



**Sambeya v Republic (Criminal Appeal 19 of 2019)
[2022] KEHC 12892 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 19 OF 2019**

**A. ONG'INJO, J
JULY 29, 2022**

BETWEEN

RICHARD SAMBEYA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Richard Sembeya was charged with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No 3 of 2006.
2. Particulars were that on diverse dates between June 17, 2017 and July 8, 2017 at Tudor area in Mombasa district within Mombasa county being a male person intentionally and unlawfully caused his penis to penetrate the Vagina of LL, a female person who was to his knowledge his niece.
3. In the alternative the appellant was also charged with The offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006.
4. The trial Magistrate considered evidence of the 7 prosecution witnesses as well as appellants sworn statement in defence and concluded that the prosecution had proved its case beyond all reasonable doubt and convicted the appellant. The appellant was sentenced to serve 20 years imprisonment.
5. The appellant was aggrieved by the conviction and sentence and he appealed on January 28, 2019 based on 5 grounds which he later appealed to amend by notice of motion filed on March 9, 2022 concurrently with his written submissions. The amended grounds of appeal are as follows: -
 - a) That the trial court failed in law and fact by not seeing that the prosecution evidence was marred with contradictions.
 - b) That the trial court erred in both law and fact when it failed to observe that the matter was a fabricated case.



- c) That the trial court erred in fact by failing to see that the medical evince did not concur with the victim's testimony.
- d) That the trial court erred in both law and fact when it failed to observe that appellants defence was dismissed off hand.
- e) That the trial magistrate failed to see that the prosecution did not prove their case beyond reasonable doubt.
- f) That the trial Magistrate failed to take into account appellants mitigating circumstances.
- g) The appalment begged the court to allow his appeal.

Prosecution's Case

6. The prosecutions case was that the appellant returned to Mombasa with his sisters daughter the complainant herein to help take her to school but did not take her to school. When he differed with his wife and she left with their 2 children the appellant prayed on the 12 years old niece on 2 occasions and defiled her. PW1 said she was not allowed to talk to neighbours but PW2 said her crying but never asked why she was crying. She cried the more. PW2 said she had seen PW1 in the estate for 2 weeks.
7. That on July 8, 2018 when the woman in the plot noticed she was constantly crying. They called PW5 who took her to her houses and interrogated her and leant the uncle had threatened her and told her "utakula ujeuri wako". She also divulged to PW5 that her uncle had defiled her and that during the 3 episodes he could raise the volume of the radio. PW5 called a police officer known as Dorothy and reported after also informing Gladys – PW4.
8. That the following day after the complaint had come from church at around 11:00a.m. PW2, PW3, PW4 and PW5 took her to Makupa police station. PW4 said that she saw the complainant walking with her legs closely together while climbing stairs when she came from church. She said that the complainant could not even sit down and was sitting on her hands.
9. That after the complainant had been taken to police station by the woman at the plot, PW4 returned to the plot and found a crowd looking for the appellant and a struggle ensued and the men took him to police station.
10. PW4 said that the complainant came with appellant after which appellants wife left with her 2 children the complainant remained with the appellant for another 3 weeks.
11. PW5 testified that she accompanied a police officer to hospital with the complainant and she was treated and treatment documents issued to the police officer.
12. PW1 identified appellant as her uncle and PW2, PW3, PW4 and PW5 identified the appellant as the one who was staying with the complainant whom the complainant identified as having defiled her. PW5 said she did not collude with other women to defile the complainant. PW6 dr Salim Said produced P3 form filled by dr Muwuvu in regard to the complainant Ex P1. He said the complainant had injuries on the labia minora which had lacerations and the hymen was broken.
13. He said the P3 stated date of defilement as May 2017. Injuries were classified as maim. PW6 also produced post rape care form filed by Ms Maundu clinical officer.
14. In cross-examination he said the complainant was presented with a history of being defiled by the uncle. He said the assailant was not examined. He said lab tests turned negative.



