



**JKM v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 1192 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E021 OF 2023
TM MATHEKA, J
FEBRUARY 14, 2024**

BETWEEN

JKM APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against conviction imposed by Honourable B.W Wachira, (S.R.M) in Makindu Criminal Case (S.O) No. E074 of 2021 delivered on 25th November 2022)

JUDGMENT

1. JKM was charged in Makindu MCRSO 74 of 2021 with Incest contrary to section 20(1) of the [Sexual Offences Act](#), and in the alternative – committing an indecent act with a child contrary to section 11(1) of the same act. The particulars were that on diverse dates between June 2020 and 11th August 2021 in Nzau Sub-county within Makueni County being a male person, caused his penis to penetrate the vagina of NLK a female person who was to his knowledge his daughter. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars being that on diverse dates between June 2020 and 11th August 2021 in Nzau Sub-county within Makueni County intentionally and unlawfully touched the vagina of NLK a child aged 13 years using his penis who to his knowledge was his daughter.
2. He denied the charges.
3. The matter proceeded to full hearing. The case for prosecution was set out by the complainant – NLK, the assistant chief Micky Kisilu PW2, the complainant’s sister in law CN, the Clinical Officer Frank Musimbi Musau PW4 and the Investigating Officer No 107xxx PC Salome Kaini from Emali Police Station. The appellant gave an unsworn statement of defence and did not call any witness.



4. The trial court upon considering all the evidence found him guilty of the offence of incest contrary to section 20(1) of the *Sexual Offences Act*, convicted and sentenced him to 15 years' imprisonment on 25th November 2022.
5. Aggrieved, the appellant filed this appeal against the sentence only on the grounds that he was sentenced to a custodial sentence yet he had not pleaded guilty, that the charge was fabricated by his daughter in law, that he was 1st offender, that section 333(2) of the *Criminal Procedure Code* had not been complied with – that the court grant him any other sentencing option it may deem fit, that his sentence be reduced to the period served.
6. I note that from the grounds of appeal the appellant is not appealing against sentence only but also alleges that the charges were fabricated against him by his daughter in law. In essence – the issues to be determined are whether the charges were fabricated against him – whether the sentence was harsh and excessive to warrant a disturbance.
7. Both the appellant and respondent filed submissions which I have considered.
8. The complainant was born on 21st July 2008. She said that the appellant was her father and her mother had passed on. She testified that she was living with her grandmother in the same homestead and would go to her father's home. That between June 2020 and 4th August 2021 the appellant defiled her twice – but she would not recall the dates/days. According to the prosecution, it is her sister in law PW3 who had let out the secret. The complainant testified that the appellant would send her to fetch water for him, then he would tell her to put the 10 litre jerrican down – that he held her and took her to his house, told her to remove her clothes, which she did, he removed his – got on top of her, on the bed and inserted his urinating thing into hers – that he threatened her and she did not scream, he told her to go shower – he then sent her to fetch water from the river and sent her to school. On the 2nd occasion she went to the appellant's house with her sister FK aged 7 years old. The appellant gave her (FK) money to go buy mandazi. Appellant took her to bed, removed her trouser to her knees, removed his and inserted his urinating thing into hers. FK came back and they went to the grandmother. She said she told PW3 about this when PW3 asked her where she was getting the money she was spending from
9. According to PW3 – she is married to the son of appellant. On 12th August 2022 she was in her house – she was informed that the complainant had been buying mandazi. She asked the complainant about the source of her money. She told her that one BM had been giving her money while promising to marry her. She also revealed that her father had defiled her on different dates. She called another by name CM and informed her. The assistant chief was informed. She told the court that she married appellant's son in 2019 after she dropped out of school. She denied beating the complainant to come up with this story.
10. When the complainant was taken to hospital it was confirmed that there was evidence of forceful penetration as she had vulva oedema, there were signs of UTI.
11. The police officer produced her certificate of birth.
12. In his defence the appellant confirmed that the complainant was his 4th born of 7 children. He testified the complainant was refusing to go to school and had disappeared with PW3 to Sultan Hamud. That he used to work for the mother of PW3 who owed him money – and which money was the cause of this case – that it is when he demanded to be paid by P3's mother that they decided to fabricate this case against him. He told the court that PW3 had even accused his son, the one she was claiming to be married to – to have defiled her i.e. in September 2020 and that the case was dismissed. That on 9th



