



**JKM v Republic (Criminal Appeal 54 of 2018)
[2020] KEHC 3953 (KLR) (30 July 2020) (Judgment)**

JKM v Republic [2020] eKLR

Neutral citation: [2020] KEHC 3953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU**

CRIMINAL APPEAL 54 OF 2018

RPV WENDOH, J

JULY 30, 2020

BETWEEN

JKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal Originating from Nyabururu CM’s Court
Cr.No.2904 of 2015 by Hon. S.N. Mwangi – SRM.)*

A man cannot commit the offence of incest with a male relative under the Sexual Offences Act

The decision discussed the elements of the offence of incest committed by a male person and whether it could be perpetrated by a male against his male relative. While holding that a man cannot commit incest with a male relative under the Sexual Offences Act, the court recommended that the Rules Committee reconsider the provisions of section 20(1) of the Act. As it stood, under that provision, a man could not commit incest with a male relative, as a male complainant did not fall within the categories listed in section 20(1) of the Act.

Reported by Sharon Sang & Kakai Toili

Criminal law – sexual offences – incest - incest by a male person – elements constituting the offence of incest by a male person – whether a man could commit the offence of incest on a male relative - Sexual Offences Act, cap 63A, sections 20 and 22.

Criminal law – sexual offences – defilement and incest – where the charge of incest by a male person was substituted with that of defilement – where the accused had defiled a 9 year old child – where both offences bore a similar sentence which was life imprisonment – whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act – Sexual Offences Act, cap 63A, sections 8 and 20.



Brief facts

The appellant had been convicted for the offence of incest contrary to section 20(1) of the Sexual Offences Act (the Act) by the trial court. The particulars of the charge were that the appellant intentionally caused his genital organs to penetrate the genital organs namely anus of his son (the complainant) a child aged 9 years. In the alternative, the appellant was charged with the offence of indecent act with a child, contrary to section 11(A) of the Act in that he intentionally caused his genital organs to come into contact with the genital organs of the complainant. Upon conviction, the appellant was sentenced to serve 20 years' imprisonment. The appellant was aggrieved by the judgment of the trial court and thus filed the instant appeal. The appellant prayed that the conviction be quashed and the sentence set aside.

Issues

- i. What were the elements that constituted the offence of incest by a male person?
- ii. Whether the offence of incest by a male person could be established if committed on a male relative under the Sexual Offences Act.
- iii. Whether it would be prejudicial to substitute the offence of incest by a male person to the offence of defilement under the Sexual Offences Act which bore similar sentence if convicted.

Relevant provisions of the Law

Sexual Offences Act, cap 63A

Section 2 - Interpretation

“indecent act” means an unlawful intentional act which causes—

1. *any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;*
2. *exposure or display of any pornographic material to any person against his or her will;*

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

Section 20 – Incest by male persons

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.

Section 22 – Test of relationship

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.*
2. *...*
3. *An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.*
4. *In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children Act (No 8 of 2001)*



Held

1. The offence of incest by a male person was created by section 20(1) of the Sexual Offences Act. To establish a case under section 20, the prosecution had to prove the elements of the offence which were that there had to be;
 1. an indecent act or an act that caused penetration; and
 2. the victim had to be a female person who was related to the perpetrator in the degrees set out in section 22 of the Act.
2. There was overwhelming evidence on record that the complainant was aged about 8 years old. The complainant was a child of tender age and had undergone a *voire dire* examination. PW6 who examined the complainant, assessed his age at 8 years, at the time he was in nursery school.
3. There was no evidence on record as to suggest why the complainant, a child of tender age, could have framed the appellant with such a serious offence and given such candid details of the incident. The complainant was a truthful witness, he gave his evidence on oath and was subjected to cross-examination and his testimony was not shaken. The appellant was therefore the perpetrator of the offence that caused anal penetration of the complainant.
4. The complainant was a male person and did not fall within the category listed in section 20(1) of the Act. Under section 20(1), a male person committed the incest with a female relative. There was no provision in the Act where a male person was deemed to commit incest with male relative. An offence of incest had therefore not been disclosed as no such offence existed under section 20(1).
5. The evidence on record disclosed an offence of defilement under section 8(1) as read with section 8(2) of the Act. The trial court erred in convicting and sentencing the appellant under section 20(1) of the Act. The appellant was thus guilty of the offence of defilement contrary to section 8(1) as read with section (2) of the Act.
6. The appellant would not suffer any prejudice for being found guilty for the offence of defilement because the sentence under section 20 of the Sexual Offences Act was similar to the sentence under section 8(1) and (2) which was, life imprisonment.
7. The appellant behaved like a beast. The complainant was a young boy of tender age, his own son upon whom he inflicted serious injuries by his bestial acts. Instead of being his protector, he was the molester until the young boy had to run for his life and find refuge in the bathroom. The appellant did not deserve mercy.
8. [*Obiter*] “Before I finish, I wish to point out that the Rules Committee needs to reconsider Section 20(1) of the Sexual Offences Act, whether a man can commit incest on a male relative. Was it an oversight on the part of the drafters?”

