Sub-county indicated that he investigated the matter after it was reported to the children's office and that he interviewed PW1 and the appellant and found that PW1 had reported the matter after she found vaginal discharge from her 11-month child. The officer also stated that the appellant was living with sexually transmitted infection (STI) while PW1 was also confirmed to having a smelly discharge. The officer tendered a report dated August 8, 2018 which he prepared in respect to this matter. The same was marked as PEXH 1
11. Robinson Katana Musyoka (PW6), a clinical officer testified that he had a P3 Form in respect to patient named DM, a 11 months old child who had been "raped". The Officer corrected the report and stated that it was supposed to be defilement He tendered the P3 Form as P Ex 2. However, the medical officer failed to give the critical information in respect to who filled or authored the P3 Form. I have also noted that despite the fact that the P3 Form is stamped with as stamp from Kitui District Hospital, the same is not signed. I will get back to that omission shortly in this judgement.
12. The Officer also tendered Post Rape Case Form (PRC) as P Ex 3 but again did not again indicate who the author was. The form indicated that the child's hymen had been broken and she had pus oozing from her vagina though there was no evidence of physical trauma but was no explanation was offered to explain that medical state of affairs.
13. When put on his defence, the Appellant gave a sworn statement and denied committing the offence and also denied being married or cohabiting with PW1 at the time of the alleged offence. He stated that he proposed to PW1 when she fell pregnant but the two did not get married as her aunt refused. He stated that he left his village and lived with his new family in Kitui town. He stated that he was



- summoned by the area Chief and asked to provide support to PW1 and her child and that he was taken into custody when he refused. He stated that he married someone else and he believed that is why he was framed for the offence
14. In its judgement delivered on August 29, 2019, the trial court found the appellant guilty of incest, and sentenced him to life imprisonment on August 30, 2019.
 15. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
 - i. That the learned trial magistrate erred in both law and fact when convicting the appellant relying on contradicting evidence
 - ii. That the learned trial magistrate erred in both law and fact while convicting he appellant without considering that he was a first offender
 - iii. That the learned trial magistrate erred in both law and fact when convicting the appellant without considering his defence adduced before the court
 - iv. That the learned trial magistrate erred in both law and fact without giving the humble time and prepare for questioning of the witness.
 16. The appellant submits that the prosecution did not establish the ingredients of the offence. According to him medical evidence established that the minor did not have evidence of physical trauma. He relied on the case of *John Mutua Munyoki versus Republic* [2017] eKLR where the Court of Appeal found that the medical evidence establishing defilement was wanting.
 17. On identification, the appellant submits that PW1 did not witness the alleged assault. He contends that PW1's family did not establish that PW1 and the appellant were in a relationship. He relied on the case of *Stephen Munyao versus Republic* [2019] eKLR where on appeal the High court held that the complainant had not identified the appellant therein positively and although the complainant's mother identified the appellant as the person who defiled her daughter, the complainant had not given her the name or description of the appellant. When the report was made.
 18. The appellant has also taken issue with what he alleges to be contradictions in the prosecution's case. He contends that although PW5 stated that the minor had been defiled, there was also testimony to the effect that the minor could have contracted the infection from the parents' poor hygiene. He points out that medical evidence indicated that the minor had no evidence of physical trauma. He has relied on the case of *David Mwingirwa versus Republic* [2017] eKLR where the Court of Appeal faulted the High Court for relying on the evidence that the complainant's hymen was broken alone as proof of penetration. The Court of Appeal went on to cite other methods through which the hymen could be broken. The court stated that the appellate court ought to have considered the prosecution's evidence against the appellant.
 19. The appellant has also relied on the case of *GMW versus Republic* [2019] eKLR where the court found that the evidence tendered by the prosecution did not support the offence charged. The court noted contradictions in the complainant's evidence as well as the complainant's mother's evidence. The court also took notice of the fact that the investigating officer was not called to testify. This coupled with the contradictions led to the court making a finding that the prosecution's case had not been proven.
 20. The appellant also faulted the sentence meted against him stating that it was too harsh. He relied on two cases being *M K versus Republic* (2015) eKLR and *GM versus Republic* [2017] eKLR and in both cases there was exercise of discretion by the court in rendering sentences in sexual offences.



