JMM v Republic (Criminal Appeal E108 of 2022)
[2025] KEHC 9394 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 9394 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E108 OF 2022

TM MATHEKA, J

MARCH 7, 2025

BETWEEN

JMM .... APPELLANT

AND

THE REPUBLIC .... RESPONDENT

JUDGMENT

1. On14th September 2022 the appellant JMM was sentenced to life imprisonment by the honourable E. Kemei Resident Magistrate.
2. This was for the offence of incest by male contrary to section 20 (1) of the Sexual Offenses Act. The charge was that on the 12th of April 2022 at 1400 hours at Athi location Mbooni East Sub County Makueni County he caused his penis to penetrate the vagina of EMM a child age 10 years who to his knowledge was his sister.
3. In the alternative he was charged with indecent act with a child contrary to s. 11(1) the *Sexual Offences Act*. That he committed the offence at the same place on the same date by touching the vagina of EMM a girl aged 10 years.
4. He pleaded not guilty and upon a full trial he was found guilty of incest with a female, convicted and sentenced accordingly.
5. Aggrieved by the conviction and sentence he filed this appeal on the following grounds:
    i. That the trial magistrate erred by failing to observe that the trial was conducted in contravention of section 19 of the Oaths and Statutory Act on the admissibility of evidence of a child of tender years and Section 2 of the SOA

ii. That the learned magistrate erred in both points of law and fact by convicting me without considering that there was no evidence to prove the offence of incest by male to the required standard in law of beyond reasonable doubt

iii. That the learned trial Magistrate erred in both points of law and fact by failing to apply section 124 of the *Evidence Act* and to observe that the prosecution case was full of contradictions and inconsistencies which rendered the prosecution case unbelievable

iv. That the learned trial Magistrate erred in both points of law and fact when he dismissed my sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons as provided under section 169 of the CPC

6. His prayer is that the appeal be allowed the conviction be quashed the sentence be set aside and he be set at liberty

7. To support his appeal, he filed submissions

8. On the first ground he relied on sections 233 of the *Criminal Procedure Code*, section 125 of the *Evidence Act*. He argued that when it comes to testimonies from children the court is enjoined to test their capacity to testify on oath. He submitted that the voire dire process is a question and answer process between the child and the court for the purposes of establishing whether the child possesses the intelligence to understand the nature of an oath, know the difference between telling the truth and lying, prepare the child to testify truthfully, and observe, remember and verbally describe events.

9. He submitted that the evidence of a child ought to be corroborated as required by section 124 the *Evidence act* and cited Kinyua versus Republic [2002] eKLR. He submitted further that it was a miscarriage of justice, and fatal for the court not to form an opinion as to whether the child could give evidence on oath. He relied on John Otieno Oloo V R [2009] eKLR, Kiune V R Cr Appeal No 77 of 1982.

10. Citing the court record of the voire dire examination of the complainant by the court , he argued that the trial court did not record the question and answers, that the trial court did not inquire as to whether the child understood the nature of an oath but proceeded to conclude that the child did and in this view this was insufficient and a flagrant breach of the requirements of section 19 of the Oaths and the Statutory Declarations Act . He went on to add that the evidence of PW2 and PW3 required corroboration and could not have been used to convict him.

11. On the second ground he argued that there was no evidence to connect him with the offence, that other than the dock identification there was no other evidence to create a nexus between the alleged incident and himself, that there no police officer testified to having arrested him. that the offence was alleged to have taken place on the 12th of April 2022 yet the charge sheet indicates he was arrested on the 19th of May 2022 and no reason was given for that difference in time. That it is not in doubt that he is a brother to the complainant and a student and was available throughout this time and that it was an afterthought to have him arrested.

12. He went on to submit that it was evident that the complainant took time to state who the perpetrator was. Citing from the record he stated that the complainant first told the mother that she had a nose bleed but she was not nose bleeding. Then the next time she was seen with a blood stain she said that she had fallen and that it is only after this that the mother took her to hospital having called the area assistant chief who advised her to go to Kalawa police station first that the issue of alleged defilement arose.

13. According to him this was evidence that the complainant did not in the first instance mention his name as the person who had committed the offence against her. That it was possible that any other male person in the home could have done it.