Appeal partly allowed.

Orders

Appellant sentenced to serve 30 years imprisonment under section 8(2) of the Sexual Offences Act which sentence would run from the date the appellant was sentenced.

Citations

Cases

Regional Court

Okeno v Republic [1972] EA 32 - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 24(1); 50 - (Interpreted)
2. Sexual Offences Act (cap 63A) sections 2, 8(1)(2); 11A; 20(1); 22- (Interpreted)

Advocates



JUDGMENT

1. The appellant, JKM was on October 26, 2018 convicted for the offence of incest contrary to section 20(1) of the *Sexual Offences Act* by Hon S Mwangi, Senior Resident Magistrate.
2. The particulars of the charge are that on February 18, 2018 in Laikipia County, intentionally caused his genital organs namely penis, to penetrate the genital organs namely anus of JDK a child aged 9 years who to his knowledge was his son.
3. In the alternative, he was charged with the offence of indecent act with a child contrary to section 11(A) of the *Sexual Offences Act* in that on the said date, he intentionally caused his genital organs, namely, penis to come into contact with the genital organs namely anus of JDK a child aged 9 years.
4. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. The appellant is aggrieved by the Judgment of the trial court and filed this appeal based on the amended grounds of appeal filed in court on June 15, 2020.

The grounds are threefold:

1. That the trial magistrate erred both in law and fact by sentencing the appellant to a very severe sentence which is contrary to the Constitution;
 2. That the court erred in entering a conviction which went against the weight of the evidence;
 3. The court erred by not considering the appellant's defence.
5. He prays that the conviction be quashed and the sentence set aside. The appellant filed written submissions in addition to the grounds of appeal. The appeal was opposed and Ms Rugut, the learned State Counsel filed written submissions on July 22, 2020.
 6. This being the first appeal, this court has a duty to exhaustively examine all the evidence tendered in the trial court, evaluate and analyze it and arrive at its own findings and conclusions. However, this court must make allowance for the fact that it neither saw nor heard the witnesses testify whereas the trial court had the opportunity to, and to assess the witnesses' demeanor.
 7. I am guided by the celebrated case of *Okeno v 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.”

The case before the trial court was as follows:



The prosecution called a total of six witnesses.

