JKO v Republic (Criminal Appeal E092 of 2022) [2025] KEHC 9589 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E092 OF 2022

PJO OTIENO, J

JUNE 12, 2025

BETWEEN

JKO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. Hazel Wandere (SPM) in Kakamega CMC SO Case No. E102 of 2019)

JUDGMENT

1. The Appellant was arraigned before the Senior Principal Magistrate at Kakamega, in Sexual Offences Case No. E102 of 2019, and charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were set out to be that on diverse dates between 1st September, 2019 and 16th October, 2019 in [Particulars Withheld], Shieywe Sub Location, Kakamega Central Sub County within Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MC a child aged 6 years having the knowledge that she is his daughter.

3. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the that alternative offence were set out to be that on diverse dates between 1st September, 2019 and 16th October, 2019 in [Particulars Withheld], Shieywe Sub Location Kakamega Central Sub County within Kakamega County intentionally and unlawfully caused his penis to come into contact with the vagina of MC a child aged 6 years having the knowledge that she is his daughter.

5. The Appellant denied the allegations in the Charge Sheet prompting the case to proceed to full trial where the prosecution called a total of five (5) witnesses. When put on his defence, the Appellant

elected to give sworn evidence and closed the defence without seeking to add any other person as a witness.

6. Because the victim was evidently a child of tender years, the court conducted voire dire examination on her as PW1, upon which the court noted that she was shy and was thus led to give unsworn statement. She stated that she was six years old and a class one pupil at [Particulars Withheld] Primary School. She added that she lived with her 'baba', just the two of them, at [Particulars Withheld] area and that her 'mama' had moved to another house. She explained that their home had two rooms and she used to sleep alone and had her own bed. She recounted that one day her 'baba' put his thing on hers. She stated that her 'baba' used to come to her bed at night and put his 'dudu' in her 'dudu'. She pointed at her vagina to explain what she meant by 'dudu'. She explained that 'baba's 'dudu' is on his body and he used it to pass urine. She detailed that the Appellant would remove her sleeping dress and skin tight and he would also remove his trouser and insert his 'dudu'. One day she felt so much pain in her 'dudu' after her baba inserted his 'dudu' and so when she went to school, she told her teacher who took her to the police to report.

7. On cross-examination she only identified the Appellant as her father then broke down and started crying. This court notes and observes that the witness having given unsworn statement was not liable for cross- examination and that it was unlawful that she was burdened with cross- examination.

8. PW2, BKS, a teacher at [Particulars Withheld] School testified that on 17/10/2019 at around 11 a.m. while in class, a PP2 teacher named Sakima, informed her that one of her pupils, the complainant herein, had a problem of itching on her private parts.

9. She called the child who revealed to her that the pupil's father had been defiling her. She called the Guidance and Counselling teacher who took up the issue with the head teacher and the child was then escorted to the police station and hospital and the Children's Department was also involved.

10. On cross-examination, she stated that he identified the Appellant as the person that would religiously drop the complainant at school at 8 a.m. and pick her up at 1 p.m. She further stated that the Appellant was arrested when he went to pick PW1 from school. She denied lying to court and insisted on having related only what the complainant told her.

11. PW3 was the head teacher of [Particulars Withhheld] Primary School and told the court that on 17/10/2019, he was in school when a senior teacher informed him that the victim, a PP2 pupil, had been defiled by her father. The child had been noticed not to walk properly and was withdrawn. He organized for the child to be escorted to the hospital and the matter was referred to the police.

12. On cross-examination he stated that he was the headteacher of [Particulars Withhheld] Primary at the material date and that he had seen the Appellant in school who became a familiar face just as a parent.

13. PW4 was Patrick Mambili, a Clinical Officer at Kakamega Teaching and Referral Hospital. He gave evidence and produced the Post Rape Care form and P3 form filled by a colleague who examined PW1 and whose handwriting he was familiar with. He stated that, from the documents, PW1 attended the hospital on 17/10/2019 and reported that her father used to forcefully put his penis on her vagina and that he did so in two occasions. On examination, he added that, PW1 was found to be bleeding from her vagina, hymen was broken and there was a discharge which was foul smelling. Lab tests indicated pus cells and bacterial related coronae. The examining officer established an opinion that the victim had been defiled as she was in pain and there was discharge mixed with blood.

14. PW5 was Beatrice Chemutai, the Investigating Officer who testified that on 17/10/2019 while at the Kakamega Central Police Station, she received the complainant who was accompanied by PW2 and PW3. The adults informed the witness that PW1 had been defiled by her father and had difficulties

sitting down and walking. Upon inquiry, she learnt that the child had pain in her private parts and that her father had been defiling her at night. He interviewed and examined the child privately and she reiterated the information from the adults. The witness escorted her to Kakamega General Hospital for examination and the Doctor found that the child had been defiled. He recorded witness statements and the Appellant was arrested. She also produced the victim's Birth Certificate which showed that the victim was born on 25/8/2013 and that the Appellant was her father.