21. The duty of this court as a first appellate court is to re-evaluate the evidence tendered at the trial court with a view to reaching own conclusion (See *Okeno versus Republic* (1972) EA 32.)
22. The appellant, as I have observed above was charged with incest contrary to section 20(1) of *Sexual Offence Act*. The Section provides;
- “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.”
23. This court has considered this appeal as a whole which for the record is unopposed by the Office of Director of Public Prosecution for the respondent. There are only 2 issues which I have picked out which I will delve on are;
- i. Whether the prosecution’s case was proved to the required standard.
 - ii. Whether the charge sheet was defective.
24. Whether the prosecution’s case was proved to the required standard.
- This is essentially a defilement case and the necessary ingredients in that offence are;
- i. Age of the complainant
 - ii. Penetration
 - iii. Identity of the perpetrator
- I have considered the evidence tendered in respect to age and though the prosecution had a birth notification card marked, it forgot to have it tendered in evidence. However, this court finds that the evidence of a victim of a sexual offence can also be established through other evidence like P3 Form or any other document like birth certificate inoculation or clinic card etc.
25. In this instance the prosecution tendered a P3 Form which indicated that the victim was aged 11 months. This could have sufficed if the P3 was admissible and had been tendered properly in evidence.
26. This court finds that the P3 Form tendered was improper and inadmissible in evidence for 2 basic reasons;
- i. Robinson Kanata Musyoka (captured as PW5 but should have been PW6) did not state if he authored the document. He did not state if he examined the infant and found out the evidence of defilement himself. His testimony is scanty and unclear.
 - ii. The P3 Form itself is unsigned though it is stamped. This is an indictment on the part of the Office of the Director of Public Prosecution because of lack of diligence because it ought to have noted the anomaly like the witness noted that the P3 Form indicated rape erroneously instead of defilement given the age of the victim.
27. In the face of the above anomalies, this court finds that the medical evidence that could have established 2 crucial elements of penetration and age is wanting for the aforesaid reasons. The trial court fell



into error to place reliance on such a document. The crucial elements of age and penetration was not proved to the required standard.

28. Whether the charge sheet was defective.

The appellant as observed above was charged with incest contrary to section 20(1) of *Sexual Offence Act*. The particulars contained in the charge sheet however only reveal an offence of defilement. The ingredient of “knowledge” is missing from the charge sheet.

For an offence of incest to be sustained, it must contain the particulars of the victim and contain the particulars that “a female person who is to his knowledge his daughter.....etc.” That is missing in the charge presented because the particulars simply state that the appellant unlawfully and intentionally caused his penis to penetrate into the vagina of the infant who was aged 11 months.

The particulars of the charge did not clearly disclose the offence upon which the appellant was charged. In other words, the particulars in the charge sheet were inconsistent with the charge.

This court could have resorted to section 382 of *Criminal Procedure Code* to cure the defect because it is apparent that the appellant never suffered any prejudice but owing to the lack of medical evidence, resorting to section 382 will be an exercise in futility.

This court has deeply agonized over the injustice visited on an 11-months-old by lack of diligence on the part of the prosecution. The victim certainly had no role on the mistakes made during trial and I am convinced that the interest of justice dictates that a re-trial be conducted. That way both the appellant and the victim might eventually get justice.

For that reason, while I allow this appeal for the aforementioned reasons and set aside the conviction and sentence, I will direct that the appellant be escorted back to the duty court at Kitui CM’s court for retrial. I will also direct that the trial if possible be fast-tracked in order to protect the interest of justice to both the victim and the appellant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 30TH DAY OF MAY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

