



REPUBLIC OF KENYA



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**FKO v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 2271 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E007 OF 2024
AC MRIMA, J
FEBRUARY 13, 2025**

BETWEEN

FKO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S.N Makila (PM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E214 of 2021 delivered on 21st December 2022)

JUDGMENT

Background:

1. FKO, the Appellant herein, was charged with the offence of Incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence are that; on diverse dates between the year 2021 in March and 1st September 2021 within Trans-Nzoia County being a male person caused his penis to penetrate the vagina of FOO. a female person who to his knowledge his daughter.
2. The Appellant faced the alternative charge of; committing an indecent act with a child contrary to section 11(1) of [Sexual Offences Act](#) No. 3 of 2006 whose particulars were that on diverse dates between the year 2021 in March and 1st September 2021 at Usafi area within Trans-Nzoia County unlawfully and internationally caused the contact between your genital organ namely penis and genital organ namely vagina of FOO a child aged 16 years old.
3. Five witnesses testified for the prosecution. The Complainant, FOO, testified as PW1, Jane Nafula, a village elder testified as PW2. Nelson Alusiola, a Clinical Officer attached at the Kitale County Hospital testified as PW3. Elvis Wanyonyi, a Nyumba Kumi official testified as PW4. No. 71070, Corporal Harun Ombaso testified on behalf of Corporal Namusia Audrey the Investigating Officer. He was PW5.



4. At the close of the prosecution's case, the Appellant was placed on his defence. He gave sworn testimony and did not call any witness.
5. Upon considering the entirety of the case, the trial Court found the Appellant guilty of the main offence of incest, convicted and accordingly sentenced to 20 years imprisonment.

The Appeal:

6. The Appellant was dissatisfied with the conviction and sentence. Through an undated amended Petition of Appeal, he urged this Court to quash his conviction and to set aside his sentence on the following basis;
 1. That the learned trial magistrate erred in both law and fact by convicting the Appellant and sentencing him to serve 50 years on evidence of incredible witness.
 2. That the learned trial magistrate erred in both law and fact by sentencing the Appellant to 50 years ye failed to note that the appellant alibi defence was plausible, believable and that it revealed contagious issues which the magistrate overlooked when giving verdict.
 3. That the learned trial magistrate erred in both law and fact when she sentenced the Appellant to 50 years imprisonment yet failed to note that the gravity of the case against the Appellant was not watertight therefore harsh sentence.
7. In his written submissions, the Appellant claimed that he has been on HIV medication since the year 2017 and if indeed he defiled the complainant, she could also have contracted the virus. He submitted that the evidence of PW2 were lies and that PW3 failed for not stating anything concerning the complainant's clothing, age, where she was schooling, who and when she was escorted to the hospital and when the P3 form was filled. The Appellant further claimed that PW3's evidence was to the effect that the hymen was torn and old looking and he could not ascertain the cause of penetration.
8. With respect to the evidence of the investigating officer, the Appellant submitted that he failed his duties for not presenting himself to testify. He concluded by submitting that the Respondent herein planned the case against him and as a result there was no cogent evidence to support the charges. He prayed that he appeal be allowed and his conviction and sentence set aside.

The Respondent's case:

9. The Respondent challenged the appeal through written submissions dated 14th May 2024. It was its case that proof of penetration, existing relationship between the accused and the child and identification of the perpetrator were the essential ingredients for the offence of incest to be proved.
10. The Respondent submitted that the penetration was proved by the evidence of the complainant when she testified that the Appellant sex with her four times in the month March, April June and September. It was its case the complainant's evidence was corroborated by medical evidence of PW3 when he concluded that there was PV penetration secondary to sexual intercourse. The decision of the Uganda Supreme Court decision in *Bassita Hussein -vs- Uganda* was relied upon where it was observed that the aspect of sexual intercourse can be proved by both direct and circumstantial evidence.
11. On the limb of identification, it was submitted that there was no mistaken identity since the complainant knew the Appellant as his father. The decision of the Court of Appeal in *Wamunga -vs- Republic (1989) KLR 426* was relied upon where it was observed it is only when the identification of based on circumstantial evidence that a Court is called upon to examine the evidence carefully to be



satisfied that the circumstances of identification were free from possibility of error before it can safely make a conviction.

12. As regards the aspect of existing relationship, the Respondent submitted that the issue was not in contest. In addition, it was its case that the complainant stated categorically that the Appellant was his father.
13. The Respondent, in reference to the decision in Twehange Alfred -vs- Uganda, Criminal Appeal No. 139 of 2001, and that of Philip Nzaka Watu -vs- Republic submitted that any errors that were brought out in the case were minor and did not cast material doubt on the case of the Prosecution. It was further its case that the prosecution was not expected to call a superfluity of witnesses to prove a particular matter in issue.
14. In conclusion, it was argued that the Appellant's defence was considered and were found to be mere denials. The prosecution prayed that the appeal be dismissed.