15. PW6 said the injuries near the anus and on the vagina could only have been caused by penetration with a blunt object. PW6 said injuries are consistent with defilement.
16. PW7 PC Joyce Okemo of Makupa police station investigated the offence of defilement of the complainant by the uncle the appellant herein. She established the appellant and his wife turned the complainant into house help instead of taking her to school as promised when she was brought from upcountry. When the appellant's wife left with her 2 children he turned his niece into a wife defiling her on 2 occasions and doing house chores for him.
17. PW7 identified P3 and PRC form that was produced by dr Salim Said as Ex P1 and 2. She also produced age assessment report Ex P3 confirming age of the complainant. PW7 said that when she called the complainants mother she refused to come.
18. In cross-examination PW7 said that the appellant was arrested by neighbours and taken to the police station. She also said that the accused could not have been examined as time had lapsed. She said the victim identified the appellant as the one who defiled her.
19. She also said that appellant was not fabricated. She said the complaint was defiled by the appellant who was no one else and that the said incident happened on July 8, 2018. PW7 said the complainant was committed to Mahali pa Usalama children's care. She said that the complainant was defiled when she remained with the appellant between June 17, 2017 and July 8, 2017. She said she didn't demand for Kshs 20,000/= from the appellant. She said she owed the victim justice and she empathized with her.
20. When placed on defence the appellant gave sworn statement and said that he was residing at Tudor in Mombasa. He said that on 17th he came back from Kakamega where he had attended his father's funeral. He said his father used to stay with the complainant and he was given the child to go to school in Mombasa. That after 2 weeks his wife travelled to their home for a funeral together with their 2 children. She said she remained with the complainant who was in class 7 as he looked for a school to take her. He said that in July 2017 he went to church at Buxtan which is 2 km away. He said that the complainant was walking with difficulties because the shoes she wore were undersize.
21. He said that his neighbours saw the complainant walk with difficulties but didn't ask why and instead started talking with their neighbours secretly suspecting he had defiled the child. He said the complainant continued to have problems with her leg as and he would help her with it. He said the complainant was a quiet girl and could remain home when never he went to work.
22. He said that on July 7, 2017 when he returned from work he found the complainant eating food given by a neighbour and he warned her. That later at night he heard the complainant call him while she was vomiting. That lights went off for a while. He said the complainant was unwell until the following day and it was not true that he defiled her. He said the child was sick due to prolonged vomiting.
23. That on July 9, 2017 the complainant was feeling better and she accompanied him to church. That when he asked her to go home after 1st service she was taken to police station. That at 3:00pm PW5 and PW2 followed her and a crowd gathered at his house and police also went and arrested him and he was escorted to police station where he found the complainant. He said he was arraigned in court on July 11, 2017 and he denied allegations of incest.
24. In cross examination the appellant said that he was guardian of the complainant in Mombasa. He admitted she was at his house from June 26, 2017 and he was to take her to school. He said that his house had 2 rooms and that the complainant would sleep in the sitting room while he slept on a bed in the bedroom.



25. He confirmed he remained with the complainant when his wife left. He said the difficulty in walking was caused by the ill-fitting shoes. He said the complainant didn't report to him that she had been defiled by someone. He said the child was coached by neighbours to be against him. He said a one known as Peter he and the neighbours plan to lie against him.
26. He said there was no dispute between him and G as sheet had not stayed at the plot long. He said he had no issue with other neighbours. This appeal was canvassed by way of written submissions.

Appellants Submissions

27. The appellants submissions were to the effect the prosecution's evidence was marred with contradictory particularly as to date of offence as shown in P3 and in the charge sets evidence of complainant and other prosecution witnesses.
28. It was also argued that there was contradictions as to which of the neighbours PW2, PW3, PW4 and PW5 took the complainant to hospital. The appellant submitted that the complainant could not be said to be a truthful witness since she was defiled in May 2017 but lied to police that she was defiled between June 17, 2017 and July 8, 2017. The appellant submitted that there was no eye witness to the alleged offences and further contradiction in evidence of PW4 as to date when offence was committed compounded the confusion in the prosecutions case.
29. The appellant further submitted that since the complainants evidence was not truthful the trial Magistrate ought to have looked for corroborating evidence. That it was incorrect for the trial court to place reliance on the questionable evidence of PW1 which was inconsistent.
30. He argued that the complainant may have been defiled but evidence linking him into the offence is wanting. The appellant sought to support his case with the holding that in *Thangwe Alfred v UG* Cr App No 139 of 2001 [2003] UGCA6 where it was held:-“with regard to contradictions on the prosecution case, the law set out on numerous authorities is that grave contradictions unless satisfactorily explained and usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks they point to deliberate untruthfulness as if they do not affect the main substance of the prosecution case”.
31. The same position is also held in *Ndungu Kimani v Republic* [1979] KLR 28Z “A witness whose evidence is to be relied on should not create an impression that he/she is not a straight forward person.”
32. The appellant also relied on the holding in the Court of Appeal of East Africa holding in *Chilla v Republic* [1967] EA722 & 723 where it was stated
 - i. “the judge should warn assessor and himself of the danger of acting on the uncorroborated evidence testimony of the complainant, but having done so many convicts it's the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.”
33. He concluded that the truthfulness of PW1's testimony was wanting and questionable and devoid of any other independent, admissible and material evidence to support the claims against him.
34. The 3rd ground that appellant was fabricated is construed by him from alleged contradictory dates given as date when alleged offence took place. He said that PW1 testified that the mother of the complainant was non-committal on the issue and she suggested that he should be released. He argued that the email magistrate should have interrogated why the mother of complainant refrained from involving herself with an issue involving her daughter and agitated for his release. He said the reason could only have been



