



**NMN v Republic (Criminal Appeal E021 of 2023)  
[2024] KEHC 3650 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E021 OF 2023  
LM NJUGUNA, J  
APRIL 17, 2024**

**BETWEEN**

**NMN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. R. G. Mundia (PM) in the Chief Magistrate's Court at Embu Sexual Offence No. E021 of 2021 delivered on 22nd June 2023)*

**JUDGMENT**

1. This is an appeal arising from the abovementioned decision. The appellant has filed an undated petition of appeal seeking that the appeal be allowed, conviction be quashed, sentence be aside and the appellant be set at liberty, on the grounds that the learned trial magistrate erred in law and facts by:
  - a. Failing to consider that the appellant's specimen was taken for *DNA* sampling by the Government Chemist but the report was not produced as evidence;
  - b. Failing to conduct a fair trial according to Article 50(2)(b)&(h) and Article 25 of the [\*Constitution\*](#);
  - c. Failing to compel the prosecution to produce DNA evidence showing that the appellant was the father of the complainant and her child;
  - d. Disregarding the appellant's defense without giving cogent reasons;
  - e. Failing to consider that the medical evidence linking the appellant to the crime was not adduced by the prosecution;
  - f. Failing to consider that the appellant made an application for DNA sampling in open court for both the complainant and her child but the same were not conducted; and



- g. Imposing a sentence that is harsh and excessive given the age and background of the appellant.
2. The appellant was charged with the offence of incest contrary to section 20(1) as read together with section 22(1) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on or before 16<sup>th</sup> April 2021 at Grogon village in Embu Township within Embu County, the appellant, being a male person, caused his penis to penetrate the vagina of GM, a minor aged 13 years who was to his knowledge his step daughter. He also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars for the alternative charge are that on or before 16<sup>th</sup> April 2021 at Grogon village in Embu Township within Embu County, the appellant intentionally touched the vagina of GM, a child aged 13 years with his penis.
  3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
  4. PW1 was the victim who stated on oath that on 16<sup>th</sup> April 2021, the appellant, her father, returned home from his errand and again left for a bar in the company of one Kiava. That soon after, he returned and called for her while he was lying on his bed. That he then wore a condom and defiled her. She stated that Mama Mwangi walked in on the appellant defiling her and she raised alarm, causing people to gather. That the appellant was taken outside the house while he was naked and still wearing the condom. That before this incident, the appellant had defiled her once before at a time when his relationship with her mother was strained. That she had also been defiled by another young man who did not use a condom.
  5. The court inquired if the young man who defiled her had been arraigned but PW1 stated that the case was resolved at the chief's office. That she was taken to hospital but no medication was given and she was told that she was pregnant. On cross-examination, she stated that at the time of the incident, the appellant had disagreed with her mother. That she did not cry for help because he had been threatening that she would be killed if she cried. That Mama Mwangi alerted members of the public who beat him up after the incident.
  6. That the appellant told her that he had sex with her sister and that he wanted a child. That the appellant told her to say that it was Nyaga's son who had defiled her. She denied that her mother coerced her to testify against him so that she can take over his estate. On re-examination, she stated that the appellant, who had been in prison and was released in 2021, had been defiling her over a period of time and her mother knew about it. She stated that the area Chief advised her mother to report the matter at the DCI offices and she accompanied her mother to DCIO.
  7. PW2, Stephen Kiromo stated that at around 5PM, neither the appellant nor the complainant had been seen outside. That word on the street was that the appellant was having sex with his daughter and shortly afterwards, the rumour was confirmed by Mama Mwangi who found the appellant in the act of defiling the complainant. That members of the public frog-marched the appellant outside while he was naked and only wearing a condom. That the complainant informed the members of the public that the appellant had forced her into sex. That he had known the appellant for about 3 months and that he had heard that the appellant was in the habit of having sex with his daughter. On cross-examination, he stated that it was oddly quiet and the lady who had sold him alcohol on credit had gone to collect her money at this house. That he had not been paid to testify against the appellant and that he found the appellant defiling the complainant on the bed that is next to the door in his house.
  8. PW3, PC Frida Karimi of Municipality Police Post stated that she arrested the appellant when she received a report from the area chief. That the suspect had allegedly defiled his daughter. That at the time of arrest, she found the appellant being assaulted by members of the public while he was