Analysis:

15. This being a first appeal, this Court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). Similarly, in Criminal Appeal No. 280 of 2004 Odhiambo -vs- Republic (2005) 1 KLR the Court of Appeal held that: -

... On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion.

16. Further to the foregoing, this Court, in the processes of re-assessing the evidence, is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to pay due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

17. Section 20(1) of the *Sexual Offences Act* creates and punishes the offence of incest. It provides as follows; Incest by male persons:

20. (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.

18. It is apparent from the foregoing provision that the ingredients that sustain a charge of incest against a male person are inter alia: -

- i. Penetration and
- ii. Knowledge of blood relation

19. Suffice to say that the age of the victim becomes relevant in sentencing. I will hence interrogate the incidence of the above limbs sequentially.



Whether there was penetration:

20. PW1's evidence was that she used to live in Mombasa with her Aunt after the death of her mother. In 2021, her Aunt asked her to go visit her father in Kitale. PW1 stated that she came to Kitale in March of 2021. It was her testimony that on diverse dates between March to September 2021 her father would come home drunk and since her mother had died, he had sex with her and told her that she shall be his younger wife. She stated that the Appellant had sex with her once in the month of March, April, June and in September. She elaborated that her father would undress her and put his penis into her vagina and she should cry but the Appellant warned that he would kill her if she told neighbours.
21. PW3's evidence corroborated the incidence of penetration. He was the Clinical Officer at the Kitale County Hospital. He testified on behalf of his colleague Vivian Wambui. It was his testimony that upon examination, the complainant's hymen was old torn and her external genitalia was normal and both labia was intact. He formed the conclusion that the complainant had PV penetration secondary to sexual intercourse. He produced the treatment sheet and P3 form as exhibits.
22. Section 2 of the *Sexual Offences Act* defines the term 'penetration' as follows;

the 'partial' or complete insertion of the genital organs of a person into the genital organs of another.
23. The dynamics of penetration was expounded by the Court of Appeal in Criminal Appeal 295 of 2012, Mark Oiruri -vs- Republic [2013] eKLR when it observed as follows: -

...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...
24. Even without the medical evidence, the complainant's evidence was satisfactory as to the occurrence of penetration. It happened on four different occasions. The medical evidence only corroborated the foregoing when it made the observation that the complainant had an old torn hymen. The evidence adduced by the Respondent exceeds the threshold enumerated in the Mark Oiruri case [supra].
25. The Appellant's bid to disprove penetration on the basis that he is HIV positive, and so should the complainant, is without merit since there is no evidence that he is tested positive for the virus. Even if it were to be said that he is positive and the complainant is negative, that, without more, does not disprove penetration. In fact, had it been proved that the Appellant was HIV positive then he would have been liable to further charges under the *Sexual Offences Act*.
26. The Appellant's evidence does not, therefore, dislodge the occurrence of penetration and his claim is unsubstantiated. In the premises, this Court will not interfere with the trial Court's findings. It only affirms that penetration was proved.

The relationship:

27. The complainant's evidence on the relationship with the Appellant was candid and believable. She stated that the Appellant was her father and that her mother had died. The Appellant further told



the complainant that she would be his second wife following the demise of the complainant mother's death.

28. In his testimony, the Appellant stated that the complainant's mother died during birth. He stated that the complainant's Aunt took her to Mombasa and his other two children were taken by their other Aunt. It is, therefore, not in doubt that the Appellant was the complainant's father.
29. The prosecution, therefore, proved the offence of incest. The conviction cannot be faulted and the appeal thereof fails.
30. As regards the 50 years imprisonment handed down the trial Court, the Court of Appeal decision in Francis Nkunja Tharamba v Republic [2012] eKLR comes to the fore. The Court discussed the concept of sentencing in the following manner: -

...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.

31. Further, in M. K. - vs – [Republic \(Nbi\) Criminal Appeal No. 248 of 2014](#) (C.A) (2015) eKLR the Court of Appeal stated as follows: -

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 imprisonment.
32. The Appellant herein was sentenced to 50 years. Under Section 20(1) of the Sexual Offences, the sentencing Court, had the latitude of sentencing the Appellant up to life imprisonment since the



evidence, as seen from the Age Assessment Report on record, the complainant was 16 years old. The Court instead opted to give a definite sentence of 50 years imprisonment.

33. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
34. The trial Court, after going through the Probation Officer's Report, therefore, exercised discretion in a favourable manner towards the Appellant. This Court does not see how the sentencing Court erred. The sentence is a lawful one and this Court will not interfere with it.
35. In the premises, this Court finds the appeal on sentence to equally fail.

Disposition:

36. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
37. In the end, the whole appeal is found and held to be without merit and is hereby dismissed.
38. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

FKO, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.