8. PW1, a minor JDK, testified on oath after the court conducted a *voire dire* and was satisfied that he understood the meaning of truth and untruth. PW1 recalled that he lived alone with his father in their house while his other 6 siblings lived with relatives as his mother works in Saudi Arabia, that sometime in August, 2017, the appellant who is his father told him that men do not sleep with clothes on. PW1 shared the bed with the appellant on the same bed. On that day, he was told that men do not sleep with clothes, the appellant pushed him against the wall, removed his thing for urinating and pushed it in his behind; that he had done this three times on different days. The second time the appellant did that, PW1 told Mama N a neighbor and she told the uncle to take him to hospital and he was taken; that on this night, after the appellant abused him, PW1 went and slept outside near K's shop; that the first time the act was done to him, he slept in the bathroom and Mama B saw him there and she told him to go prepare himself for school. He said that the appellant abused him when electric lights were on and that is how he saw what he did to him. He was also taken to Nyahururu District Hospital where he was examined and reported at the Police Station after which the police picked up the appellant. He told the court that the appellant used to beat him a lot and that he had slept outside 5 times.
9. PW2 AMK, a resident of [Particulars Withheld] recalled that on 19/02/2019, she went to the toilet about 6.30 PM and heard noise in the bathroom. She called neighbours to listen to the noise emanating from the bathroom which was locked from inside. When they knocked, a boy by name JDK. opened; that he was cold and shaking. PW2 took him to the house and gave him tea and Ugali. PW2 enquired from the boy why he was sleeping in the bathroom and the boy asked her not to tell the father but that the father used to put his thing for urinating at his back. PW2 called Mama K to listen to what PW1 had to say and he repeated the same story. The village elder was called and she left the boy with him.
10. PW2 told the court that the complainant lived with the father, the appellant, but she had never seen his mother.
11. PW3 MWM, a resident of [Particulars Withheld] recalled 19/2/2018 when about 8.00 AM, PW2 went to her place with PW1. She left the complainant with her and on enquiring what was wrong, PW1 warned her not to tell anybody else and told her that the father used to put his thing for urinating on his back and he feels pain. PW3 said that twice. She had heard PW1 crying at night. PW3 asked the village elder to who came with a police officer. PW3 recalled that PW1 lived alone with the father, who is the appellant.
12. PW4 FNM of [Particulars Withheld] Village recalled that on 19/2/2018, about 8.20 AM – 9.00 AM M (PW2) informed him that he was required at the Nursery School which he obliged. PW2 narrated what PW1 had told her and he followed PW1 to her home and PW1 repeated to him what the father used to do to him while in bed. PW4 took the child to St M, then to hospital and later to [Particulars Withheld] Police Patrol Base. He took the child to Nyahururu Hospital and an anal test was done. He knew the appellant as they resided in the same plot and was also a neighbor at their home in [Particulars Withheld]. PW4 also said that before that day, they had found the (PW1) sleeping in the bathroom on three occasions.
13. PW5 PC Benard Maina of [Particulars Withheld] Police Station was at [Particulars Withheld] Police Post on 19/2/2018 when a small boy JDK was taken there by PW4, a volunteer at St Ms PW1 reported that on the night of 18/22018 the father defiled him and he ran away and locked himself in the bathroom in the same plot and was found there by neighbours on the next morning. After interrogation by the neighbours who had found PW1 in the said bathroom on other occasions, he narrated what the father used to do to him and the complainant was examined by a doctor who confirmed that the child was defiled and he arrested the appellant.



14. PW6 Sheila Njeri, a clinical officer at [Particulars Withheld] Heath Centre said that the complainant was taken to the Centre on 19/2/2018 with a history of defilement. On examination, the complainant found evidence of ulceration of the ana region and muscles were interfered with. She estimated the age of the child to be 8 years. The Clinician recommended further examination to determine the extent of injury and surgical review.
15. When placed on his defence, the appellant gave an unsworn evidence and denied committing the offence; that whenever he went to work at night, PW1 would leave the house about 8.PM He took PW1 to a baby class but three weeks later, a neighbor called him and informed him that the child was at some garbage at Oljabet. He went and confirmed it. He informed his relatives that he had problems with the complainant and he was asked to pay for a private school which he did.
16. In his submissions, the appellant argued that the court was in breach of article 24(1) of the Constitution in sentencing him to a very harsh sentence and that the court should have been guided by article 50.
17. On ground two, the appellant submitted that the complainant was a difficult child and admitted having wanted to burn the house and that he slept outside because he feared being beaten.
18. On her part, Ms Rugut submitted that the appellant and PW1 are father and son; that PW1 identified the father as the person who defiled him when there where electric lights in the house; that the defence was a mere denial.
19. As to whether the sentence was unconstitutional, counsel submitted that section 20(1) of Sexual Offences Act provides that upon conviction, one is liable to imprisonment for not less than 10 years or if the victim is under 18 years, one is liable to life imprisonment; that the complainant's age was assessed at 8 years, a child of tender years and that the sentence is lawful. Counsel urged the court to dismiss the appeal.

Whether the offence of incest was proved:

20. The offence of incest is created by section 20(1) of the Sexual Offences Act which provides as follows:

“ 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 provided 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.”
21. To establish a case under the above Section, the prosecution must prove the elements of the offence which are:

There must be:

 1. An indecent act or an act that causes penetration;
 2. The victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the Act.



Section 22 states as follows:

- “(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.
- (2)
- (3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.
- (4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children Act (No 8 of 2001).”

Whether the complainant was indecently assaulted or whether there was penetration:

22. Indecent act is defined under section 2 of the *Sexual Offences Act* as:

“indecent act” means an unlawful intentional act which causes:-

- a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
- b. exposure or display of any pornographic material to any person against his or her will.

