



**Republic v JMK (Criminal Appeal E043 of 2021)
[2022] KEHC 13594 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E043 OF 2021
RK LIMO, J
SEPTEMBER 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

JMK ACCUSED

*(An Appeal against the Conviction and Sentence vide Mutomo
Principal Magistrate's Court Sexual Offence Case No. 8 of 2021)*

JUDGMENT

1. JMK, the appellant herein, was charged with incest Contrary to Section 20(1) of the [Sexual Offence Act](#) No. 3 of 2006 *vide* Mutomo Principal Magistrate's Court Sexual Offence Case No. 8 of 2021. The particulars as per the charge were that on the 8th Day of May, 2020 at Mutomo Sub-County within Kitui County, he intentionally and unlawfully caused his penis to penetrate the vagina of (name withheld) a child aged 12 years who to his knowledge was his niece.
2. The appellant denied committing the offence but after trial where the prosecution presented 6 witnesses with the appellant presenting one, the trial court found him guilty and sentenced him to serve life imprisonment.
3. The following is a brief summary of the evidence presented at the trial court.
4. The complainant whose name I have deliberately withheld to protect her, testified on oath that she was in class 5 and aged 13 years at the time she was giving her testimony on April 6, 2021.
5. She testified that on May 8, 2021 while at home alone at her grandmother's house, the appellant followed her to the kitchen and grabbed her. She also stated that the appellant, her uncle also strangled her when she tried to scream and he undressed her before defiling her. The girl gave a vivid account of how the appellant removed his penis and inserted it into her vagina as he laid on her on a chair used by



- her grandmother to keep clothes. The minor testified that when she cried, the appellant released her and threatened her but the girl bravely dared him and told him she was going to report anyway.
6. The girl further testified that she went outside, tethered the goats and looked for her grandmother but could not find her. She stated that she later found her other aunt named E and told her what had happened after she inquired as to why she was crying.
 7. The minor further testified that she also went and informed her other aunt named M who then called her grandmother, the lady with whom the complainant was staying with. The witness stated that she thereafter accompanied M and grandmother to Mutomo Police Station and thereafter hospital. She recalled being examined at the hospital and being treated adding that she had not changed the clothes she wore during and after the incident. She further testified that the appellant was her uncle and stayed with them in the same compound. She testified that she was taken back to the Police Station at Mutomo the following day where she recorded her statement.
 8. VK (PW2) told the court that she was PW1's grandmother and the Appellant's mother. She stated that while she was at work on the material day when she was called by the complainant's aunt with information that her granddaughter (PW1) had been defiled by the Appellant. She stated that while she went home and when she asked the Appellant whether what she had been told was true, he denied the allegations and told her that he only punished PW1 by beating her because she allegedly had refused to fetch him some salt from her house. She stated that she took PW1 to the police station to report the incident and later accompanied her to Mutomo Mission Hospital for medical attention. The witness also identified two medical documents in court being treatment notes (PMFI 2) and a PRC form (PMFI 3)
 9. JM (PW3) PW1's aunt told the court that she was at her home on the material day when PW1 went to her crying and requested to use her phone to call her grandmother (PW2). That upon inquiring why PW1 was crying, she informed her that the Appellant had defiled her. She states that she decided to call PW2 herself and informed her of what PW1 had told her. She added that she stayed with PW1 at her home until PW2 arrived and the three, PW1, PW2 and PW3 went to the police station to report the incident and later accompanied PW1 to hospital in the company of two police officer, (Madam Ruth) and Carol for medical attention.
 10. Ruth Mutinda (PW5), a Clinical Officer from Mutomo Level 4 Hospital testified that on August 9, 2020, a girl aged 12 (the Complainant) reported to their hospital with a history of having been defiled by a person well known to her. The Medical Officer testified that she examined the patient and estimated the age of the injuries she observed to be one day and probably caused by penile tissue or hand. She testified that the vagina was inflamed which she opined was an indication that something had penetrated forcefully. She also found that the child was defiled twice and needed counselling and social support. She tendered P3 as P Ex 3 which showed that there was trauma on the vagina which caused epithelial cells. She also tendered PRC Form as P Ex 2.
 11. Police Constable Caroline Atieno (PW6) from Mutomo Police Station stated that she took over investigations into the case following the transfer of her colleague Ruth Nafula. She stated that PW1 was brought into the station on the material in the company of PW2 to report a case of defilement. She stated that her colleague, Ruth accompanied PW1 and PW2 to Mutomo Level Hospital for medical attention. The Officer produced PW1's birth certificate (P.Ex 1) which indicated that she was born on 15/3/2008.
 12. When placed on his defence, the appellant gave unsworn defence and denied committing the offence adding that he was framed up. According to him the Medical Officer who testified was bribed with



