



REPUBLIC OF KENYA



**Mosete v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 1927 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E007 OF 2023
HI ONG'UDI, J
MARCH 1, 2024**

BETWEEN

EDWIN MOSE MOSETE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgement of Hon C. A. Ogwen (SRM) delivered on 19th October, 2022 in Kisii Chief Magistrate's Court Criminal (Sexual Offences Case) No. 119 of 2020)

JUDGMENT

1. EMM the appellant herein was charged with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars were that the appellant on 11th December, 2020 in Kisii county he intentionally and unlawfully caused his penis to penetrate the vagina of EK a child aged 5 years, who was to his knowledge his niece. He denied the charge and the matter proceeded to full hearing.
2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were that on 11th December, 2020 in Kisii county the appellant intentionally and unlawfully touched the vagina of EK a child aged 5 years, who was to his knowledge his niece.
3. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses namely the child's mother, the child, the investigating officer and the clinical officer. The appellant gave a sworn statement of defence and called no witness.
4. Upon hearing the entire evidence, the learned trial Magistrate found the appellant guilty, convicted him on the principal charge and sentenced him to life imprisonment.
5. Being dissatisfied with the judgment the appellant filed the present appeal citing the following grounds:



- i. That, the learned trial magistrate erred in law and fact to convict the appellant without considering that the prosecution case was not proved beyond reasonable doubt.
 - ii. That, the learned trial magistrate erred in law and fact without considering that there was no investigation conducted in the instance case.
 - iii. That, the learned trial magistrate erred in law and fact by concluding that the complainant was defiled and yet all she said was that he did ‘tabia mbaya’ which cannot necessary mean defilement.
 - iv. That, the learned trial magistrate erred in law and fact by arriving at the conclusion that the evidence before him did not support the charge as framed.
 - v. That, the learned trial magistrate misdirected himself on the principle sentencing occasioning a gross miscarriage of justice.
 - vi. That, the learned trial magistrate erred in law and fact by coming to a wrong conclusion without withstanding that there was nothing that linked the appellant like medical test to confirm whether it is the appellant who had committed the crime in question.
 - vii. That, the learned trial magistrate erred in law and fact when erroneously failed to note that the appellant was not represented by an advocate following the seriousness of the offence.
 - viii. That, the learned trial magistrate erred in law and fact when seemingly based conviction without withstanding that the medical report was not clear since according to the complainant’s mother they took the complainant to hospital immediately after the alleged incident and examination was done 5 days after the incident.
 - ix. That, the learned trial magistrate erred in law and fact by failing to note that the evidence tendered by PW1 through her mother was not trustworthy to be relied by the court of law. The court used the complainant’s mother as an intermediary to give evidence and this was to be courts duty to find someone within the court to act as intermediary.
6. The minor herein who testified through an intermediary (mother) gave unsworn evidence. She stated that on 11th December, 2020 she was at her grandmother’s house when the appellant took her to his house. He removed her clothes as well as his and did bad manners to her. She pointed at her abdomen at the vaginal area as the place where the bad manners were done. She felt pain and cried when he did that to her.
 7. PW1 who is the minor’s mother was at a construction site on 11th December, 2020 at 4pm when she was informed by her eldest son of what had happened to the daughter. She rushed home and found the child crying with a lot of people around. Her husband and her took the child to Gatare hospital where a post rape care form, P3 form were filled. She identified them together with the treatment notes. A report was made to the police station and a statement recorded. She produced a birth certificate showing the child was born on 28th September, 2015 (EXB 1). She identified the appellant as her husband’s brother. In cross examination she denied bringing the appellant to court because of a land dispute.
 8. PW4 Joash Nyang’ara a clinical officer from Nyamache subcounty hospital stated his qualifications. He testified that he had filled a post rape care report at Iranda subcounty hospital for a child who had a history of sexual assault. He examined her five (5) days after the alleged defilement. She had been treated at Kisii Teaching and Referral Hospital. He found her to have lacerations on the labia minora and majora. The hymen was broken with signs of healing. Urinalysis showed the presence of epithelial