15. On cross-examination, she stated that while at the station, the Appellant shouted at and was quarrelsome to the child hence the child became terrified and was crying.

16. The evidence of PW5 marked the close of the prosecution case after which the court ruled that a prima facie case had been established and the Appellant person was put on Defence.

17. The Appellant was the only witness for the defence. In his sworn testimony he denied the charges and stated that he stayed with the victim who is his daughter after her mother abandoned them. He stated that he worked as a hawker at signature nightclub and would leave PW1 under the care of a neighbor whom he later learnt was a drunkard and would fail to pick his daughter from school on time yet her kids schooled in the same school and were picked on time. He however let the neighbour, Mary, to continue caring for the child.

18. On the night before 16.9.2019, he was invited to help with funeral catering duties and spent the night there. On 17/9/2019, he recounted, PW1 was taken to school by the neighbor but did not return as usual. On enquiring from the school, he was told that the child had been handed over to the Children's Department. He then went to report at the police station where he was arrested and later charged. He complained that the police were very harsh to him thus the report that he shouted. He denied having defiled the child, asserted that he left the child with a neighbour due to his nature of work and that the village elder knew him very well.

19. There is no record that the prosecution exercised its right in cross-examination of the Appellant.

20. In its reserved judgment, the trial court found the Appellant guilty and convicted him on the main count and sentenced him to forty (40) years' imprisonment.

21. Dissatisfied with the judgment of the trial court, the Appellant has lodged a petition of appeal dated 15/7/2022 seeking to have his conviction quashed and sentence set aside. The appeal is premised on the following grounds;

    a. That the learned magistrate grossly erred in both law and fact by failing to accord me the right to fair trial by violating article 50 (2) (b) (j) of *the Constitution* of Kenya.

    b. That the learned trial magistrate erroneously convicted me basing (sic) on evidence that was contradictory in nature, inconsistent, uncorroborated and malicious.

    c. That the learned magistrate grossly erred in both law and facts by failing to exercise its judicial discretion when sentencing me without considering the circumstances of the offence.

    d. That the learned magistrate erred in law and facts by convicting me and subsequently sentencing me even after failing to appreciate that key ingredients of defilement were not proved beyond reasonable doubt as required by law.

    e. That the learned magistrate erred in both law and facts by failing to appreciate my plausible defence and mitigation unreasonably.

22. Even when fragmented into the five grounds, the appeal can be seen to challenge the conviction and sentence on the grounds that the offence was never proved beyond reasonable doubt and that the discretion in sentencing was wrongly exercised.

23. The appeal was canvassed by way of written submissions whose summation is as below.

Appellant's Submissions

24. The Appellant faults the finding of the trial court by stating that a) the sentence was harsh since it did not take into account the fact that he was HIV positive; b) the voire dire done on PW1 was unlawful since she appeared to be under duress and she was told to frame the Appellant; c) the age of the complainant was not properly ascertained; d) the element of penetration was not corroborated as required by law since the victim was a child of tender years and that the evidence of PW4 did not corroborate the evidence of the victim since he gave the evidence of another Clinician thus violating the provision of Section 77(3) of the *Evidence Act* which requires the maker of a document to produce the document.

25. He further faults the prosecution's case for failing to call crucial witnesses such as the examining Doctor and the Teacher who saw the child itching on her private part.

Respondent's Submissions

26. It is the submission by the prosecution that it proved the charge of incest to the required standard in that on the first element of proof of degree of consanguinity, the Appellant confirmed that the victim was his daughter. That fact was equally established by the Birth Certificate which listed the Appellant as the victim's father.

27. On the proof of age, it is submitted that the Birth Certificate showed, without contestation, that the victim was born on 25th August, 2013.

28. On proof of penetration, the prosecution asserts that the evidence of the victim on penetration was corroborated by PW4 who stated that on examination, the victim was found to be bleeding from her vagina, her hymen was broken and there was discharge with foul smelling.

29. On identification of the Appellant as the offender, the Respondent argues that the evidence of PW1 was clear and believable since she stated that she lived alone with the Appellant and that even though he used to defile her in the dark, the two were alone in the house and it was father who would prepare her for school and take her to school every morning.

30. The prosecution thus asks this court to uphold the conviction and the sentence of the trial conduct and conduct an inquiry into the welfare of the minor victim and make necessary orders pursuant to section 20(3) of the *Sexual Offences Act*.

Issues, Analysis and Determination

31. The court has re-evaluated the grounds of appeal, the proceedings of the lower court and the submissions by both the Appellant and the Respondent and discerns the following issues for determination: -

    a. Whether voire dire examination was properly conducted on the victim and if not, its effect on the conviction of the appellant?

b. Whether the offence of incest with a child was proved to the required standard against the appellant?

c. Whether the sentence meted was manifestly harsh and excessive?