- Kshs. 10,000. He however, failed to give details as to why he was framed or how the Clinical Officer was bribed and by whom.
13. MM (DW2) told the court that she was the Appellant's aunt. She stated that he was working for her at the material time specifically preparing bricks for her. She also told the court that on the material day, the Appellant was at her home but she was personally not present in the home during the day and only returned home at 9.00pm.
 14. In its judgement delivered on October 26, 2021, the trial court found the appellant guilty of incest, and sentenced him to life imprisonment on November 30, 2021.
 15. The appellant was dissatisfied with conviction and sentence and raised the following grounds namely: -
 - i. That the learned trial magistrate erred in both law and fact when relied on prosecution evidence which was not proven beyond reasonable doubt
 - ii. That the Learned Magistrate erred in both law and facts and not on view that this act was a framing one
 - iii. That the Learned Magistrate erred in both law and facts when accepted medical examination report which was not proved beyond reasonable doubt
 - iv. That the Learned Magistrate erred in both law and facts when relied on prosecution evidence which was not collaborated to warrant conviction
 - v. That the Learned Magistrate erred in both law and facts when accepted prosecution evidence and examination done while the Appellant has not re-examined for approval of the act beyond reasonable doubt
 - vi. That the identification from the scene of crime was not proved beyond reasonable doubt and the trial magistrate directed himself convicting the appellant relying on un proved identification
 - vii. The sentence imposed upon the appellant is manifestly excessive.
 16. The Appellant filed his submissions dated May 5, 2022 on May 18, 2022 where he submitted that the prosecution did not establish the ingredients of the offence.
 17. He has taken issue with PW5's testimony in chief which appears to suggest that PW1 was examined at Mutomo Level 4 Hospital on 9/8/2020 which was three months after the offence was committed. He also contends that the witness stated that she did not know who defiled the Complainant.
 18. The prosecution opposed adoption of the additional grounds of appeal contained in his submissions as he did not seek leave to file the same. It is correct that the amended grounds included in the appellant written submissions violate Section 350(2) of the *Criminal Procedure Code* which provides: -

“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal.”



19. It is also true that the appellant never sought leave to rely on additional grounds contrary to the above cited provision and the grounds therefore are not competently raised and are irrelevant to this appeal.
20. The prosecution has further opposed this appeal through their written submissions dated June 17, 2022.
21. The Prosecution submits that it was able to prove all the elements required to prove the offence of incest. The state has cited a persuasive decision delivered by J Mwongo in *PMM vs R*(2018) eKLR where the court dismissed the appeal but directed the file to be placed before the trial magistrate for exercise of her discretion in sentencing after the court found that the trial court had discretion in sentencing under the provisions of Section 20(1) of the *Sexual Offences Act*.
22. The Prosecution however is asking the court to uphold the maximum sentence meted by the trial court.
23. The duty of this court being the first appellate is stated in the case of *Okeno vs Republic* (1972) EA 32 at pg 36, the EA Court of Appeal said:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Ruwalla v Republic* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peter v Sunday Post* (1958) EA 424.”

24. The Appellant as observed above, was charged and convicted of the offence of 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.”

25. The issues for determination before this court are;
 - a. Whether the prosecution proved the offence of incest beyond reasonable doubt.
 - b. Whether the sentence imposed was proper.
26. (1) To establish a charge of incest, the prosecution must have proven the elements of the offence which are:-

Whether the elements of incest were disclosed	<ol style="list-style-type: none"> i. The victim must be a female person under the age of eighteen years who is related to the perpetrator and the perpetrator had knowledge of the same ii. An indecent act or an act that causes penetration
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27. The question of relationship between the appellant and the Complainant was clearly brought out by VK, (PW2), the Appellant's mother and also grandmother to the victim. She testified that the appellant was her own son while the Complainant's mother was her step daughter. The Appellant essentially was an uncle to the Complainant and that explains why they resided together in the same homestead.

i. "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.

i. In this Act

a. "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning

b. "nephew" means the child of a person's brother or sister and "niece"

29. The evidence tendered by the prosecution proved beyond doubt the consanguinity between the appellant and the Complainant. The Appellant was the uncle and the Complainant described him as such during trial.

