SMI v Republic (Criminal Appeal E083 of 2023)
[2025] KEHC 4833 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4833 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E083 OF 2023

AK NDUNG'U, J

APRIL 24, 2025

BETWEEN

SMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E015 of 2022– B. Mararo, SPM)

JUDGMENT

1. The Appellant, SMI was convicted after trial of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars were that on unknown dates in the month of November 2021 at Laikipia East subcounty within Laikipia County, intentionally caused his penis to penetrate the vagina of AN a child aged 13 years having knowledge that she is the granddaughter. On 29/06/2023, he was sentenced to twenty (20) years imprisonment.

2. The Appellant has now appealed against both conviction and the sentence. He filed a petition of appeal on 16/10/2023. The conviction and the sentence are challenged on the following grounds;

    i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.

    ii. The learned magistrate erred relying on a single witness evidence.

    iii. The learned magistrate erred by failing to note that the complainant changed clothes.

    iv. The learned magistrate failed to appreciate that there were no physical injuries according to medical examination.

    v. The learned magistrate erred by failing to note that he was not examined.

vi. The learned magistrate erred by failing to note that the hymen was old broken, normal external genetalia according to medical examination.

vii. The learned magistrate erred by failing to note that the sentence meted upon him was manifestly harsh and exorbitant.

3. The appeal was canvassed by way of written submissions. In his submissions, the Appellant argued that the learned magistrate erred by relying on uncorroborated and questionable voir dire evidence that failed to meet the set threshold in sexual offences. That any sexual offence leaves an emotional mental and psychological imprint of fear and paranoid and the victim in this case who had undergone through the alleged ordeal more than one time would have affected her home life, school life, social and church life. However, the victim continued to attend school, sunday school and church normally. That the act could not have gone unnoticed from school and even at church. Further, that there was no statement from her teachers and sunday school teacher to substantiate her evidence that the Appellant had harmed her.

4. That the PRC and P3 forms were filled on 24/01/2022 and they were stamped on 26/01/2022 whereas the offence was reported on 15/11/2021. That the alleged offence was committed on 11/11/2021 whereas the victim was examined in January, 2022, hence a time lapse of two months. He raised a doubts as to how could such evidence which was in the form of biological samples and first point of contact evidence be deduced by a clinical officer without the same being tampered or compromised due to the lapse of time. That the reliability of the P3 and PRC forms are in jeopardy as the victim's biological state was already compromised by time lapse due to passage of time. That there was no evidence in form of DNA test to substantiate the charge of incest and the trial court relied on hearsay evidence. Further, the medical evidence was doctored and was a regurgitation of the usual filling of P3 and PRC form.

5. It is the Appellant's case that the prosecution brought forth a charge of incest but adduced incredible and doctored evidence relating to the previous charge of defilement. That the evidence tabled by the prosecution wholly relied on the medical evidence on the previous charge of defilement which evidence was discredited by lapse of time. That the lack of evidence to substantiate the charge of incest amounted to a miscarriage of justice. He urged the court to acquit him and if not, reduce the sentence.

6. The Respondent's counsel on the other hand submitted that the complainant's age was proved through her birth certificate, Pexhibit1 which was corroborated by PW2 and PW4. As to penetration, he submitted that the victim testified that the Appellant did bad things to her including putting his penis in her vagina and pushing it in. That while her evidence can be corroborated by medical evidence, the circumstances as to the place and time can only be corroborated by other witnesses or material evidence. However, this has been cured by Section 124 of the *Evidence Act* which allows the court to convict on uncorroborated evidence of a sexual offence victim if the court is convinced of the truthfulness and credibility of the complainant's evidence. That the clinician testified that the hymen was old broken and there was presence of epithelial cells and came to conclusion that there was penetration.

7. As to the fact that the P3 form was filled 2 months after the incident, he submitted that this was a reasonable time as the victim had fresh memory considering the nature of the offence. The complainant did not disclose the presence of another male person in the house on the material day and she only mentioned the Appellant. The matter was under discussion in their local church whereby the Appellant and his wife were confronted with the matter. Therefore, penetration was proved beyond reasonable doubt. As to identification, he submitted that the Appellant, PW1 and PW2 were living in the same house. He was not a stranger to PW1 as he was her grandfather. PW4 confirmed that he was

the perpetrator. On the material day, PW1 and the Appellant were both at home. The Appellant in his version of the story places him at the scene with the complainant hence he had an opportunity to commit the offence. Reliance was placed on the case of Francis Charo Opo v Republic (1980) eKLR where the court held that the Appellant was with the complainant on the material afternoon and had the opportunity to commit the offence.

8. That the Appellant was the biological grandfather to the complainant and therefore, a relationship of consanguinity was established to prove the offence of incest. That the Appellant confirmed that he was the complainant's grandfather and that they lived together a fact confirmed by grandmother. As to amendment of the charge, he submitted that it was proper since it was established that there was a consanguine relationship between him and the victim. That his defence was considered and the trial court found that it did not dislodge the water tight testimony by the prosecution. As to sentence, he submitted that the trial court exercised full discretion alive to the recent precedents on mandatory minimum sentences in sexual offences. It was therefore upon the Appellant to demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle as was held in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003. It is urged that the Appellant did not demonstrate any of the above factors. The trial court while sentencing him considered his mitigation including his age and that he was a first time offender. That the sentence of 20 years was not only lawful but lenient in the circumstances.

9. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

10. A suitable point of departure in the voyage of the determination of this appeal is a recap of the evidence at trial to place this court on an appropriate pedestal to re-evaluate the evidence as required of it by the law.

11. The evidence before the trial court was as follows; PW1, the complainant testified that in 2021, she was living with her grandparents and in November on a Saturday, her cucu had gone to work and while she was washing clothes, her guka returned at midday. She went to the house where maize was stored and her Guka threw her on the chair and did bad things. That he was removing some white stuff and he put his penis in her vagina. He pushed it in. He turned to pour the white substance and she ran to the house. After three weeks on a Sunday, they were being taught about sex and she was told that she could speak freely. She gave her cucu's and aunt's number and the teacher called her aunt and she informed her. She told her cucu and the cucu said she was lying. The church advised that they settle the matter. She ran away and she wanted to commit suicide but a lady rescued her and took her to police. They went to a neighbor, Mama Nyambura. Mama Nyambura had discussed with cucu. Police went and they summoned her cucu and guka and she was taken to hospital.

12. On cross examination, she testified that it was around midday and cucu would return home at 1:00pm. She did not tell her nor the neighbours as he had been told by the Appellant not to tell anyone. She had told cucu but she said she was lying. She only informed mama Nyambura and the teacher and she did not tell her cucu. That he turned and poured the white discharge and she was able to ran away. That he penetrated her by force and it was not the first time. That he had made it a habit of inserting his fingers in her penis (sic). That she only told the police the incidence of November. That he had disagreed with Mama Nyambura and he blamed her.

13. On re-examination, she testified that Mama Nyambura had said that he had molested her.

14. PW2 testified that she had gone home on 12/12/2021 after being called by their mother and she was informed by her brother that Baba K had caught (sic) A. She called her and she said that the Appellant had held her in November 2021 and that she feared telling her. She went back home and inquired from the Appellant (her husband) but he denied. She was contacted the following day by a neighbor who informed her that her husband had held a child and the matter had gone to the church. That she was confronted by church members and the child claimed to have been defiled. They went to hospital. That she said she did not have a boyfriend and that she did not feel pain and did not bleed. That they were with her the date she was defiled.

15. On cross examination, she testified that she was not there and that it was the neighbor who made the allegations.

16. PW3 the clinical officer testified that the P3 and PRC forms were filled on 24/01/2022 and that the complainant had a history of defilement by her grandfather on 15/11/2021. That she used to live with him. On examination, there were no injuries on the genetalia, the hymen was broken but old, she had a whitish vaginal discharge. On lab examination, pregnancy was negative, HIV was negative, VDRA negative, high vaginal swab was normal, there were epithelial cells and pus cells but no yeast cells. Epithelial cells was an indication of infection. That the incident occurred on 15/11/2021 but the child was examined in January. That spermatozoa could not be seen after two weeks. That there was evidence of penetration due to abrasion of hymen and presence of epithelial cells. That the P3 form had the same information as the PRC form. He produced the P3 and PRC forms as Pexhibit 2 and 3 respectively.

17. On cross examination, he testified that the perpetrator ought to have been examined on the day of the arrest. They examined the child and her hymen was broken and there were epithelial cells. She was defiled and she said she was defiled on 15/11/2021 but was taken to hospital on 24/01/2023. That the child could fear to say what happened. She said she was defiled by her grandfather.

18. PW4 was the investigating officer. She testified that she escorted the minor to hospital and recorded statement. That in November 2021, her grandmother left her in care of her grandfather. That she went to her uncle's house which was being used by the grandmother as a store. She had gone there to take out some maize when the Appellant entered the house, locked it from inside and told her not to tell anyone what had happened. He removed her trouser/pant and told her to lie on the sofa. He unzipped his trouser and tried to penetrate her vagina. She tried to scream but the Appellant threatened her. She informed her grandmother who said she would warn the grandfather. She reported and the matter was referred to Nanyuki police station. That the complainant was not comfortable living with the grandmother so she was taken to children's home for custody. She produced PW1's birth certificate as Pexhibit1.

19. On cross examination, she testified that she did her investigations and that the doctor confirmed that she was defiled. That she said it was the Appellant and that it was in November 2021 on a Saturday.

20. The Appellant in his unsworn defence testified that in December 2021, the wife left to Sirimon to prepare for her sister who was going home. Complainant did not go since she had exams she did not wish to miss. On 09/12/2021, he told the child to come home on Friday and he found her home fetching water and she said she will prepare githeri and she brought shopping. At 8:00pm, she was called by the neighbor and she returned home at 9:00pm and in the following morning, he woke up and found that she had gone to school. He went to town and found that she had returned and she was watching TV and he asked her why she did not go but realized that he was stressing her. He escorted her to a bus stop and gave her Ksh.120 for fare. She called the wife who informed him that she had not yet arrived but she arrived later. That on Sunday, they all returned and his wife looked mad and she

asked what he had done to Anne. On 19/01/2023, he went to Sirimon with his wife's family. The wife said the girl went out and they did not know where she went and they did not find her at home. At 1:00pm, she went to report to the police station. On 05/05/2023, they went to Nanyuki police station and she was interrogated and he was arrested. That he did not know what happened in November.

