



REPUBLIC OF KENYA



KENYA LAW
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**DKM v Republic (Criminal Appeal E074 of 2022)
[2024] KEHC 12 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 12 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E074 OF 2022
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

DKM APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the conviction and sentence in Sexual Offence Case No. 12 of 2019 delivered on 9th March 2022 at Kilungu Law Court by Hon. E. M. Muiru (PM))

JUDGMENT

1. The appellant was charged with incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that between May and August 2018 at [Particulars withheld] village in Mukaa Sub Location of Makueni County being a father caused his genital organ to penetrate the genital organ of C.M.K a child aged 16 years and 2 months who was to his knowledge his daughter.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that between the same months and at the same place intentionally and unlawfully touched the genital organ of C.M.K a child aged 16 years 2 months with his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of incest, and sentenced to life imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
 1. The Magistrate erred when he convicted him and sentenced him without regard to basic rights including disclosure as required under Article 50(2) of the *Constitution*.



2. The Magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of incest to the required standard in law of beyond reasonable doubt.
 3. The learned Magistrate erred in law and in facts in shifting the burden of proof to the appellant, misapprehending and misdirecting himself on the evidence, hence arriving at the wrong conclusion, by failing to observe that the prosecution evidence was untenable, unworthy contradictory, inconsistent and full of lies, which required him to resolve the doubts in favour of the appellant.
 4. The learned Magistrate erred 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.
 5. The learned trial Magistrate erred in her interpretation of Section 124 of the Evidence Act (Cap.80) in convicting the appellant on the uncorroborated evidence of PW1 and therefore requiring corroboration within the meaning of Section 31(10) of the Sexual Offences Act.
 6. The learned trial Magistrate erred in accepting uncorroborated evidence of PW1, failed to comply with the provisions of Section 124(Cap) Laws of Kenya (sic).when he dismissed his defence which alleged possibility of being framed up due to existing grudge without giving cogent reasons as provided under Section 169 CPC.
5. The appeal was canvassed through written submissions and in this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
 6. This being a first appeal, I am required to re-examine and re-evaluate the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic* [1972] EA 32.
 7. The appellant has raised a technical ground that he was not provided with evidence prior to trial thus there was contravention of Article 50(2)(j) of the Constitution.
 8. From the record of the trial court, it is apparent that the appellant was initially not supplied with all the prosecution evidence. ON 28.9.2019 he raised the issue in court that he had only been provided with statements on the related earlier case of aiding procurement of an abortion. He was then provided with copies of witness statements and allowed to cross-examine witnesses who had testified again. In my view therefore the violation of the Constitution was corrected. I dismiss that ground.
 9. The other grounds relate to proof of the case beyond reasonable doubt. In my view, on this the evidence of the complainant PW1 Christine Kyalo is not believable with regard to incest.
 10. This is because all the initial reports, and the initial criminal case, was with regard to the appellant attempting to aid an abortion. I have not been told whether the initial case ended up in an acquittal, conviction or withdrawal. Whichever way, it is quite clear to me that this later case against the appellant was an afterthought and based on doubtful evidence, and the trial court should have thus given the appellant the benefit of the doubt.



11. The second reason why this appeal will succeed is the doctrine of autrefois convict or acquit. In this regard, with the facts being in the same series as the case wherein the appellant was charged for aiding an abortion, he should have been also charged therein for the present offence of incest.
12. Short of that, it would be very easy for a person to be tried twice or more for the same or some series offences, causing double jeopardy, contrary to the principles of fair trial envisaged under Article 25 and 50 of the *Constitution of Kenya*.
13. For the above reasons therefore, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF JANUARY, 2024 AT VOI.

GEORGE DULU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

