



**Kibe v Republic (Criminal Appeal 17 of 2023)
[2024] KEHC 191 (KLR) (16 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 17 OF 2023
RB NGETICH, J
JANUARY 16, 2024**

BETWEEN

SAMUEL KIBE APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgment by Hon. R. Koech (SPM) delivered on the 16 th day of December, 2021 in Edama Ravine Magistrates Court S/O No. E035 of 2021)

JUDGMENT

Background

1. The appellant was charged with the offence of incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that the Appellant on diverse dates between 20th and 24th June, 2021 at Maji Mazuri village in Koibatek Sub-County within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of A.W a child aged 5 years old whom he knew to be his niece.
2. In the alternative, the appellant was charged with offence of committing indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on diverse dates between 20th and 24th June, 2021 at Maji Mazuri village in Koibatek Sub-County within Baringo County, caused his penis to come into contact with the vagina of A.W a child aged 5 years old.
3. The Appellant pleaded not guilty to the main and alternative charges and the case was set down for hearing with the prosecution calling 7 witnesses. At the close of prosecution case, the trial court found that the prosecution had established a prima facie case against the Appellant. On his defence, the



- appellant gave unsworn statement. By judgment delivered on 16th December, 2021 the court found the appellant guilty of the main charge, convicted and sentenced him to serve 30 years imprisonment.
4. Being aggrieved by the decision of the trial court, the appellant lodged a petition of appeal on the 28th January, 2022 which was amended on the 16th November, 2023 citing the following grounds of appeal: -
 - i. That the learned Trial magistrate erred in both law and fact by convicting and sentencing the Appellant by not noting that the evidence remained un conclusive considering that it was circumstantial in nature.
 - ii. That the Learned Trial Magistrate erred in both law and fact by convicting the Appellant but failed to note the Appellant's defence of Alibi was not considered.
 - iii. That the Learned trial magistrate erred in both law and fact by convicting the Appellant but failed to note that the sentence was unlawful and excessive.
 - iv. That the Learned trial magistrate erred in both law and fact by failing to note that there was no fair trial in the Appellant's case.
 5. The Appellant prays that this appeal be allowed, conviction and sentence set aside.
 6. The Appellant filed written submissions on the Appeal together with his amended grounds of appeal and relied on the submissions filed whereas the Prosecution argued the appeal orally in court.

Appellant's Submissions

7. The Appellant submits that the evidence on penetration remains un-conclusive considering that the evidence on record was circumstantial in nature; that the evidence of penetration which was used to convict the Appellant was adduced by PW4 a minor of approximate age of 5 years whose evidence was not sworn and which needed corroboration and cited the case of *J.M VS Republic* [2014] eKLR.
8. The Appellant submits that the evidence of the complainant was not conclusive as the complainant in her testimony stated that she got injured in her groins where she was burned by urine and nothing else injured her apart from urine. The Appellant argue that the above evidence does not show that the Appellant inserted his penis into the to the vagina of the complainant and so the trial court misdirected himself when he held that the evidence of the complainant who seem not to understand the said matter and was stood down severally amounted to prove of penetration.
9. The Appellant further submit that the evidence of PW5 that was considered by the Trial Magistrate was a mis-direction and could not corroborate the evidence of Pw2 to prove penetration. The Appellant argues that A.W liked mentioning his name as she grew up and he had been providing for A.W and even paying his school fees
10. The Appellant further submit that the evidence on the P3 Form which the Learned Trial Magistrate took to mean corroboration cannot be taken to be corroboration of penetration since the complainant herself did not proved to the satisfaction of the court that she was indeed defiled. The Appellant proceeds to state that Pw1 said while bathing the complainant she noticed that rashes were on the groin.
11. The appellant submits that his defence was not considered; he argues that on 23rd June, 2021, he received a call asking him to go to Maji Mazuri dispensary where the complainant who is his niece had been taken for treatment and shortly the area Chief arrived and took the Appellant to his office where he was hand cuffed and placed in custody. He stated that he learned that A.W had been defiled and she had mentioned Sammy. The Appellant submitted on law of alibi but did come out clearly as to whether he raised defence of alibi in the trial court.



12. On sentence, the Appellant submits that it was harsh and excessive. That according to the sentencing guidelines that were published by the Kenya Judiciary in the year 2016, the sentence imposed must meet the objectives in totality being retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.
13. That while ensuring that the sentence imposed satisfies these parameters, the court should take into consideration the spirit of restorative justice. The appellant argues that sentence imposed by the trial court was excessive based on the circumstances and has caused a lot of psychological trauma to him and places reliance on the Constitution of Kenya 2010 under Article 50(2) and the case of Francis Opondo Vs Republic [2017] paragraphs 6-7.
14. The appellant argues further that the period spent in remand from the time of his arrest was not captured in the judgement of the trial court resulting in harsh and excessive sentence.
15. The appellant proceeds to argue that Article 49 of the constitution was breached as he was arrested on 24th June,2021 but availed in court on 28th June,2021 and there was no explanation given by the Prosecution as to why his trial delayed which was a violation of his fundamental rights to fair trial. He further argues that fair trial is a constitutional right that cannot be limited and that it is in the interest of justice that justice should be done and everyone is equal before the law as stated in Article 27 of the Constitution.