14. He relied on s. 107 (1) of the *[Evidence Act](#)* and Woolmington v DPP AC 462 and Miller v Minister of Pensions 2ALLER 273 on the onus on the prosecution to prove the charge against the accused beyond a reasonable doubt. He argued that the prosecution must prove the ingredients of the offence. That the failure by the prosecution to call the family members and the chief brought the case within the purview of Bukenya vs Uganda (1972)EA 548. He also cited Charles Kibara Muraiya V Republic Cr App 33 of 2001 Nyeri.

15. He drew the court's attention to the principles of Pandya v R and Shantilal M Ruwala v R both reported in (1957) EA 336, 570 respectively, to the effect that the appellant is entitled in a first appeal to reassessment of the evidence and for the court to draw its own conclusions. That the trial court failed to reconcile the disparities in the evidence and shifted the burden of proof on the appellant.

16. On the third ground the appellant submitted that the evidence of the complainant was not corroborated. It is his position that the evidence of a minor requires corroboration and that the law is very clear on that. For this proposition he cites the Court of Appeal case Barnard Kebiba versus Republic [2000] eKLR...Benjamin Mugo Mwangi and another versus Republic [1984] eKLR ,Margaret vs Republic (1967) KLR 267.

17. In addition he relied on Sahali Omar versus Republic [2017]eKLR on the exception to corroboration of the evidence of a minor as provided for in the proviso to section 124 of the *[Evidence Act](#)*. The Court of Appeal stated that "the court must first satisfy itself on reasons to be recorded that the child is being truthful it is a well-established rule of law that the unsworn testimony of a child of tender years must be corroborated ". . To the same end he relied on John Cardon Wagner versus Republic and two others [2011] eKLR where the Court of Appeal stated "...it is required which is of paramount importance that a trial court must indicate or point out instances of demeanor which he noted and which he relies upon as a basis of accepting the evidence of particular witnesses. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing The instances as to why and how he thinks that a particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth the trial court was wrong in its decision.

18. It is the appellant's position that the learned magistrate failed to apply this provision of the law and did not say why she conclusively believed that the complainant was telling the truth. That it was not enough for the court to contrast the complainant's testimony with a sworn defence of the appellant he argues that even if the court was satisfied that the child was competent to tell the truth her testimony nonetheless required corroboration. He further argued that the trial court did not analyse the corroboration between the doctor's evidence and that of the complainant towards the identification of the perpetrator. That the doctor's evidence was only corroborative in as far as penetration was concerned but was not in any way sufficient to identify the perpetrator.

19. On the 4th ground the appellant argues that the court shifted the burden of proof on him and cited Dorcas Sang Versus Republic [2018] eKLR . The Court of Appeal stated "...in the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the upon the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant,"...did not call witnesses to support her defence" and they learned judge remarked that "...it was a significant fact that the appellant did not call ...any

witnesses at the trial". By these sentiments both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground "

20. The appellant further supported this submission by quoting from the judgment of the trial magistrate where she stated that" the defence offered by the accused did not in any way dislodge or rebut the overwhelming prosecution's evidence"

21. He submits further that the onus upon the prosecution to prove their case beyond a reasonable doubt never shifts to the defence. He relied on Michael Mumo Nzioka versus Republic [2019] eKLR where the court stated "Section 309 of the criminal procedure code states as follows if they accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

22. Regarding the sentence, the appellant submitted that the trial magistrate imposed the minimum mandatory sentence in violation of Article 28 of *the Constitution* without taking into account the dignity of the appellant. Further that she did not take into consideration the circumstances of the offense. He cited Dismas Wafula Kilwake versus Republic [2019] eKLR and argued that this sentence was not only excessive it was harsh, that the trial court did not consider his age and his circumstances and that he was a first offender who deserved a second chance in life .

23. In conclusion he submitted that the prosecution had not proved their case to the standard required by law the witnesses were not credible and that the trial court had shifted the burden of proof on their appellant He add the court to allow his appeal and set him free..

