AMN v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 13010 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13010 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E027 OF 2024

LN MUTENDE, J

SEPTEMBER 18, 2025

BETWEEN

AMN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. AMN, the Appellant, was charged with Incest contrary to Section 20(1) of the *Sexual Offences Act*. Particulars were that on the 10th day of November, 2012, at [Particulars Withheld] in Laikipia County, he unlawfully and intentionally caused his penis to penetrate the vagina of MNN a female person who to his knowledge is his daughter.

2. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars being that on the 10th day of November, 2012, at [Particulars Withheld] in Laikipia County, he intentionally caused his genital organs namely penis to come into contact with the vagina of MNN who to his knowledge is his daughter.

3. He was taken through full trial convicted for the offence of incest and sentenced to serve life imprisonment.

4. Aggrieved, through an amended petition, he appeals on the grounds that;

    a. The learned trial Magistrate erred in law by acting on wrong principles of law and upheld an unlawful sentence.

    b. The learned trial Magistrate erred in law and in fact in convicting, sentencing the Appellant based on glaringly contradictory and inconsistent evidence tendered by the prosecution.

    c. That penetration was not proved and the defence was not considered.

5. Briefly, facts of the case were that on 10th November, 2012, the Appellant, the victim's father asked her to accompany him to the maize farm to harvest maize. She carried a gunny bag while he carried a panga. On reaching the farm he told her to lie down and remove her pant and placed the panga on the ground. She complied and he violated her sexually and out of fear he did not divulge the information to anybody.

6. Later, she was in pain and she asked her teacher for assistance. She was examined at Rumuruti District Hospital. It was established that she was pregnant that is when she informed her mother of the ordeal. She was delivered of the baby who was six weeks old at the time of testifying in court.

7. Upon being placed on his defence, the Appellant testified that he woke up on 16th June,2013, had breakfast and went to work. While there he was arrested and taken to Kwanjiku police station where he was interrogated and taken to court.

8. The appeal was canvassed through written submissions following directions taken which I have taken into consideration alongside authorities cited. It is urged by the Appellant that the sentence of life imprisonment was awarded without any explanation yet it is not a mandatory sentence. That the elements of incest were not proved as defined by the law and in particular pregnancy was not proof of penetration, and that the defence was not considered.

9. This being a first appellate court, it is duty bound to subject evidence adduced before the trial court to a fresh evaluation and analysis bearing in mind the fact of not having had the opportunity of hearing the witnesses and observing their demeanour. This was stated in Okeno v Republic [1972] EA 32 as follows;

> " 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. R., [1957] E. A. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 Peters v. Sunday Post, [1958] E. A. 424."

10. The Appellant was indicted and convicted for incest an offence that is created by Section 20(1) of the *Sexual Offences Act* which enacts that;

> " 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:
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> 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."

11. As held in Woolmington v DPP [1935] 4KHL 1, it is the duty of the prosecution to prove the case beyond reasonable doubt and the accused bears no duty to prove his innocence. Also cited in this regard was the case of Patrick Ong'au Okioma v Republic [2021] eKLR where the High Court stated thus;

> " Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is on the Prosecution to prove their case beyond reasonable doubt."

12. The prosecution was therefore duty bound to prove that; an indecent act or act of penetration was committed; the offender had knowledge that the victim was a relative; and for purposes of sentencing age of the victim is relevant.

13. At the time of testifying in court the victim stated her age to be sixteen (16) years, age that is not in dispute as it is acknowledged by the Appellant. In Mwalongo Chichoro Mwajembe v Republic, Msa Cr.App. No. 24 of 2015, the Court of Appeal held as follows:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

14. The victim was of an apparent age of 16 years and as afore found the age was not questioned at trial.

15. On the question of the degree of consanguinitas that did exist between the complainant and the Appellant, evidence tendered was that the victim was the Appellant's daughter which he does not dispute.

16. Penetration is defined by Section 2 of the *Sexual Offences Act* as;

> " .....the partial or complete insertion of the genital organs of a person into the genital organs of another."

17. Evidence regarding the act was of a single witness, the victim. She testified that the Appellant

18. made her lie down having placed the panga on the ground, which suggests some threat or intimidation, he used his genital organ to penetrate her genitalia and after the act she bled and was in pain and he told her to keep quiet regarding the pain. Indeed, she remained silent because of fear. Subsequently it was discovered she was pregnant.

19. It is urged that penetration did not occur and pregnancy is not proof of penetration. Reliance is placed on the case of Williamson Sowa Mbwanga v Republic [2015] JERL 92855(CA) where it was stated that:

> " ...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM."

20. This is a case where the prosecution did not pursue the issue of the DNA being conducted to establish paternity of the baby who was born. However, what should be established is whether the Appellant was engaged in a sexual activity with the victim. The victim was a child. Section 124 of the *Evidence Act* provides that;

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
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> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. The trial court believed the fact of the victim having been sexually violated. In cross examination all the Appellant sought to know was where the child who was sired was, a result of the incestuous relationship was, a question to which the victim answered that she was in court and she added that the father was the Appellant whom she had known since childhood. The duty of this court is to re-appraise evidence adduced. The victim was accorded the opportunity to testify and she gave her testimony at her own pace. She did testify against her father. There was no insinuation of existence of animosity between them. Her evidence was sufficient to prove the fact of penetration having occurred.

22. On the question of the defence put up having been disregarded, the Appellant gave a tale of how he was arrested. As correctly submitted, the prosecution was duty bound to prove each and every element of the offence, a burden that did not shift. Evidence adduced proved beyond doubt the ingredients required hence proof beyond doubt.

23. On the question of contradictions that were discernible; In Twehangane Alfred v Uganda (Criminal Appeal No. 139 of 2001) [2003] UGCA 6 it was held that;

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

24. With that principle as a guide, the contradiction pointed out in respect of the victim's testimony not being confirmed by medical evidence as she went to hospital while 24 weeks pregnant, hence evidence of the clinical officer could not confirm the fact of defilement. As afore stated, evidence was of a single witness hence the evidence of the clinical officer was inconsequential.

25. On the question of sentence, the contention is that the sentence provided is not mandatory hence the trial court should have exercised discretion and explained imposing the stated sentence. The proviso to Section 20(1) of the *Sexual Offences Act* enact that;

> 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.

26. The word liable in the sentence clause permits the court to exercise discretion. In M.K. v Republic [2015] the Court of Appeal stated that;

> " 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?
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> 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.
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> 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 of imprisonment."

27. In the M.K. case (Supra) the court set aside life imprisonment and sentenced the Appellant to 20 years imprisonment.

28. This being an appellate court, it has limited power to interfere with the trial court's sentence. It must be demonstrated that the sentence was harsh and excessive in that the court acted on wrong principles.

29. The Appellant was granted the opportunity to mitigate but he opted not to say anything. This was proof of lack of remorse. It does not call for any leniency. However, a maximum penalty being imposed on a first offender may be deemed harsh. (See Arrisol v Republic [1957] EA 447).

30. The aggravating circumstances were that; the Appellant used a weapon to intimidate/threaten the victim made him have control over her, a fact not regretted.

31. The upshot of the above is that the appeal against the conviction lacks merit and is accordingly dismissed. But, the sentence is set aside and substituted with a sentence of 30 years imprisonment which will be effective from the date of arrest, 27th May, 2013.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18 TH DAY OF SEPTEMBER, 2025.

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L.N. MUTENDE

JUDGE