- cells. He filled the P3 form which he produced as PXB2 and the post rape care form as PEXB 3. He also produced the treatment notes (PEXB 4(a) – (d).
9. No 214425 PC Evans Odoyo of Nyatioko police station was the investigating officer. He stated that the appellant was arrested by members of the community policing, who identified him as an uncle to the victim.
 10. In his sworn defence he stated that on 2nd December, 2020 he woke up and went to work and returned home at 7pm. On the way he was arrested by unknown men for unknown reasons. On 11th December, 2020 he was at work in Nyambara Kisii. He stated that PW1 who is married to his brother Richard Nyambane sold land belonging to his late brother Evans Mosota yet he had an interest in it. He was never involved in the transaction. He was thus arrested for questioning PW1 about it. He denied defiling the child.
 11. The appellant's submissions were filed in person on 15th November, 2023. Generally, his submission is that he was framed by the sister in law (PW1) because of a dispute over land belonging to his late brother and which PW1 sold without involving him. He argued that the minor was not able to speak in court and so wondered how he gave PW1 any information. He queried why the minor was examined five (5) days after the incident. Further that PW4 never visited the scene.
 12. Relying on the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal No 12 of 2021 he submitted that his sentence of life imprisonment was unconstitutional. Also see *Republic v Bieker* [2009] 1WLR 223.
 13. The respondent's submissions are dated 19th October, 2023 having been filed by Mr. Justus Ochengo prosecution counsel. Counsel submitted that the age of the victim was proved to be five (5) years as at the date of defilement. That this was a case of recognition as the victim and appellant are niece and uncle. Further that penetration was proved by the minor's testimony through an intermediary. Her evidence was corroborated by the medical records. Further that reference to the sexual act as bad manners was not fatal to the prosecution case. Reference was made to the case of *Muganga Chilejo Saha v Republic* [2017] eKLR where the Court of Appeal Mombasa noted that "tabia mbaya" was used by the child complainant to infer sexual intercourse. Penetration was thus proved.
 14. Counsel submitted that the defence of alibi was an afterthought and never arose during the trial and it was equally not corroborated. There was no evidence to show that on the material day he was at his work place. He supported the sentence which he argued was just in the circumstances.

Analysis and Determination

15. Upon careful consideration of the evidence on record, grounds of appeal, parties' submissions, cited cases and the law I find the main issue of determination to be whether the prosecution proved the charge of incest to the required standard. The second issue is whether the life imprisonment sentence is lawful.
16. This is a first appeal and this court has a duty to re-examine and re-consider the evidence afresh and arrive at its own conclusion. The court should bear in mind that it did not see nor hear the witnesses and so give room for that. In *Njoroge v Republic* [1989] KLR 313 the Court of Appeal held:

“On first appeal from conviction by a magistrate the appellant is entitled to have the appellate court's own consideration and views on the evidence as a whole and its own decision thereon”.



17. The appellant was charged with the offence of incest with a child aged five (5) years, Section 20(1) of the [Sexual Offences Act](#) defines incest as follows:

Incest by male persons

1. Any male person who commits an indet act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grand mother is guilty of an offence termed incest and is liable to imprisonment for a term not less than 10 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.

18. From the said definition, the main ingredients to be proved by way of evidence are:
- i. The relationship between the offender and victim
 - ii. The age of the victim
 - iii. Penetration of the victim’s genital organ
 - iv. Identification of the perpetrator
 - v. Whether the sentence of life imprisonment is unlawful.
19. There is no dispute that the appellant is a brother to the husband of PW1 who is the victim’s mother. He is therefore an uncle to the victim who is his niece.
20. PW1 confirmed to the court that the victim was born on 28th September, 2015. She produced the child’s birth certificate (EXB1) confirming the same. The child was therefore aged 5 years, 2 months plus 2 weeks at the time of offence. In this case age was proved and the victim was aged below 18 years.
21. The court observed that the child could not speak clearly and so engaged the services of an intermediary. An intermediary works to enable all court participants to follow the action, make informed choices, and understand any judgments that are made. An intermediary makes sure that things are explained and talked about in ways that the vulnerable person can understand.
22. The function of the intermediary in court is to communicate to the witness questions put to the witness, and to communicate the answers to the person taking the questions. Article 50(7) of the Kenya [Constitution](#) on fair hearing provides
- “In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court”
23. The appellant in his submissions did not approve the presence of PW1 as an intermediary. He seemed to suggest that what PW1 was stating was not what really happened. When the victim testified the appellant was in court. If indeed PW1 was stating her own things he should not have shyed away from informing the court. He never raised any issue during the hearing.
24. From the cited provisions of the [Constitution](#) both the complainant and accused person have a right to be assisted by an intermediary in court. Secondly the victim herein was a five (5) year old girl who was shy as noted by the court which saw her. I do not therefore fault the trial court for taking that direction.