24. The state responded by reiterating its case before the trial court. It was submitted by the state that in JKM versus Republic [2020] eKLR the elements to be proved in the offence of incest are set out: an indecent act or an act that causes penetration took place and two that the victim must be a female person who is related to the perpetrator in the degrees set out in section 20 and 22 of the Act.

25. The respondent submitted that there were six issues for determination; whether there was penetration by a relative under section 20 of this sexual offenses act; Whether the appellant was properly identified; whether the evidence of the complainant was taken in accordance with the law; whether there were notable inconsistencies in the testimony of the witnesses; whether the sentence meted out to the appellant is safe.

26. On the first issue it is submitted that the complainant told the court that her brother penetrated her and that penetration resulted in serious bleeding that the clinical officer who examined her found that she was bleeding and noted that the hymen was broken and hence there was sufficient evidence that there was penetration. The respondent relied on Joseph Mwangi versus Republic[2015] eKLR where the court stated that the evidence of a victim in sexual offenses is sufficient and does not require corroboration under the court relied on section 124 of the *Evidence Act* .Also relying on GOA versus Republic [2018] eKLR the respondent submitted that no corroboration is required in sexual offences and that a court can convict on the sole evidence of the victim if the court records the reason for believing the victim and also records that it was satisfied that the victim was telling the truth.

27. On identification it was submitted that the appellant is the complainant's brother and there could have been no mistaken identity

28. Citing section 19 of the *Oaths and Statutory Declarations Act* the respondent submitted that trial court conducted voire dire where the child told the court" I will speak the truth", a clear indication that she understood the need to do so. The Court relied on Japheth Mwambire Mbitha v R [2019] eKLR

for the proposition that in conducting voire dire once the trial court had enquired as to whether the witnesses understood meaning of telling the truth, and the consequences of lying , and having satisfied itself and put on record that the minors understood the importance of telling the truth, then their testimony was admitted in accordance with the law. The State submitted that in this case the trial court had complied and that the testimony of PW1 was taken properly and admitted in accordance with the law.

29. On whether there were notable inconsistencies in the testimonies of the witnesses for the prosecution, it was submitted that the totality of the testimonies points to the fact that the appellant penetrated the complainant and caused her serious injuries. That more importantly the appellant had not pointed out any specific incidents of the alleged inconsistencies.

30. It is submitted further that even if there were inconsistencies and contradictions, it has been held consistently, that for these to lead to the rejection of the evidence, they have to be significant and sufficient to paint a clear picture of untruthfulness of the witnesses. On this reliance was made on Erick Onyango Ondeng v Republic [2014] eKLR and the oft cited Ugandan case of Twengane Alfred vs Uganda Crim App. No 139 of 2001 [2003] UGCA.

31. With respect to the sentence, the State submitted that the complainant was 10 years old. Under

    s. 20(1) of the SOA it is provided for that where the victim is a minor the offence attracts a sentence of up to life imprisonment. That the court acted properly meting a sentence of life imprisonment. The State submitted that in PMM v Republic [2018] eKLR the Court was called upon to determine the issue of sentencing in a case of incest and the Court held as follows:

    > " ...From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment...

32. This court is urged not to interfere with the sentence as it is an exercise of discretion of the trial court. The state submitted that in SKM v Republic [2021] eKLR the court held that sentencing is at the discretion of the trial court. The sentence meted out by the trial court should not be interfered with unless it is found to be illegal or unsafe. The court held as follows:

    > " ...Sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed..."

33. The court is urged to dismiss the appeal

34. As a first appellate court my duty is to re consider and re-evaluate the evidence before the trial court and to draw my own conclusions. See 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 ."

35. The issues key issue for determination is whether the case for the prosecution was proved beyond a reasonable doubt, through the following question; whether the evidence of the minor was admitted in accordance with the *Oaths and Statutory Declarations Act*, whether the evidence was full of inconsistencies and whether the sentence and harsh and unreasonable.

36. The case for the prosecution is that the appellant is a brother of the complainant. He is an older brother (the 2nd born) and was above 20 years of age at the time of the offence while the complainant was 10 years old. This fact was not denied by the appellant, and was confirmed by their mother who testified PW2.