- because evidence against him was concocted to unfairly incriminate him. He said the trial Magistrate failed to accord due consideration to the conduct of the complainant's mother and determine their contributions on the probative value on the lack of it in the prosecution case.
35. The appellant said he was not examined to establish link between him and the offence.
 36. The appellant also submitted that he was concerned about the manner the complainant was walking and she told him that it was here ill fitting shoes which was causing her severe discomfort. He said this defence was unfairly dismissed by the trial court who placed reliance on the questionable medical evidence to find him guilty. He said the trial court shifted the burden of proof to him instead of placing serious doubt on the prosecutions evidence.
 37. He said that PW1 was given food by a neighbor which made her vomit severely for a longtime rendering her unwell for some few days but the trial magistrate ignored his defence in that regard.
 38. The appellant urged the court to allow his appeal. The respondent is their submissions argued that the evidence of PW2, PW3, PW4 and PW5 that appellant defiled the complainant was clear, cogent and consistent that the complainant was defiled between June 17, 2017 and July 8, 2017 when she remained alone with her uncle the appellant.
 39. It was also submitted that there was evidence that PW2, PW3, PW4 and PW5 all took the complainant to the police station and later PW5 accompanied police and complainant to hospital and that there was no dispute the minor was taken to hospital.
 40. On whether the prosecution case was a fabrication, it was submitted that *voire dire* examination was conducted and PW1 was found to be intelligent and understood nature of an oath and she gave clear evidence as to what happened when she remained with the uncle.
 41. It was submitted that the complaint's age was proved by the production of age assessment report–exhibit P3. It was also submitted that the complainant narrated how appellant defiled her on the night of June 17, 2017 and it happened again she could not walk well and she reported to neighbors who noticed she looked disturbed and was crying. That when complainant was taken to hospital it was established she had been defiled.
 42. It was submitted that the P3 and PRC forms has consistent findings that the complainant was defiled and corroborated the evidence of PW1.
 43. On whether appellants defence was considered it was submitted that at page 11 of the trial Magistrates judgment found that appellant's allegations that the difficulty in walking was caused by ill-fitting shoes was an afterthought as it was being raised for the 1st time during defence case.
 44. It was also submitted that there was no dispute that the appellant was an uncle to the complainant as he was a brother to her mother.
 45. It was submitted that the burden of proof was discharged by the prosecution and the trial court judgment should be upheld.

a. Analysis and Determination

46. This is the 1st time the appellant is approaching this court to reconsider the evidence on record during his trial as well as judgment of the trial court and as against his grounds of appeal and submissions and the holding as to mandate of this court as held in *David Njuguna Wairimu v Republic* [2010] eKLR calls upon this court:



i.

“to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court”

47. After considering the evidence in the trial court the judgment of the trial Magistrate, the grounds of appeal and submissions this court finds that the issues for determination are: -

Whether there were material and/or grave contradictions in the prosecution evidence that should have led to rejection of the said evidence by the trial Magistrate.

- a) Whether the charge against the appellant was a fabrication.
- b) Whether the medical evidence corroborated the complainant's evidence.
- c) Whether the trial Magistrate considered the appellants defence.
- d) Whether the prosecution case was proved beyond all reasonable doubt.
- e) Whether the appellants mitigations was considered/taken into account during sentencing process.

48. Section 20(1) of the *Sexual Offence Act* provides: -

- (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.

- (2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.
- (3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the *Children Act* (No 8 of 2001) and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

The ingredients to be proved in the offence of incest as provided under Section 20(1) of the *Sexual Offences Act* are: -

- a) Age of complainant
- b) Proof of penetration or indecent act
- c) Positive identification of assailant
- d) Proof of familial relationship between assailant and complainant.



