



**FKM v Republic (Criminal Appeal E080 of 2021)  
[2022] KEHC 15852 (KLR) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E080 OF 2021  
GMA DULU, J  
NOVEMBER 29, 2022**

**BETWEEN**

**FKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. Otieno J. in Makueni Chief Magistrate's Court (S.O) Case No.E019 of 2021 pronounced on 13th August 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of offence were that on August 7, 2021 at around 11:30 hours Kathonzweni Sub-County in Makueni County in the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of MM (name withheld) who was to his knowledge his niece a child aged 10 years.
3. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place unlawfully and intentionally touched the vagina of MM with his penis who was to his knowledge his niece a child aged 10 years.
4. He was recorded as having pleaded guilty to the charge. He was consequently convicted and sentenced to serve 20 years imprisonment.
5. The appellant has now come to this court on appeal, through a petition of appeal filed through counsel M/s Muumbi & company advocates, on the grounds of appeal as follows –
  1. That the magistrate erred by failing to appreciate that at the time the appellant was charged and took plea, he was suffering from a mental illness namely bipolar since the year 2006 which



made him unfit to plead, rendering him incapable of knowing what he was doing and knowing who he was.

2. The learned magistrate erred in law and in fact by convicting the appellant on a defective charge sheet since the person charged was Francis Maingi Kanyemo and not the appellant.
  3. The learned magistrate erred in convicting the appellant as the plea was not unequivocal.
  4. The magistrate erred by convicting the appellant as she did as the conviction was against the weight of evidence as no witness was called to testify.
  5. The learned magistrate erred by not giving due and/or adequate consideration to the appellant's mitigation who was not in his right mind to mitigate.
  6. The sentence imposed was harsh and excessive in the circumstances.
  7. The learned magistrate erred in convicting the appellant.
  8. The magistrate erred in law and in fact in sentencing the appellant as she did.
  9. The magistrate erred and misdirected herself by selectively applying the evidence tendered and thereby aiding the case of the respondent against the appellant.
  10. The learned magistrate's decision does not conform to the relevant laws.
6. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by Muumbi & company for the appellant, and the submissions filed by the Director of Public prosecutions. I note that counsel for the appellant has relied on several decided court cases.
  7. The appellant's counsel has worded some grounds of appeal as if evidence from witnesses was tendered at a trial. The fact of the matter is that no such evidence was tendered, as the proceedings were in regard to a plea of guilty and what the prosecutor is required to do in such a case is only to summarize the facts in support of the charge and not to call evidence from witnesses. Thus the issues for decision are first whether the appellant was mentally unsound and unfit to take plea, secondly, whether the plea of guilty was properly taken, and thirdly, whether the sentence was harsh and excessive.
  8. With regard to the mental status of the appellant at the time of taking plea the persuasive case of *Abdulalabi Farah Ibrahim v Republic* (2016) eKLR was relied upon by counsel for the appellant. I note that in that particular case, there was evidence that the appellant had shown unusual behavior of climbing to the top of a church and on being noticed, running away.
  9. In the present case however, there was no unusual behavior displayed by the appellant before or even during the proceedings. Even on appeal, I have not been supplied with any medical documents to show that the appellant suffered a mental disorder.
  10. I bear in mind the provisions of section 11 of the *Penal Code* which states as follows –

Every person is presumed to be of sound mind at any time which comes in question, until the contrary is proved”.
  11. Thus to convince a court that an accused person is of unsound mind, there has to be such proof, even if unsound mind, there has to be such proof, even if on a balance of probabilities. Such proof is lacking in the present case. A mere allegation by counsel or the appellant that he suffers from mental incapacity is not enough.



12. Thus, I find no reason to find that the appellant was mentally incapable of taking plea or standing trial.
13. With regard to the procedure and process adopted by the trial magistrate in taking the plea of guilty herein, in my view, the trial court complied with the requirements set out in the case of *Adan v Republic* (1973) EA 445 in that the charge was read in a language he understands and he agreed to it. He was warned of the severity of the sentence but still agreed to the allegations leveled against him. The facts were then summarized by the prosecutor, and he accepted the same before he was convicted.
14. In my view therefore, the plea of guilty entered herein was proper and unequivocal, and conviction was proper I will dismiss the appeal on conviction.
15. With regard to sentence, I am aware that sentencing is an exercise of discretionary power by the trial court. An appellate court should thus be slow in interfering with the sentence imposed.
16. In the present case, the appellant was sentenced to 20 years imprisonment. The minimum penalty for the offence under section 20 of the *Act* is 10 years imprisonment. In my view, in the absence of a social enquiry report, and the accused having pleaded guilty to the charge, and the breaking of the victim's hymen not being fresh, the appellant also being a first offender and young, the sentence imposed by the trial court herein is harsh and excessive. I will thus vary the sentence, and reduce it to 10 years imprisonment.
17. To conclude therefore, I dismiss the appeal on conviction. With regard to sentence, I set aside the sentence imposed by the trial court and instead order that the appellant will serve ten (10) years imprisonment from the date he was sentenced by the trial court.

It is so ordered.

**DELIVERED, SIGNED & DATED THIS 29<sup>TH</sup> DAY OF NOVEMBER 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**