Respondent's Oral Submissions

16. The Prosecution through Counsel Ratemo submitted that the Appellant was charged with the offence of incest which was proved by the prosecution beyond reasonable doubt and the prosecution confirmed to the court that there was defilement and the victim was aged 5 years old which was also confirmed through P3 Form produced and a notification of birth produced by the prosecution.
17. That although there was no birth certificate provided, the P3 Form indicated the age as 5 years and submit that during the medical examination, the Doctor indicated the age of the victim to be 5 years old; that there was prove that the apparent age was a tender age. The Respondents places reliance in the decision of Evans Wamalwa Simiyu Vs Republic [2019] eKLR where the court of appeal used the age indicated in the P3 Form.
18. That P3 Form also indicated that the hymen was broken which is confirmation that defilement took place. On identification, the victim while testifying appeared traumatized and proceeded to point at the Appellant as the perpetrator of the offence; that prosecution further proved that the Appellant was the accused's relative which was proved by the evidence of PW1 and prosecution therefore proved the offence of incest.
19. On the issue of sentence meted out by the lower court, the offence of incest attracts life imprisonment where victim is below 18 years and in this particular case, the trial court deemed it fit to impose 30 years imprisonment. The prosecution submits that the sentence was lenient considering the complainant was 5 years old and by virtue of the fact that the accused was a relative who owed her a duty of care but he took advantage of her and her life has been ruined by the actions of the Appellant. The Respondents prays that the appeal be dismissed.



Analysis and Determination

20. This being first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

21. In view of the above, I have perused and considered record of appeal and submissions herein and identify the following as issues for determination:-

- i. Whether the ingredients of the offence were proved beyond reasonable doubt.
- ii. whether the sentence imposed was harsh and excessive.

(i) Whether the ingredients of the offence were proved beyond reasonable doubt.

22. Section 20(1) of the Sexual Offences Act define the offence of incest 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.

23. From the following the ingredient of the offence of incest are as follows:-

- a) Knowledge that the person is a relative;
- b) Penetration or indecent act.

24. Section 22 of the Sexual Offences Act provides that in cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

25. PW1 one namely Ann Wanjiru testified that she is a resident of Maji Mazuri where she lives with her husband Stephen Njoroge, she confirmed that the child has stayed with Ann Wanjiru since she was one year old and was 5 years old at time of the offence. She confirmed that the accused is the uncle to the complainant. Pw3 one Stephen Njoroge Maina testified that PW1 was his wife while the complainant was his granddaughter who she has been living with since birth. Pw3 further testified that the accused Sammy Kibe is his last-born child. PW4 the complainant testified that she stays in Maji Mazuri with his grandparents and with Sammy (Points at the accused). The accused in his defence admitted that the complainant was his niece who had been left by her mother when she was 1 year old and he has been taking care of the child like her father. There is therefore no dispute on relationship between the complainant and the Appellant.



26. On the issue of penetration, section 2 of the *Sexual Offences Act* defines penetration as follows:-

“.....the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

27. Indecent act has been as:-

Indecent act means an unlawful intentional act which causes:-

- a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
- b) Exposure or display of any pornographic material to any person against his or her will.

28. From evidence adduced, pw1 who was washing the complainant pw4 noted some rushes and upon interrogating her, the complainant informed her that she had been burnt by urine. She applied oil on her. Later Pw2 Eunice Wairimu who was the complainant's teacher while taking children for physical exercise noticed that the complainant was walking with difficulty; that she walked while legs were apart and was in pain. She informed other teachers including Pw6 Patsy Cheruiyot who together with other teachers removed the complainant's pant and biker and saw some dirt on the walls of the inner thighs which was a whitish wet dirt. She took the minor and interrogated her and the minor mentioned that she had been injured by urine. She further questioned the child who stated that an uncle called Sammy requested her to take water and a broom to his house and when she took the water and broom to Sammy, he placed her on the bed after cleaning the house and he did bad manners.

29. Pw4 the complainant testified that on the 23rd June, 2021, Sammy injured her in his house while her grandfather had gone to the farm and that she felt pain.