Whether voire dire examination was properly conducted on the victim, and if not, the effect on the conviction of the appellant?

32. PW5 produced the Birth Certificate of the victim as PEXH4 and it captured the victim's date of birth as 25th August 2013 to mean that she was aged six years at the time the incident occurred. She was thus in no doubt a child of tender years.

33. Section 19 of the Oaths and Statutory Declaration Act guides the court on how to receive the evidence of a child of tender years. The law provides that the evidence of such a child may be received, even if not given upon oath, if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence, and if the child understands the duty of speaking the truth.

34. A child of tender years was defined by the Court of Appeal in the case of Patrick Kathurima versus Republic [2015] eKLR as follows:-

> "The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the *Oaths and Statutory Declarations Act* and under the *Children Act*. On our part we have no good reasson to depart from this well-trodden path, as we are in agreement the purpose of undertaking voir dire examination in a criminal trial is to protect the guaranteed right of a fair trial…"

35. When the victim appeared in in court on 20.01.2020, the trial court purported to have conducted voire dire on the victim by noting as follows:-

> " Examination by the court in order to ascertain.
>
> "I am called MC…"
>
> "What is your age"
>
> Court: "PW1 keeps quiet
>
> Court findings; "The witness appears shy but can be led to testify."

36. The examination falls short of the purpose of a voire dire examination as envisaged in Section 19 of the Oaths and Statutory Declaration Act since the court did not ask the victim questions that were geared to establish if she possessed sufficient intelligence to justify the reception of her evidence and if she understood the importance of telling the truth. I therefore find that the trial court failed to conduct a lawful and proper voire dire on the victim. The question that follows is what is the effect of such failure!

37. Courts have time and again held that the absence of voir dire examination is not fatal to the evidence of a witness. The Court of Appeal in the case of Maripett Loonkomok v Republic (2016) eKLR observed as follows;

> "We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on

the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014."

38. It thus stands as the law that, in appropriate case where voir dire is not conducted, or inappropriately conducted, but there is sufficient independent evidence to support the charge, the court may still be able to uphold the conviction. See, the Court of Appeal in Athumani Ali Mwinyi v Republic, Criminal Appeal No.11 of 2015.

39. In her judgment, the trial Magistrate noted that the evidence of the victim was corroborated by the Clinical Officer who testified as PW4 and who confirmed that upon examination, the victim was found to be bleeding from her vagina, her hymen was broken and there was a discharge which was foul smelling. It was clear from that evidence that the victim had been defiled. Thus, even though the evidence of the minor was improperly taken, and having been unsworn, it may carry no probative value, that alone does not vitiate the conviction if some other evidence be available to connect the Appellant with the offence.

40. Such other evidence, besides that by the victim needs to connect the Accused with the offence. This is because it is not sufficient to prove the commission of an offence without connecting same with the offender. See the Court of Appeal in Mukungu v Republic [2002] 2 EA 482.

41. In this matter, the evidence of PW4 was limited to the examination of the minor with little to connect it with the Appellant. I t proves that the victim had been defiled.

42. The court appreciates the circumstances to have been that the victim as a child was under the care and protection of the Appellant. The Appellant was the single person responsible for the safety and care of the victim. It is not sufficient for him to pass that responsibility to a neighbour he alleges was alcoholic and neglectful. He did not deny but confirmed that he lived alone in the same house with the victim. He never challenged that the minor had been defiled. His point was that it was not him who committed the offence.

43. The court finds that there was no basis or an explanation why the child could have set out to frame and victimise the Appellant she repeatedly called 'baba'. No basis was laid by the Appellant on why the teachers would victimise him alone and not any other person. To the contrary, the court finds that having been determined to have been a victim of sexual exploitation by the father, all circumstances, point irresistibly and unerringly to the Appellant. Thus, when the trial court convicted on the circumstantial evidence, as it did, it properly applied the law.

44. The court therefore finds that the conviction was safe and lawful. The appeal against conviction is thus determined to lack merits and is dismissed.

45. On the severity or propriety of the sentence, the court notes that the law provides a life sentence for the offence upon which a conviction reached and that sentencing is at the discretion of the trial court. It takes a very strong case for an appellate court to interfere with a decision reached upon exercise of judicial discretion. I find no such strong case in this matter and see no reason to interfere with the sentence.

46. Right of appeal within fourteen (14) days.

DATED AND SIGNED THIS 12TH DAY OF JUNE, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 1ST DAY OF JULY, 2025.

S. MBUNGI

JUDGE

In the presence of:

Ms. Osoro for the DPP on-line

Appellant present on-line

Court Assistant: Ang'ong'a