21. That was the totality of the evidence before the trial court. I have had occasion to read and consider the evidence as recorded in the trial court. In so doing, I have taken cognisance that I neither heard nor saw the witnesses testify and I have given due allowance for that fact. In the same breadth, I have considered the relevant statutory provisions, the submissions made and case law cited.

22. Of determination is whether the prosecution proved its case to the required degree and if in the affirmative, whether the sentence imposed is legal and appropriate in the circumstances.

23. It is trite that for the charge of incest to stand in circumstances where the victim is under 18 years, the Prosecution must prove the age of the victim, that there must be penetration/indecent act, relationship of the victim and the defiler, and a clear identification of the perpetrator. This is provided under section 20 (1) of the *Sexual Offences Act* which states 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 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."

24. Addressing itself to the ingredients of the offence of incest, the court of appeal in MGK v Republic [2020] eKLR held that:

> " the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply."

25. The age of the minor is not disputed. The same was proved by her birth certificate produced as Pexhibit1. It shows that she was born on 06/05/2008 and therefore she was a minor at the time the alleged offence was committed on November 2021.

26. The relationship is also not in dispute. Though the Appellant in his submissions stated that the relationship was not established, he did not deny during the trial that the minor was her granddaughter. The complainant testified and referred to the Appellant as guka (grandfather) and PW2 as cucu (grandmother). They we living together in the same house.

27. As to penetration, PW1 testified that her Cucu left for work and Guka returned home at midday. She went to the house where maize was stored and her Guka threw her on the chair and did bad things. That he was removing some white stuff and he put his penis in her vagina. He pushed it in. He turned to pour the white substance and she ran to the house. She reported to a teacher when they were being taught about sex. The church tried to resolve the matter and PW2 confirmed that she was confronted by the members of the church. Her testimony was also corroborated by PW4.

28. The evidence of the victim was rich in graphical details of what happened to her. She described the sexual act that she was subjected to in detail stating that the Appellant inserted his penis into her vagina and he warned her when she tried to scream. She explained with considerable clarity how the Appellant turned away to ejaculate and she saw the white substance.

29. The victim's evidence was corroborated by PW3, the clinical officer who testified that upon examination of the victim, the hymen was broken and there was presence of epithelial and pus cells. That the presence of epithelial cells was an indication of an infection. He concluded that there was prove of penetration due to abrasion on the hymen and the presence of epithelial cells. This was captured in the P3 and PRC forms, Pexhibit 2 and 3 respectively.

30. The Appellant attacked the credibility of the P3 and the PRC form based on the fact that the same were filled two months after the incident. My evaluation of the evidence leads me to the conclusion that the said attack is misplaced as the clinical officer only confirmed the hymen was broken a fact that corroborates the victim's evidence that she had been penetrated at some point. There could not have been fresh signs of penetration since as explained by the victim, she reported the incident late and there were efforts by the church to settle the matter. Indeed, her initial report to her grandmother was unhelpful as the grandmother, for reasons not difficult to discern (being the wife to the Appellant), took no action on the matter.

31. That notwithstanding, it is trite law that Whereas proof of penetration is a requirement in proving a sexual offence, the same need not necessarily be proved by way of medical evidence alone. Penetration can be proved by other methods of evidence among them circumstantial evidence.

32. In the case of E E v Republic [2015] eKLR the court expressed itself on the question of penetration as follows;

> " Penetration is defined in section 2 of the *Sexual Offences Act* as
>
> > "'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.
> >
> > The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. 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 own evidence and corroborated by medical evidence or other evidence."

33. In this case, even assuming there was no medical evidence to prove penetration, the evidence on record proves penetration and the attack on the medical evidence does not aid this appeal at all.

34. As to identity of the perpetrator, I have considered the evidence by both sides. It is clear from the evidence that the Appellant was the grandfather of the victim whom he was living with. Certainly the victim knew him. The act was in broad daylight. Am satisfied that the identification of the Appellant by the victim was free of any error.

35. As Regards the sentence, the Appellant was sentenced to twenty (20) years imprisonment. He was given a chance to mitigate and he denied committing the offence. While sentencing him, the trial court considered his age and the fact that he was a first time offender.

36. Section 20 (1) of the *Sexual Offences Act* which states 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 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."

37. The offence under Section 20(1) of the Act provides for life imprisonment if the victim is a minor. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

38. In this appeal, the Appellant did not demonstrate any of the above factors. Indeed, he ought to consider himself lucky that he got away with a sentence of 20 years imprisonment. This court would have been inclined to enhance the sentence to life imprisonment save for the fact that the prosecution has not sought enhancement and in any event no notice of such intended enhancement was served on the Appellant. This court will let the matter lie.

39. With the result that the Appeal herein has no merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE

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