30. Pw5 one Timothy Chesang, testified that he is attached to ERSCH as RCO and testified that on 24th June, 2021 the complainant was taken to ERSCH. He filled and signed the P3 form of the Child on 30th June, 2021. He testified that the hymen of the child was broken and inflamed; that there was blood on her vaginal swab, a whitish yellowish discharge which was foul smelling. He stated that the child was taken to the lab for tests and was found HIV Negative, Syphilis was Negative, pus cells were seen in her urine which is a sign of bacterial infection. That Hvs showed pus cells but no spermatozoa was seen and he made a finding that the child had been defiled based on history; given the broken hymen, inflammation takes two to three days and the injuries were possibly 24 Hours on 24th June, 2021. He stated that the hymen was inflamed and there were pus cells and the vaginal discharge was caused by inflammation. That prolonged urine wetting of a child result in Ammonia like smell and urine cannot cause the injuries noted. He produced the P3 form of the child as PExh 3.

31. Pw7 one No. 248772 PC (W. Pauline Aliaro) attached to Makutano Police station said previously she was attached to Maji Mazuri police station and that she received the minor together with her teacher where the teacher reported that she noticed during Physical Exercise that the child was walking with difficulty. She booked the report and interrogated her and the child informed her that the accused asked her to take water and a broom to his house and while there, he removed her clothes and defiled her on his bed.

32. From the above, I find that evidence of the complainant was corroborated by the evidence of PW 6, PW 7 and the medical evidence of PW5 confirmed that there was penetration of the genital organs of the complainant. There is therefore no doubt that penetration was proved beyond reasonable doubt.



33. Pw7 the Investigations Officers produced a Birth Notification SR. NO. 5370/74 in the names of the complainant showing that she was born on 30th April,2016 which confirmed that in June, 2021 the complainant was 5 years old. Age of complainant was therefore not in doubt.
34. PW4’s evidence does not require corroboration in light of Section 124 of the Evidence Act. Further, the medical evidence produced by PW5 show that there was forceful penetration caused by a male organ.
35. On whether appellant’s defence was considered by trial court, I have perused the judgment and note that the defence was considered in a summary form. The trial court stated at page 38 of the judgement as hereunder: -

“He merely denies committing the offence in order to evade the consequences of his actions. His defence sounds hollow, unbelievable and should be dismissed with the contempt that it deserves.”

36. From the above, it is clear that the accused’s defence was considered by the trial court contrary to his allegations in the appeal. I agree with the trial court’s finding that the defence was mere denial of the offence. The evidence of the victim was clear and precise on what the appellant did to her. She described what happened.
37. The Appellant argues that his constitutional rights were violated; he submits that it is on record that he was arrested on 24th June,2021 but availed in court on 28th June,2021 and the delay of presenting him to court was not explained by the police in total breach of the provisions of Articles 49(1)(f) of the constitution of Kenya, 2010, Section 37 and Section 108 of the CPC.
38. Article 49 of the Constitution provide that an arrested person should be brought before court as soon as reasonably possible, but not later than twenty-four hours after being arrested and if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.
39. On perusal of the charge sheet, I note that the appellant was arrested on 24th June, 2021 and arraigned in court on 28th June,2021. There seems to be no dispute that there was a delay in arraigning the appellant in court which as a consequence was contrary to the stipulations of the Constitution. The consequence of such violation was pronounced in the case of Julius Kamau Mbugua vs Republic (2010) eKLR, thus;

“In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensable by damages.”



40. Further in the case of *Musa Shaban Kabughu v Republic* [2020] eKLR the court had this to say;

“In other words, the violation of the appellant’s right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appellant was at liberty to claim for the violation of his Constitutional rights. On this basis, we do not consider the delay in his arraignment in court to have been unreasonable or fatal to the prosecution’s case. This ground is dismissed”

41. From the above decided cases, violation of constitutional right to be availed in court within 24 hours is not fatal to prosecution’s case and it would be out of scope for the criminal court to consider compensation. The only remedy available for the accused to channel his grievances to the constitutional court for legal remedies for violation of his rights and for that reason. This ground of appeal cannot therefore stand.

42. From the foregoing, I see no merit in the appeal herein.

(ii) Whether sentence imposed was harsh and excessive

43. The appellant was sentenced to 30 years imprisonment. Sentence provided where the complainant is under 18 years is life imprisonment. The child herein was 5 years old. The sentence imposed in my view is appropriate taking into account the age of the child who looked upto the accused for care and protection but instead abused the trust bestowed on him.

44. Record show that the appellant was in remand from 24th June, 2021 up to 16th December,2021 when the case was determined which is a period close to 6 months which was not mentioned by the trial court. Section 333(2) of the *Criminal Procedure Code* was not therefore complied.

Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Sentence by trial court is upheld.
3. Period served in remand to be reduced from sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 16TH DAY OF JANUARY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Karanja – Court Assistant.

Appellant present.

Ms Ratemo for State.