37. The complainant told the court that she has three brothers the appellant and two others the youngest being in grade 1. The brothers shared a room separate from the parents' house. The parents' house was two rooms and she slept in one of them. On the material date the eldest was away in Nairobi, she was at home with the appellant. Her mother was at the market, her father was at work

38. She was going to the church to attend an event and needed to stich her dress. The needle and thread were in the boy's room. Justus was there. She went to pick the same. When she got there he pushed her to the bed, locked the door with the latch, removed her under pants. He was in shorts which he removed together with his under wear. He lay on top of her, and in her own words she said he broke her. She pointed to the area of her groin to show where he had broken her.

39. After he did this she got up and left for the church but did not get there instead went to her mother's at the market. Her clothes were blood stained and blood was oozing from her genital area. She went back home and Justus was still there. Her mother later took her to hospital. She said she was examined in her groin area, photos were taken and she was admitted in hospital for a period she could not recall. On cross examination she told the court that it was Justus who had done those things to her and they had no grudges.

40. Her mother PW3 told the court that on 12th April 2022, her child the complainant came to her place of business at the market. She was on her way to Church. It was around 3:00pm and she asked for a leso. She had blood stains on her clothes. She asked what was wrong, she said it was a nose bleed. She gave her the leso and told her to go home. When she got home later she checked the child's nose, and there was no sign of bleeding but she still had blood on the dress she had changed into. She told her to change aging and when she was changing she noticed that she was bleeding from her vagina and the blood was flowing on her thighs. She asked again what had happened and the child said she had fallen. Due to these contradictions she decided to take her to hospital. She sought the assistance of the Chief to take her to hospital but the chief told her to go to Kalawa Police Station first.

41. She did so. At Wote she took the child to Makueni County Referral Hospital where the child was examined and admitted for treatment for about two weeks. She said she did not know what happened to the child but that Justus was mentioned in connection with the case.

42. Justus did not cross examine his mother.

43. The mother was later recalled to produce the complainant's certificate of birth which shows that she was born on 6/11/2012.

44. PW4 no 23xxx PC Jane Mutie was the investigation officer. She testified that the report of the defilement was received on 13th April 2022 at Kalawa Police Station. She told the court that the minor was in a bad state, and was admitted in hospital for 2 weeks. She said the complainant took them to the scene, a one roomed house separate from the main house. She also showed them the bed.

45. She told the court that the complainant identified the accused, her brother as the perpetrator and he was arrested and charged with this offence. On cross examination the Police Officer denied fabricating anything.

46. The medical evidence was produced by the PW1 Stella Muasya C.O Makueni CRH . she told the court that she has a Diploma in clinical medicine and surgery . She examined the complainant on 13th April 2022 who had history of defilement by her brother on 12th April 2022 at around 200pm. She was bleeding from the vagina. After certain tests were carried out she was admitted in the hospital for treatment.

47. She found from the examination and tests that her hymen was freshly torn, blood had clotted in the uterus (uterine haematoma). She told the court that the complainant was I nursing care upto to 26th April 2022 in the hospital and the P3 was completed on 28th April 2022 two days upon her discharge.

48. In his defence the appellant told the court through an unsworn statement of defence that he was Justus Musyoki Muli. He told the court that the case was fabricated against him as he only saw police coming to arrest him for no reason.

49. In her judgment the learned trial magistrate found that there was evidence to prove the ingredients of incest: the appellant was the biological brother of the complainant, and there was penetration. On sentence, she applied the SOA.

50. I have set out the evidence and it is not in doubt that the appellant is the biological sibling of the complainant. She is his sister and hence falls within the prohibited category according to S. 20(1) of the SOA which states:

    (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.

51. It is not in doubt that there was penetration. The complainant's testimony clearly described what happened. The record shows that she described the act of being defiled as being broken. She told the trial court that the accused 'alinivunja' ! What I can deduce from this statement is her expression of what the complainant felt and what the act of being defiled left her feeling. This evidence was persuasive and as per s. 124 of the *Evidence Act* did not require corroboration. In this case the complainant's evidence was corroborated by that of the Clinical Officer and her mother.

