



REPUBLIC OF KENYA



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**MS v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 4245 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E054 OF 2023
AC MRIMA, J
APRIL 11, 2024**

BETWEEN

MS APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. Kassim Akida (Resident Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. E118 of 2021 delivered on 19 th April, 2023)

JUDGMENT

1. MS, the Appellant herein, was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#). The particulars of the offence were that between the 25th and 30th April, 2021 at [particulars withheld], the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of T.N., a female child aged 14 years old whom he had knowledge was his daughter.
2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) whose particulars were that between the 25th and 30th April, 2021 at [particulars withheld], the Appellant intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of T.N., a child aged 14 years old.
3. The accused denied the charges and was tried. After a full hearing, the Appellant was found guilty and convicted on the main charge of incest and he was sentenced to serve a term of 30 years' imprisonment.
4. The Appellant was aggrieved by the conviction and sentence. He lodged an appeal which is under consideration in this judgment.



The Appeal:

5. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of applying wrong principles in convicting him and that the defence and grudge were not considered. He urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.
6. The Appellant argued his appeal by way of written submissions. He expounded on the grounds of appeal.
7. On the part of the prosecution, through its extensive written submissions, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.
8. Both parties relied on various decisions in support of their respective cases.

Analysis:

9. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
10. Having carefully perused the record, this Court is now called upon to determine whether the offence of incest was committed, and if so, whether by the Appellant.
11. It is established by law [Section 20 of the *Sexual Offences Act*] and settled judicial precedents that the offence of incest carries four components. They are the relationship between the victim and the assailant, the age of the victim, penetration and identification of the assailant.
12. This Court will deal with each of the issues in turn.

Age of the victim:

13. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.
14. In this case, the age of the complainant was not in issue. It was proved by Certificate of Birth No. 7575900 which was produced in evidence. It confirmed that the complainant [who testified as PW1] was born on 29th January, 2006. As such, as at April 2021, the complainant was aged 14 years old.
15. The complainant was, therefore, a child within the meaning ascribed to the term under the *Children Act*.

Penetration:

16. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."



17. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

18. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

19. The Appellant herein vehemently argued that the prosecution failed to establish penetration.
20. The issue of penetration in this case cannot be denied. There was evidence that the complainant got pregnant and even gave birth. Unfortunately, the child died.
21. The position was attested to by PW1, PW2 [who was PW1's mother] and by way of medical evidence through the documents produced by a Clinical Officer [who testified as PW3].
22. With the foregoing cumulative evidence, there is no doubt that penetration of PW1's genitalia was proved.

Identity of the perpetrator:

23. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.
24. The identification aspect in this matter was attested to by the complainant. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.
25. Evidence by a single witness must be treated carefully and cautiously. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

.... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than



identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

26. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

27. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in *Peter Musau Mwanzia vs. Republic* (2008) eKLR, Court stated as follows: -

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

28. Further, the Court of Appeal in upholding the evidence of recognition at night in *Douglas Muthanwa Ntoribi vs Republic* (2014) eKLR held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

29. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & Another vs R* (unreported) had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

30. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.



31. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence as truthful.
32. The complainant was quite forthright on the identity of the assailant. The incident occurred over a period of time. PW1 testified that the Appellant was his father. The Appellant admitted as much.
33. PW1 narrated how the Appellant had left their home and went to live in a lodge. That, as she went for her friend's birthday, PW1 met the Appellant who took her to town, bought her lunch and ended up with her at his place of abode which was in a lodge. The Appellant locked PW1 inside his room for a couple of days as he went on with his work; as he was a mechanic and ran a garage.
34. PW1 was eventually rescued by PW2 through her friends who went and informed PW2 of the whereabouts of PW1. By then PW2 was looking for PW1.
35. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events as narrated, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.
36. This Court has also considered the Appellant's defence. The Appellant contended that he was framed by his wife, PW2, out of their longstanding grudge. He denied committing the offences and wondered why neither the owner of the lodge was called to testify nor the records thereof produced in evidence.
37. He denied leaving his home to live elsewhere.
38. On cross-examination, the Appellant stated that there was no reason why PW1 would implicate him in this matter. On the issue as to whether the Appellant had left his home, there was ample evidence by PW1 and PW2 to that end. That evidence was not controverted during cross-examination.
39. The Appellant raised the issue of disharmony with PW2 and that he had reported the matter at Namanjalala Police Station where he was referred to a Human Rights organization. Surprisingly, there was no such interrogation of such on any of the witnesses. To this Court, the issue can be safely regarded as an afterthought and that is why it was rightly declined by the trial Court.
40. Coming to the end of this issue, this Court also recalls that there is uncontroverted evidence that the Appellant's siblings [who are PW1's uncles] threatened PW1 and compelled her to withdraw the case. As such, PW1 had to be moved around Children homes for her safety.
41. Therefore, the trial Court was right in finding that the Appellant was positively identified by way of recognition. Relationship between the Complainant and the Appellant:

42. Section 20(1) of the *Sexual Offences Act* provides as follows: -

Incest by male persons:

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.



43. The issue of the relationship between the Appellant and the victim was settled by both parties to the effect that the complainant was a daughter to the Appellant.
44. The dictates of Section 20(1) were, hence, satisfied.
45. Having dealt with all the four ingredients of the offence of incest and since none of them has impugned the prosecution's evidence, this Court finds that the Appellant was properly identified as the perpetrator and that he was rightly found guilty and properly convicted.
46. Deriving from the above, the appeal against the conviction is hereby dismissed.

Sentence:

47. The Appellant was sentenced to 30 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court. The Court also called for a Pre-Sentence Report.
48. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
49. I have considered this matter with caution and care. The sentencing Court received the Appellant's mitigations. The Court considered the age of the victim, the conduct of the Appellant and the general circumstances of the case. There is no doubt the offence is serious. The effects on the victim were catastrophic; she had to conceive at such an early age. The Probation Report did not also favour the Appellant.
50. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
51. This Court does not see how the sentencing proceedings are to be impugned. The Court exercised its discretion correctly more so given the age of the victim, the fact that the Appellant was PW1's biological father and the aftermath of the impugned actions on the victim.
52. With the above findings, the appeal on sentence also fails.

Disposition:

53. In the end, the following final orders of this Court do hereby issue: -
 - a. The Appeal is wholly dismissed.
 - b. This file is hereby marked as CLOSED.Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

MS, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