On the other hand:

Penetration is defined under section 2 of the *Sexual Offences Act*, means ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person’”

23. There is overwhelming evidence on record that the complainant was aged about 8 years old. The court observed that he was a child of tender age and he underwent a *voire dire* examination.
24. PW6 who examined the complainant (PW1) assessed his age at 8 years. At the time he was still in nursery school. I have no doubt that the complainant was a child of tender age.
25. The complainant candidly narrated to the court what the appellant who is his father did to him. He said that he shared a bed with his father. The father complained why PW1 slept with clothes and he removed them. The appellant then pushed him against the wall and inserted his ‘thing for urinating into his behind’. It did not happen once but several times. PW1 further told the court that about twice he had ran and hid in the bathroom on the plot, after that happened to him. PW2 corroborated PW1’s evidence that she found PW1 cold and locked up in the bathroom on 19/2/2018. After PW1 told PW2 what his father had done him, it is PW2 who raised the alarm and informed PW3 and 4. PW4 took up the matter, escorted PW1 to the police station and then hospital where he was examined. PW6 the clinical officer confirmed that the complainant had been defiled. Her findings were that rectal ulceration was evident, the muscles were interfered with and that it was a long standing act and



recommended that PW1 needed counseling and surgical intervention to assess the damage to the rectal region.

26. PW6, materially corroborated PW1's evidence. PW2 said that when she found PW1 in the bathroom and he told her what the appellant had been doing to him, he repeated the same narration to PW3, 4 and 5. There is no doubt there was penetration of PW1's anus and that caused injury to the same. Section 2 of the Sexual Offences Act defines genital organs to include female genital organs and the anus.
27. PW1, identified the perpetrator as his father, the appellant; that electric lights were on when it happened. In any case, it is an act that happened severally. PW2 to 4 confirmed that PW1 lived alone with the father.
28. I have no doubt in any mind that PW1 identified the perpetrator as the father. PW2 to 4 lived in the same plot with PW1 and the appellant. What the witnesses confirmed is that the child had been found in the bathroom on several occasions. PW3 had even stated that he had heard PW1's screams on some nights confirming what happened to the boy. There is no evidence on record as to suggest why PW1, a child of tender age could have framed the appellant with such a serious offence and given such candid details of the incident. I have no doubt that PW1 was a truthful witness. He gave his evidence on oath and was subjected to cross examination and his testimony was not shaken. I agree with the trial court's finding that the appellant was the perpetrator of the offence that caused anal penetration of PW1.
29. The complainant is a male person and does not fall within the above category listed in section 20(1). Section 20(1) is clear that, a male person must commit the incest with a female relative. There is no provision in the Sexual Offences Act where a male is deemed to commit incest with male relative. An offence of incest was not disclosed as no such offence exists under section 20(1) of the Sexual Offences Act. I hereby acquit accused of the said offence as charged. The evidence in record however, discloses an offence of defilement under section 8(1) as read with section 8(2) of the Sexual Offences Act. The trial court committed a serious error in convicting and sentencing the appellant under Section 20(1) of the Sexual Offences Act. I however, find the appellant guilty of the offence of defilement contrary to section 8(1) as read with section (2) of the Sexual Offences Act.
30. The appellant will not suffer any prejudice because the sentence under section 20 of the Sexual Offences Act is similar to the sentence under section 8(1) and (2) that is, life imprisonment.
31. I have considered the fact that the appellant behaved like a beast. The complainant, is a young boy of tender age, his own son upon whom he inflicted serious injuries by his bestial acts. Instead of being his protector, he was the molester until the young boy had to ran for his life and find refuge in the bathroom. He does not deserve mercy. I sentence him to serve 30 years imprisonment under section 8(2) of the Sexual Offences Act. The sentence will run from the date the appellant was sentenced on October 26, 2018.

The appeal partially succeeds.

32. Before I finish, I wish to point out that the Rules Committee needs to reconsider section 20(1) of the Sexual Offences Act, whether a man can commit incest on a male relative. Was it an oversight on the part of the drafters?

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 30TH DAY OF JULY, 2020.

.....

R.P.V. WENDOH



JUDGE

Present:

Ms. Rugut for State

Eric C/A

Appellant present – (virtual)