52. The appellant argued that the complainant's different stories as to what happened to her was evidence that made her testimony incredible. I have noted that she before they went to police and hospital she did not tell her mother that the appellant had defiled her. My considered view from the evidence on record is that the complainant was still in shock as to what had happened, that the must have been

a sense of confusion as to what she would tell her mother. The mother may also have been told and could have been in denial as it is not an easy thing for something like this to happen in a family. In many families such a thing will be hidden from the public eye for a host of so many reasons including the stigma that carries with the offence. This is seen in the record where the appellant tells the court: "the complainant and witnesses are my relatives. I pray for the parents to have a sit down and settle out of court". The court rejected the application stating "The nature of the charges herein does not allow, by law, to have the same settled out of court..."

53. Hence, it is my view that the complainant's explanations to the mother as to what happened were not contradicting stories but evidence of the difficulty in telling the mother what exactly happened.

54. Was the appellant the culprit? The complainant told the doctors and the police that it was her brother Justus who defiled her. Justus argued that he was not the only man in the family. That any other male could have done it. That the failure to call them as witnesses weakened the case for the prosecution.

55. The complainant told the court that her two other brothers were not at home. Her father was at work. This evidence was not challenged. In any event since they were not at home their testimony would not have added any value to the case for the prosecution. The appellant could also have called them as his witnesses.

56. Contrary to the ground of appeal that the court failed to consider the appellant's sworn statement of defence; the record shows that the appellant made an unsworn statement of defence. His defence was that the whole case was fabricated against him. He did not give any details of the alleged grudge. The complainant told the court that she did not have any grudge with her brother. So, who would fabricate the case against him and for what reason? Without some indicators from the appellant it would be difficult for the prosecution to do what he was suggesting; rebut.

57. The fact that the trial court stated that the appellant's defence did not shake the case for the prosecution was not an invitation to the appellant to prove his innocence. My understanding of what the trial court stated is that it was already persuaded that the case for the prosecution was tight and without any explanation from the appellant, then the court would proceed to convict.

58. In the circumstances, I find no error here.

59. On the sentence, the law states that where the female victim is under the age of eighteen years, the accused person shall be liable to imprisonment for life.

60. The trial court exercised its discretion and sentenced him to life imprisonment.

61. There is sufficient jurisprudence currently in Kenya that a sentence of life imprisonment is no longer tenable as an indeterminate sentence. The indeterminate nature of the sentence of life imprisonment has been found to be unconstitutional.

62. I am guided by the court of appeal in Wasike v Republic (Criminal Appeal 201 of 2019) [2024] KECA 325 (KLR) (15 March 2024) (Judgment) where the court stated

    As was stated by this Court in Benard Kimani Gacheru v Republic [2002] eKLR:

    > " 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."

9. As the trial court did not properly exercise its discretion, this Court has jurisdiction to re-examine the sentence that was imposed on the appellant. Given the circumstances that were before the trial court, including the age of the complainant, the gravity of the offence that was committed by the appellant cannot be underrated. An eight-year- old girl was subjected to sexual violation of the worst kind. We agree with Mr. Oyiembo that the appellant deserves a deterrent sentence and the life sentence provided by the trial magistrate under section 8(2) of the *Sexual Offences Act*, though a mandatory sentence was appropriate.

10. In accordance with this Court's decision in Evans Nyamari Ayako v R (Kisumu Crim. Appeal No. 22 of 2018), the indeterminate nature of the sentence of life imprisonment is unconstitutional and, therefore, we substitute the sentence of life imprisonment to 30 years' imprisonment.

63. In this case a 10-year-old was violated by her own brother through an act in her own words broke her. Who does that to his youngest sister? The appellant though a young offender who has the prospects of rehabilitation and remorse, is horrendous and inexplicable. Though horror of the thing he did to his sister and the effect of what he did will live with his kid sister for ever. It He deserves a severe sentence that will also be deterrent and give him time to think over what he did.

64. In the circumstances the Conviction is sustained

65. The sentence of life imprisonment is set aside and substituted with the sentence of 30 years' imprisonment from the date of his arrest.

66. Right of Appeal 30 days

67. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH MARCH 2025

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-03-07 22:29:17

Appellant Present

Ms Nelima Court Assistant

Mr Kazungu for State