- August 2021 at 2pm he was summoned to the chief's office, he went – the chief showed him (appellant) his (appellant's) daughter's photo in his phone and told him that he was being accused of defiling her.
13. In his submissions, the appellant argues that there are discrepancies in the evidence that are material to the case; first the issue of diverse dates; that the dates in the charge sheet and the dates given by complainant were not tallying – one says between June 2020 to 11th August 2021, then between June and 4th August 2021. that from June 2020 to August 2021 is one year, two months – why did the child not report earlier? He submits that it is only when he demanded his money from PW3 when this case came up; second on documentary evidence, he submitted that the P3 and PRC forms were not produced.
 14. On sentence he submits that he was in custody from 23rd August 2021 to 25th November 2022 and this period was not factored in his sentence as a 1st offender.
 15. The State submitted through Ms. Muraguri prosecution counsel that as per *JKM v R* [2020] eKLR the ingredients for incest which the prosecution is required to establish are:
 - i. An indecent act/act of penetration
 - ii. That the victim is a female person related to the perpetrator as set out in section 22 of the act
 16. The State submits that all the ingredients were established. That the complainant clearly described what transpired and her testimony was corroborated by the clinical officer, despite the fact that, that is not necessary. She relied on *Joseph Mwangi v R* [2015] eKLR on the application of the proviso to section 124 of the *Sexual Offences Act*, and *GOA v R* [2018] eKLR on the fact that the court can convict on the evidence of the victim of the sexual offence for reasons to be recorded that the court was satisfied as to the truthfulness of the witness.
 17. It was submitted that there were no inconsistencies that were material to the credibility of the case for the prosecution. For this counsel relied on *Ali Mohammed Ibrahim v R* [2017] eKLR and *Eric Onyango Odeng v R* [2014] eKLR where the court cited *Twehangane v Uganda* Criminal Appeal No 139/2001 [2003] UGCA:

“.....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's case ...”
 18. On the sentence, it was submitted that the sentence was legal and safe and considering the age of the victim as 13 years, the 15 years imprisonment was safe– that the sentence provided for under section 20(1) was life imprisonment but the learned trial magistrate had meted a 15 year imprisonment sentence. She cited *PMM v R* [2018] eKLR

“... From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment ...”



19. The state urged the court not to tamper with the sentence as it was an exercise of the discretion of the court. She relied on *SKM v R* [2021] eKLR
- “... The court when passing the sentence gave reason that the applicant was not remorseful. The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion, I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed....”
20. Taking guidance from *Okeno v R* and related cases I am aware of the duty of the court to subject the evidence to fresh scrutiny and draw my own conclusions aware that I never heard nor saw the witnesses testify.
21. Was the charge fabricated? The appellant’s ground for alleging fabrication is the claim that the PW3’s mother owed him money and because he demanded for it this case was fabricated against him. It is noteworthy from the record that that issue was not raised with the PW3 on cross examination and only came up in the appellant’s testimony. The question was not put to the complainant as well as to whether she was aware that her own father was being persecuted for demanding his debt from the mother of PW3. He testified that his own son was a victim of the machinations of PW3 but he never called that son to testify in his case.
22. The testimony of the appellant’s daughter was vivid and believable. She may not have been able to recall the exact dates as it was evident from her testimony that the whole thing was being worked backwards from the date the same was discovered. The length of period before reporting is not surprising. The appellant is the father to the victim. His wife passed on. The children depended on him, and may not have had anyone to talk to about this. The child told the court that the father would threaten her. He made it look normal. Fetch water, bring the water, lie on the bed, then go shower. Or when he decided to do a quick one, by lowering his trouser and lowering hers too after sending her sister to buy mandazi. The child painted clear scenarios of what happened and there is nothing in the evidence to raise flags that the appellant was set up. I find no merit on the submission that the case was fabricated against him.
23. The only other issue I need to speak to on this is the name BM mentioned as one of the other persons who would defile the complainant. This in my view is an indication of what happens in many homes where the children become vulnerable. The people with bad hearts, instead of seeing opportunities to assist they see opportunities to exploit, use and abuse.
24. On the sentence, Section 20 of the *Sexual Offences Act* provides for the offence of Incest by male persons in the following manner
- (1) 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. (emphasis mine)
25. The learned trial court considered the circumstances of the offence and found did not sentences the appellant to life imprisonment but to the sentence that she considered, in her discretion to be suitable to the circumstances. I find no reason to disturb the sentence.
26. Did the court take into consideration the provisions of s. 333(2) of the *CPC*? No



27. So what are this court's final findings?
1. The appeal against conviction has no merit and is dismissed
 2. The Appeal against the sentence is not merited and is dismissed
 3. The trial court did not apply s. 333(2) of the CPC
28. The appeal only succeeds to the extent that the appellant's 15 years' term of imprisonment sentence will run from the 13th August 2021.
29. Right of Appeal 14 days

DATED SIGNED & DELIVERED THIS 14TH DAY OF FEBRUARY, 2024.

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MUMBUA T. MATHEKA

JUDGE

Court Assistant:

Appellant: Present

Prosecutor: Tanui