30. (ii) This element is not contested in this appeal. The Complainant was aged 12 years and the birth certificate (P Ex 1) tendered by PW6 clearly indicates that she was born on March 15, 2008 while the offence took place on May 8, 2020 when she was 12 years old.

Complainant

31. (iii) An indecent act is defined under Section 2 of the *Sexual Offences Act* as:

Whether

the "Indecent act" means an unlawful intentional act which causes: -

Complainant

was

indecently

assaulted

and/or

whether

there

was

penetration? "the partial or complete insertion of the genital organs of a person into the genital organ of another person."

32. The appellant contends that he was framed but the evidence from the complainant (PW1) shows what transpired when she was home alone with the appellant. The girl narrated that she was herding goats at the material time when the appellant asked her to go and get him some salt and as the girl search for some inside her grandmother's house, the appellant apparently had ulterior ideas and motive because as soon as the girl was in the house, he followed her inside the house and grabbed before defiling her on a plastic chair which the girl stated was used by her grandma to keep her clothes. The complainant stated that she tried to scream but the appellant strangled her and then proceeded to defile her.

33. The Complainant's testimony was corroborated by a Clinical Officer from Mutomo Sub-County Hospital named Ruth Mutinda (PW5). She stated in no uncertain terms that she examined the complainant and found that her vagina was inflamed which she opined was an indication of trauma. She was of the opinion that the girl was defiled. She further established that the injuries/trauma on the victim's vagina had been caused by penile tissue or human hand. She tendered P3 Form as P Ex 3 and



PRC Form as P Ex 2. The Medical evidence tendered in my view was quite consistent with what the minor told the trial court. She was defiled and that fact was proved beyond any shadow of doubt and the trial court was correct to make that finding.

34. The Appellant raised an issue with PW5's testimony in chief which recorded that PW1 was examined at Mutomo Level 4 Hospital on 9/8/2020 which was three months after the offence was committed.
35. This in my opinion was a typing error as the same witness presented a P3 form in court (PEXH 3) which she filled on 9th May 2020 a day after the offence was reported.
36. This court finds that the appellant's allegations that there was a grudge and/or that the medical officer was bribed are far-fetched and wild. There was no evidence tendered to support the allegations.
37. This court has re-evaluated the evidence tendered by the prosecution and find that the same was simply overwhelming against the appellant. He cannot run away from physical and psychological trauma he subjected the Complainant to. The prosecution's case in respect to penetration was proved beyond doubt.
38. On sentence, Section 20(1) of the [Sexual Offence Act](#) provides; -

“The Sexual Offence Act at Section 20(1) provides;

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.”

The complainant was below 18 years of age. The evidence tendered as I have found above showed that she was 12 years old. The trial court was in order to impose life imprisonment as prescribed by law.

39. The trial court indicated that its hands were tied by Law but the question is, were they? There are a number of authorities holding the position that a trial court has a discretion to impose any sentence under Section 20(1) which sentence can be up to life but not necessarily.

In [MK v Republic](#) [2015] eKLR, the Court of Appeal had this to say;

“ 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”. The Court of Appeal added that,

“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-vs- 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.

40. Taking all the facts of this case into consideration, the sentence in my view was proper. The Appellant lived with the complainant in the same compound, and he sexually assaulted her in her grandmother’s house. The pre-sentencing report presented in court indicated that the complainant had suffered psychologically, socially and physically. The victim impact statement indicated that the complainant had refrained from playing with her mates and was also not bathing in public probably out of fear. (Bathing in the open especially near the rivers in this County is a common practice).

41. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

42. In my view the trial court hands were not tied but the trial court seems to have factored that factor erroneously. But having looked at the aggravating circumstances in this matter like the impact assessment report on the victim and the fact that the appellant showed no remorse whatsoever in regard



to the consequences of his actions. The sentence meted out appears justified. He was quite violent on the victim and threatened her in the process. It only took the courage of the young girl to report the incident.

That shows that the appellant was and is still not ready to take responsibility over his actions which means that if some leniency is extended to him, chances of repeating the offence over again against other victims cannot be ruled out. As a matter of deterrence and in order to send out clear signal to other like-minded offenders, in my view, life sentence in the circumstances was justified.

In the premises this court finds no merit in this appeal and the same is dismissed.

Dated, Signed and Delivered at Kitui this 28th day of September, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