25. The next issue is whether there was penetration of the victim's vagina. The *Sexual Offences Act* defines "Penetration" as follows:

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

26. In her evidence the minor through an intermediary explained that the perpetrator took her from her grandmother's house. While there he removed his clothes and did bad manners to her. She then pointed at her abdomen at the vaginal area as the place the bad manners was done. She told the court that she felt pain and cried when the bad manners was done to her.

27. Upon receipt of this report PW1 came home and together with her husband took the child to hospital. PW4 is the clinical officer who filled the P3 form (EXB 2) after examining the minor. He confirmed that she had been treated at Kisii Teaching and Referral Hospital (KRTH) and the treatment notes confirmed she had lacerations on the labia minora and majora, with a broken hymen. The urinalysis showed presence of epithelial cells.

This evidence by PW4 disapproves the submissions by the appellant that the child was never taken to hospital before the examination by PW4 was conducted. One of the receipts in the bundle EXB4(a) – (d) shows payment of Ksh 120/= on 12th December, 2020 at 9.50am

28. The payment was done in the minor's name meaning she was the patient. The other documents show that the minor was at the same facility on 14th December, 2020 when several tests were done with the results indicated in EXB 4a and another document No 1403 in the same bundle. All this goes to show that before the P3 form (PEXB2) was filled the minor had been taken for treatment. My finding on this issue is that there was penetration of the minor's vagina.

Issue No (iv) Identification of the perpetrator

29. On the issue of identification, I will rely on the principles set out in the cases of *Republic v Turnbull and others* [1973] 3 ALL ER 549, *Anjononi & others v Republic* [1976-1980] KLR 1566; and *Wamunga v Republic* [1989] KLR 426

30. This incident as shown at page 1 of the P3 form (EXB2) occurred at around 6.00pm on 11th December, 2020. PW1 had left home for work at a site. She was later called by her son and informed of what had happened. When she returned home she found a lot of people and the minor was crying. Identification is key in cases of this nature. In this case the incident occurred during day time. The appellant was arrested by members of community policing and taken to the police station on the same date of incident. The P3 Form (EXB2) shows that the report was made at Nyatiko police station on 11th December 2020 at 2047 hrs.

31. The minor while testifying in court stressed severally that it was the appellant who had taken her to his house and defiled her. This confirms she knew him, she knew his house and she knew her grandmother's house. This was further confirmed by the fact that the minor's father is the appellant's brother.

32. After the minor testified it was surprising that the appellant had no question for her in cross examination. Her evidence thereof remained unchallenged. In his defence the appellant claimed to have been fixed in this matter because of a land dispute whereby PW1 had sold his late brother's land without involving him. Besides his word of mouth, he did not avail any other evidence to confirm that. If this was true his own brother Richard Nyambane or his late brother's children would have come to support his claims. He also claimed to have been at work in Nyamvera Kisii town on 11th December



2020, without stating when he left for work and when he returned. All this would have assisted him in countering the evidence of the prosecution witnesses.

33. After considering all the evidence I find that the element of identification was well established. This was a clear case of recognition. It all confirmed the appellant as the perpetrator. The conviction is therefore safe.

Issue No (iv) Whether the sentence of life imprisonment is unlawful.

34. I have considered the submissions on the sentence of life imprisonment meted out against the accused. The appellant submitted that relying on the Court of Appeal case of *Julius Kitsao Manyesa v Republic* (*supra*) the sentence is unconstitutional and he should be set at liberty. This was opposed by the prosecution counsel Mr. Justus Ochengo arguing that the minor was defiled by her uncle who ought to have protected her. Further that the trauma caused to the minor would haunt her all her life.

35. I have taken all this into account and the fact that the law on life imprisonment has not been amended. The circumstances of this case where a small child aged five (5) years was defiled by an uncle (a brother to the father) is not anything to be taken lightly.

36. It is true that life imprisonment is not a specific sentence. One is always left wondering as to when he/she will complete the sentence. Otherwise what the appellant did is unacceptable by all means.

37. In the circumstances I set aside the life imprisonment and substitute it with thirty (30) years imprisonment less the period he was in remand custody from 11th December, 2020 to 19th October, 2022.

The appeal against conviction fails.

38. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 AT NAKURU.

H. I. ONG'UDI

JUDGE

