



**DMN v Republic (Criminal Appeal E013 of 2022)  
[2024] KEHC 4304 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4304 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E013 OF 2022  
SM GITHINJI, J  
APRIL 11, 2024**

**BETWEEN**

**DMN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal of conviction in Criminal Case No.E005 of 2020 of the Principal Magistrate’s Court at Mpeketoni Law Courts delivered on 28th day of February, 2022 before Hon P.E.Nabwana – Resident Magistrate)*

**JUDGMENT**

1. DM appellant herein, faced various counts in the lower court as follows; -
  1. Incest contrary to section 20 (1) of the *Sexual Offences Act* No.3 of 2006 of which particulars are that on the diverse dates in the month of December, 2019 and March, 2020 within Lamu County, the appellant caused his penis to penetrate the vagina of MM aged 14 years, a female person who was to his knowledge his daughter. In the alternative to the said count he faced a count of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006. The particulars hereof being that on the diverse dates in the month of December, 2019 and March, 2020 within Lamu County, the appellant intentionally touched the vagina of MM aged 14 years with his penis.
  2. Deliberate transmission of HIV, contrary to section 26 (1) of the *Sexual Offences Act* No.3 of 2006. The particulars of this offence are that on the diverse dates in the month of December, 2019 and March, 2020 within Lamu County, the appellant having actual knowledge that he was infected with HIV, intentionally and knowingly had unprotected sexual intercourse with MM, which infected the said MM with HIV.



3. Attempted defilement, contrary to section 9 (1) (2) of the *Sexual Offences Act* No.3 of 2006. The particulars of this offence are that on the diverse dates in the month of July, 2019 within Lamu County, the appellant attempted to commit an act that would cause penetration with TW aged 16 years, a female person who to his knowledge was his daughter.  
  
To the above offence there is an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006. The particulars hereof are that on the diverse dates in the month of July, 2019 within Lamu County, the appellant intentionally touched the vagina of TW, aged 16 years, a female person with his penis.
2. The prosecution case is that “M.M” who gave evidence as Pw-1 and “T.W” who gave evidence as Pw-2, are sisters. While Pw-1 during the time of commission of the offences in count 1 and 2 was allegedly aged 14 years, Pw-2 during the commission of the offence in count 3 was aged 16 years. These two girls experienced a lot of hardships in life when their mother who was a drunkard separated from their father who is the appellant herein. After the said separation their mother lived in Witu with a step-father. The appellant lived with the two girls at [Particulars Withheld] with his own parents. Life there was not easy for the two girls as the grandparents were harsh on them. They used to be beaten and denied food by their grandmother especially when she felt they had not cooked to her expected standard. The appellant’s brothers and a sister were also living with them and were as well not welcoming. They are W, M, MS and W. Some of them were of undesirable behavior and their parents were over protective whenever complaints were raised against them.
3. In July, 2019 on a date Pw-2 could not recall, the two girls were told to take a basin, soap and a torch to the appellant’s house. They went and took the said items. Pw-1 went back and Pw-2 remained with the appellant. The appellant narrated to her a story allegedly of a mother who had two daughters. The mother separated with her husband and the elder daughter stepped in place of her mother and served the father as a wife would do to her husband. He then asked Pw-2 whether she could do likewise. He even went further and said he should be giving her Kshs 500 instead of taking it to prostitutes outside. Pw-2 did not respond. The appellant sent her away.
4. That night while asleep at her grandmother’s place, she felt her lessso being pulled. She looked and saw it was the appellant doing it. He held her skirt and pulled it. Pw-2 got out of bed and hid behind the door. The appellant had a red towel around his waist. He said to Pw-2 “W, W tulikuwa tumeagana aje?” meaning “W, W, what had we agreed?”. He called her a second time and she did not answer. He then left and she went back to bed. Pw-2 was disturbed by the incident to an extent that she was unable to concentrate in school. She even questioned the grandfather as to whether the appellant was her biological father, and he confirmed that he was.
5. As regard Pw-1 she narrated that in November, 2019 the appellant visited [Particulars Withheld]. He gave her 50 Kshs and told her to go and have lunch. In the evening Pw-1 was asleep in a room which had a huge hole in the wall. The appellant appeared in the room through the said hole. He called her by name and reminded her of the 50 Kshs he had given to her. Pw-1 just kept quiet. He covered her mouth with his hand. Pw-1 had slept naked. The appellant had covered himself with a lessso and had no inner wear. He removed the lessso and went on her. He inserted his penis in her vagina. She felt pain. When he was through he left through the hole in the wall. Pw-1 told nobody. The following evening, he visited as before. He was in a vest. He penetrated her as he had done previously. Pw-1 wondered how a father would do that to her. She however did not report him to the grandmother as she was over protective of her children. Pw-1 stated one son called W had defiled a girl called E and when the grandmother was told she took no action.