49. In Criminal Appeal 2 of 2019 *JMM v Republic* [2022] eKLR, the court held as follows, ‘ Therefore, the ingredients for incest are: An indecent act or an act by a male person whose degree of consanguinity falls within the prescribed parameters of section 20 of the *Sexual Offences Act*. Succinctly put the essential elements for the offence of incest are; an intentional indecent act or an act which causes penetration with a female, the identification of the male perpetrator, consanguinity between the victim and the perpetrator who must be a relative and the age of the victim.’
50. In Criminal Appeal No 80 of 2017 at Kisii *GMB v Republic* [2018] eKLR, the court held that in an offence of incest, penetration is not a necessary ingredient but an indecent act as defined under the *Act* must be proved.
51. There was no dispute as to the age of complainant and the relationship between the appellant and complainant. The complainant was said to be 12 years by the time she was allegedly defiled by the maternal uncle who was staying with her in Tudor. The complainant was rescued by neighbor’s who observed that she was always crying and was walking with difficulties. On interrogation by PW4 it was established that the appellant had been defiling her. The matter was reported to Makupa Police station and investigation conducted and it was established that she had been defiled on two occasions by the uncle. The P3 form filled in respect to the injuries suffered by the complainant showed that lacerations on the labia majora and hymen was broken. She also had lacerations at the fourchette. The complainant in cross examination told the appellant that he defiled her on two occasions both on the vagina and anus. the injuries were assessed as maim.
52. The appellant complained that the evidence by the prosecution had material inconsistencies and contradictions and claimed that the medical report indicated that the complainant was defiled in May 2017 and therefore he was not the one who defiled her since he remained with her as from 17th of June 2017.
53. This court has looked at the medical examination p3 and paragraph two of section B indicates the approximate age of injuries as between May 2017 to 9th of July 2017. The complainant testified that she travelled with appellant to Mombasa at the end of May 2017 so that she could be taken to school. The appellant confirms that he returned to Mombasa in June 2017 and after two weeks his wife travelled home for a funeral. There is therefore no contradiction as to when the complainant was defiled. She was very categorical that the appellant defiled her on 17th of June 2017 and 8th of July 2017 and she had not been defiled in Kitale.
54. The appellant claimed that evidence was fabricated against him and that the complainants evidence was not truthful and ought to have been corroborated. the complainant was examined and the trial magistrate established that she was possessed of sufficient intelligence and she understood the nature of an oath and gave sworn testimony. The appellant had an opportunity to cross examine the complainant and she was firm that the appellant defiled her both on the vagina and anus and she bled. She also said she was walking with difficulties as a result of the defilement. PW2, PW3, PW4 and PW5 who rescued the complainant and took her to the police station were the appellants neighbors and they confirmed that he had no grudge with them. There was therefore no reason why they would fabricate him as they had also known the complainant for only two weeks.
55. The appellant acknowledged the complainant was walking awkwardly and attributed the difficulty in walking to ill-fitting shoes. The medical report did not show that the complainant had any injuries on her lower limbs. All prosecutions witnesses said she was walking awkwardly because she was in pain after being defiled by the appellant. The issue of ill-fitting shoes only arose during the appellants defence and it was not put to the prosecution witnesses during cross examination.



56. The appellant also claimed that one of the neighbors had given the complainant some food which made her sick and she vomited the whole night and lights went off when he was trying to assist her. Again the P3 form does not show that the complainant was treated for any abdominal pain or vomiting when she was taken to the hospital on 10th of July 2017. The complaint admitted having been given food by a neighbor on 8th of July but she did not say that the food made her vomit.
57. The only conclusion that can be made and which was expressly pointed out by prosecution's evidence is that the complainant was walking with difficulties because of pain arising from the injurie she suffered when the appellant defiled her. The medical report and evidence of PW2,3,4, and 5 corroborates the complainants evidence that she was defiled. It is apparent that the prosecution proved its case beyond all reasonable doubt.
58. The trial Magistrate at Page 24 examined and analyzed the appellants defence and said that the issue of ill-fitting shoes were not raised in cross examination of the complainant or any of the prosecution witnesses and it did not explain why the child would have to support her sitting with her hands or why her hymen had lacerations on the labia minora and fouchette. The trial magistrate dismissed the defence as an afterthought that does not hold water or vitiate the credibility of medical findings. The trial magistrate also found that the neighbors who were called as witnesses did not have a dispute with the appellant and that there was no reason why the complainant would fabricate her uncle.
59. While sentencing the appellant on 7th of September 2018 the trial Magistrate said she had considered the appellant's mitigation and sentenced him to serve 20 years in the first count and discharged him under section 35(1) of the *penal code* in count II. It is therefore misleading for the appellant to claim that his mitigation was not considered when the record shows that he was sentenced to 20 years imprisonment to take effect from July 11, 2017.
60. In conclusion this court finds that the appeal lacks merit and the same is dismissed.

The appellant has 14 days right of appeal

DATED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS THIS 29TH OF JULY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of

Ogwel – Court Asst.

Mr. Ngiri for Respondent

Appellant – Present in person

Hon. Lady Justice A. Ong'injo

Judge

