RKK v Republic (Criminal Appeal E271 of 2023)
[2025] KEHC 2738 (KLR) (Crim) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E271 OF 2023

AB MWAMUYE, J

FEBRUARY 6, 2025

BETWEEN

RKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. E. Kanyiri (PM) delivered on 28th July,2022 in S.O Case No. 83 of 2019)

JUDGMENT

1. The Appellant, RKK, was charged with the offence of incest Contrary to section 20(1) of the *Sexual Offences Act*, 2006. In the first count the particulars of the offence as stated on the Charge Sheet were that on diverse dates between November 2018 and March 2019 at Mukuru kwa Njenga in Embakasi Division within Nairobi County the Appellant intentionally caused his penis to penetrate the vagina of LN, a female person who was to his knowledge his niece. In the alternative charge, the accused is 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. The particulars of the alternative count was that on diverse dates between November 2018 and March 2019 at Mukuru kwa Njenga in Embakasi Division within Nairobi County the Appellant intentionally touched the Vagina of LN, a child aged 15 years with his penis.

2. In the second count, the Appellant was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*, 2006. The particulars of the offence as stated on the Charge Sheet were that on diverse dates between November 2018 and March 2019 at Mukuru kwa Njenga in Embakasi Division within Nairobi County the Appellant intentionally caused his penis to penetrate the vagina of JK, a female person who was to his knowledge his niece. In the alternative charge, the accused

is 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. The particulars of the alternative count was that on diverse dates between November 2018 and March 2019 at Mukuru kwa Njenga in Embakasi Division within Nairobi County the Appellant intentionally touched the Vagina of JK, a child aged 13 years with his penis.

3. The Appellant pleaded not guilty. The prosecution called 7 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 15 years imprisonment for count 1 and a further 15 years imprisonment for count 2.

4. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the Court of appeal held: -

> " The duty of the first appellate Court is to analyze and re-evaluate the evidence which was before the Trial Court and itself come to its own conclusions on that evidence without overlooking the conclusions of the Trial Court. There are instances where the first Appellant Court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower Court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the Court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

5. I have considered the Trial Court's proceedings, the Petition of Appeal, the Appellant's submissions and the Respondent's Submissions and I identify issues for determination as follows: -

   a. Whether the prosecution proved its case beyond reasonable doubt as required in law;

   b. Whether the sentence was harsh and excessive under the circumstances.

Whether the prosecution proved its case beyond reasonable doubt as required in law

6. The offence of incest is defined in section 20(1) of the *Sexual Offences Act* as: -

> 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 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.

7. In FOD V. Republic (2014) eKLR, Majanja J (as he then was) held that:-

> " While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

8. Further, in MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) (27 October 2022) (Judgment), Mativo J (as he then was) held:-

> " Thus the ingredients for the offence of incest are:
>
> i. Proof that the offender is a relative of the victim.
>
> ii. Proof of penetration or indecent Act.
>
> iii. Identification of the perpetrator.
>
> iv. Proof of the age of the victim."

9. I agree with the above persuasive authorities which aptly explain the ingredients of the offence of incest.

10. Regarding the age of the victim, PW7, CPL Ruth Waweru who was the investigating officer stated that PW1, LN was born on 30.7.2003 while PW2, JK was born on 21.5.2006. This means that PW1 was 15 years and PW2 was 13 years at the time of the offence. She produced the respective birth certificates as evidence to prove the same.

11. With regard to the issue of identification, PW1-LN testified that the Appellant was their uncle. It was her testimony that she lost her mother and went to live with the uncle who was the Appellant. PW2-JK also testified that the Appellant was their mum's brother. The Appellant in his testimony stated that he used to live with his two children and three others belonging to his sister.

12. Based on the testimonies above, it is clear to me that the Appellant and the victims (PW1 and PW2) were well known to each other. The Appellant was the victim's uncle whom they had been living together. The Appellant was thus not a stranger to them.

13. Flowing from the above, it is my finding that the Appellant was positively identified as the perpetrator of the offence.

14. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. Penetration can be proved through the evidence of the victim corroborated by medical evidence.

15. In Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No. 35 of 1995, the Court stated,

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

16. PW1 testified that the Appellant put her on the bed, pulled her skirt up and removed her panty and he too lowered his trouser and put his penis into her vagina. She stated that the Appellant took 10 minutes to rape her. She also testified that before she told her teacher, the Appellant had had sex with her 5 times.

17. PW2 testified that the Appellant had had sex with her on three different occasions. The first time he did it was on 19.3.2019 when she was in the house at around 5 pm, the Appellant came and had sex with her. He put his penis into her vagina.

18. This was also corroborated by the doctor who conducted examination and confirmed that indeed the complainants were defiled.

19. I therefore find that all the elements of the offence were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence was harsh and excessive under the circumstances

20. As regards the sentence, the Appellant has submitted that the same was harsh and excessive. Section 20(1) of the *Sexual Offences Act* provides that any male person who commits incest with a female person who is under the age of eighteen years shall be liable to imprisonment for life. In sentencing the Appellant to fifteen (15) years for each of the two counts he was convicted, the Trial magistrate considered the mitigating factors advanced by the Appellant as well as the need to impose a deterrent sentence.

21. The sentence imposed is for protection of society against predators like the Appellant. It is my finding and holding that the sentence imposed was lawful, appropriate and justified in the circumstances. I find no reason to interfere with the same. It is affirmed.

22. From the foregoing analysis, I am satisfied that the Appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal. In the result, I affirm the judgement of the Court below and dismiss the appeal in its entirety.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY, 2025.

.....

BAHATI MWAMUYE

JUDGE