6. Prior to the alleged defilement of Pw-1 by the appellant, there was a time the grandmother gave Pw-1 a torch to take an uncle called JW. She went and gave him the torch at 20.00hours. The said uncle got hold of her hand and pulled her on the bed. He held her mouth. He then defiled her.
7. The two girls reported the incidents later to their aunt called GW. The issues were deliberated within the family and the appellant denied it. Later another aunt called JW (Pw-4) visited. They informed her about it. She sought assistance of World Vision. Through the help of the said organization the matter was reported at Hindi Police Station.
8. The two victims were referred to Mpeketoni Sub-County Hospital. They were examined and according to Pw-3, Pw-1 was found to be HIV positive. Urinalysis revealed presence of pus cells, a sign of bacterial infection, pregnancy test was negative. Hymen was broken and lacerations were noted. It was concluded that penetration occurred.
9. For Pw-2 it was noted that she was not pregnant and urinalysis disclosed no infection. There were also no lacerations. In short, all was okay.
10. Pw-6 investigated the matter. The appellant was arrested and also subjected to medical examination at Mpeketoni Sub-County Hospital. HIV test was positive. He was then charged with the offences in the charge sheet.
11. The appellant in his defence stated he lives in Hindi where he is a farmer. In November, 2020 he left Hindi for [Particulars Withheld]. On a Sunday a KPR officer called Kuria told him that there was an issue he wanted them discuss together with another KPR officer called Kamau. He was carried on a motor cycle up to [Particulars Withheld]. On the road there was a police vehicle. He was handed over there. He was taken to police station where it was alleged that he had defiled his two daughters. The two were under his care since one was 4 years and the other 6 years old. He took them to his mother.
12. In 2019 the girls went to visit their aunt called JW. She was with them at Hindi for 2 months. After school opened the girls were not returned. The appellant called his estranged wife and told her to tell her sister to return the girls so as to attend school. She was told by her father to return the children and did so.
13. During the corona pandemic in the year 2020 the children visited the grandfather to help him in tilling the farm. JW visited them and took the girls again to Hindi. The appellant was told about it. He called JW and asked her why she did that. She said she can also take care of her sister's children. The two argued over the issue for a long time. Eventually she said when he will be incarcerated she will have them. When he was fixed with the offences he never committed, that came to pass.
14. The trial court evaluated the evidence and concluded that only the offence of incest in count 1 was established against the appellant beyond reasonable doubt. He was convicted of it as he was acquitted of the others. A sentence of 40 years' imprisonment was meted.
15. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that; -
  1. He pleaded not guilty to the offence.
  2. In a case of year 2020, he was issued with witness statements late in July, 2021 when the hearing commenced.
  3. Penetration was not proved or established.
  4. Prosecution case is marred with contradictions and inconsistencies.



5. Burden of proof was shifted upon the appellant.
6. His alibi was unfairly dismissed.
16. The respondent opposed the appeal which was canvassed by way of written submissions.
17. I have as a first appellate court considered the charges, evidence on record, judgment of the lower court and sentence meted, grounds of the appeal and submissions by both sides.
18. The appellant herein was convicted for the offence of incest of which as was held in the case of *MGK v Republic* (2020) eKLR, the ingredients are:-
  1. The victim and the offender must be related within the categories stated under section 20 (1) of the *Sexual Offences Act*.
  2. Penetration of the sexual organs of the victim by the sexual organs of the offender.
  3. Where the victim is allegedly a child, the age of the said victim.
  4. Proper identification of the offender as the real culprit.
19. On the first ingredient, the evidence of Pw-1, Pw-2 and Pw-4 well establishes that Pw-1 is a daughter of the appellant. The appellant himself does not dispute the fact and confirmed so during this defence. This is therefore a well settled fact.
20. Penetration is challenged. The evidence of Pw-1 indicates clearly that she was penetrated by the appellant. She stated that he inserted his penis in her vagina. The girl though young knew of what she was talking about. The appellant's brother had done it previously and the appellant did it to her twice later. Though it could not be confirmed who had infected her with HIV, given that JW had defiled her before the appellant, and if he was infected could have infected her and the appellant could as well have been infected by her, her evidence as was concluded by the trial magistrate is credible and conclusive on the issue. The doctor's evidence shows clearly that she was penetrated. Hymen was broken, there were lacerations, peeling of the upper skin, bacterial infection and she was HIV positive as well the appellant. The witness had no cause to fix her father if really he was innocent. His *modus operandi*, of offering cash to entice for sex is corroborated by the evidence of Pw-2. The evidence leaves no doubt that there was penetration of a genital organ by a genital organ.
21. On age of the complainant at the time of the offence, she herself stated she was 14 years old. The trial court in its judgment observed that her general appearance in court was that of a minor. This would fit to her "apparent age." Though the trial court as well depended on the issue, on the probation officer's report, such was not right as the report was not given as part of the prosecution evidence and the probation officer was not a witness to be cross-examined on the report findings. The defence did not dispute the age of Pw-1 and what is on record shows she was a minor, below the age of 18. I agree with the prosecution submissions on the issue that age could be proved by common sense and that the approximate age given by a medical officer in the P-3 form or PRC form, amounts to an apparent age of the person it relates to, founded in the findings in the cases of *Joseph Kieti Seet v Republic* [2014] eKLR and *Evans Wamalwa Simiyu v Republic* [2019] eKLR respectively.
22. On the last issue of identification or recognition, the appellant was a person who was well known to the victim. He spoke to her during the incident. Though the incidents happened at night and the source of light was not indicated, the fact that he had given her Kshs 50/= for lunch of which he reminded her about during the incident shows he was the real culprit.
23. The offence of incest against the minor was therefore proved against him beyond reasonable doubt.



24. The trial court sentenced him to serve 40 years' imprisonment. The maximum for the offence is life imprisonment. The 40 years' imprisonment is a sentence that is within the law. As a father he did the most awful thing expected of him. The sentence is deserved. I see no need to disturb it.

25. The bottom line is that the appeal fails for want of merit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF APRIL, 2024**

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**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

1. Ms Chomba holding brief for Ms Mkongo for the state
2. Appellant in person at Manyani Prison (appearing virtually).