- naked. That the appellant was rescued alongside the victim and they were both taken to Embu Level 5 Hospital.
9. PW4, Dr. Phylis Muhonja of Embu Level 5 Hospital stated that upon examination of the victim, she noted that the hymenal ring was missing from 4-7 o'clock. There was active discharge and the victim was 12 weeks pregnant. That the victim was enrolled to the antenatal clinic. That a high vaginal swab, blood, urine and pubic hair were collected for analysis. That she also examined the minor psychologically and found that she understood that it was wrong for her father to defile her but she was just as helpless as her mother. It was her conclusion that there was past and present penile vaginal penetration with ejaculation and foetal implantation. It was also her testimony that she examined the appellant and noted that he had sustained physical injuries on different parts of his body and that he also had genital warts consistent with a sexually transmitted disease.
  10. PW5, Caroline Murugi Esther stated that she owns a kibanda where the appellant ate occasionally. That on 16<sup>th</sup> April, 2021, the appellant had eaten at the kibanda but had not paid and at around 5PM, she went to his house to collect the money. That as she moved near his house, she heard the victim asking him to get off her as she was in much pain. That she called a member of Nyumba Kumi initiative who went to the appellant's house where they found him stark naked defiling the victim. That members of the public removed the appellant while naked and began to beat him up. On cross-examination, she stated that she was a tenant in the same neighborhood as the appellant and that she had gone to ask the appellant for her Kshs 80/= for the food he had eaten. That she found the appellant defiling the complainant in his house which had a curtain at the door and the curtain was not drawn. She denied that she was a bad influence to the complainant.
  11. PW6 was PC Andrew Mwangi of Municipality Police Station who stated that on 16<sup>th</sup> April 2021, the matter was reported by the area chief and a village elder. That he proceeded to the scene in the company of PW3 and they found a mob of irate members of the public lynching the appellant for defiling the complainant. That they removed the appellant and the complainant from the scene and took them to Embu Level 5 Hospital and then collected statements from the witnesses. That samples were collected for analysis by the government chemist and the appellant was charged with the offence. On cross-examination, he stated that there had been another incident where the victim was defiled by someone else who had been released because the victim denied having had sex with him and that the appellant had forced her to admit that the man had slept with her.
  12. At the end of the prosecution's case, the court found that the appellant had a case to answer and he was placed on his defense.
  13. DW1, the appellant, stated that on 21<sup>st</sup> June 2020, he was released from prison and while at home, he realized that there was a man who was having sexual relations with his daughter, the victim. That the man and the victim were arrested and taken to the police station and then to Embu Level 5 Hospital where they were examined and the man was detained at the police station. That the following day, relatives of the man in custody went to his home to settle the matter away from the authorities but he refused. That those relatives told him to ask the victim to lie to the investigating officers at DCI that the suspect did not defile her and in exchange, they would give him Kshs 50,000/=.
  14. That on 25<sup>th</sup> March 2021, the sub-area chief, who is also a relative of the suspect in police custody, went to his home and assaulted him while in the company of others. That PW6 received the Kshs 50,000/= and released the suspect and then framed him for the offence. That the minor is not reported to be HIV positive but he is, so, according to him he did not defile her. That PW2 introduced his daughter to prostitution and has been sending her to men in Embu Town. That the sub-area chief has framed him



- and has compromised all his witnesses. That the minor lied when she testified that he defiled her in the morning yet he was away drinking with his friend until 5PM and they accosted him while he was naked.
15. The trial magistrate found the appellant guilty of the offence of incest and sentenced him to life imprisonment.
  16. In this appeal, the court directed the parties to file their written submissions and they complied.
  17. The appellant, in his submissions, argued that the prosecution's case was marred with contradictory evidence and should not be relied upon. He relied on the case of *John Barasa v Republic*, Kitale Criminal Case No 22 of 2005. He argued that the mandatory sentence imposed by the trial court is unconstitutional and should be reviewed. That there was need for the prosecution to establish his guilt through DNA evidence which was not conducted or produced. That he was not the biological father of the victim and therefore, there was no proved incest.
  18. The respondent submitted that the offence of incest was proved according to section 20(1) of the *Sexual Offences Act* and the case of *DMK v Republic* (2022) eKLR where the elements of the offences were enumerated. That the prosecution witnesses proved that indeed the appellant is the step father of the victim. On identification of the appellant as the assailant, it placed reliance on the principles laid down in the case of *Reuben Taabu Anjononi & 2 others v Republic* (1980) eKLR and argued that the appellant was properly identified given that he is the step-father of the complainant.
  19. It was its argument that the element of penetration was proved according to the testimony of PW1 as corroborated by that of PW4. That the age of the victim was established and she was found to be a minor. Reliance was placed on the case of *Kaingu Elias Kasomo v Republic* Criminal Appeal No 504 of 2010 (unreported). That the appellant's rights to counsel at the expense of the State was not infringed because there are certain parameters to be satisfied before assigning an advocate to defend an offender. It relied on the case of *William Oongo Arunda alias Patrick Oduor Ochieng v Republic* (2022) eKLR where the court stated that the right to counsel at the expense of the state was available depending on the seriousness and complexity of the charge.
  20. That there is currently no law enacted that guides the apportionment of this right to an accused person. On the appellant's argument that DNA evidence should have been adduced, the respondent relied on the sentiments of the Court of Appeal in the case of *Robert Mutungi Mumbi v Republic* (2015) eKLR where it was held that section 36(1) of the *Evidence Act* does not make it mandatory that the prosecution should provide DNA or medical evidence since it is not the only evidence that can be adduced. It was the respondent's submission that the life imprisonment sentence meted out to the appellant was not harsh or excessive as section 20(1) of the *Sexual Offences Act* only provides for a minimum of 10 years and no maximum. Reliance was placed on the cases of *Republic v Nicholas Wambogo* (2022) eKLR and *Shadrack Kipkoeb Kogo v Republic* Criminal Appeal No 253 of 2003. That the sentence is not illegal or based on wrong principles of law.
  21. From a perusal of the petition of appeal and submissions, it is my view that the issues for determination are as follows:
    - a. Whether the absence of DNA evidence impacts the prosecution's case negatively;
    - b. Whether the prosecution proved the elements of the offence beyond reasonable doubt; and
    - c. Whether the sentence imposed was harsh and excessive.



22. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 I agree with the court when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

23. Under section 20(1) of the *Sexual Offences Act*, the offence of incest exists when any male person 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. First of all, the appellant herein is the father of the victim. In his defense, he expressly stated that when he left prison, he learned that there was a man who was having sex with his daughter, the victim. In my understanding, the appellant as the half father/ step father of the victim, still owed her the duty of care.

24. For the offence of incest to be proved, there must be:

1. An indecent act or an act that causes penetration;
2. The victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the Act.

Section 22 states as follows:

- “(1) 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.
- (2) .....
- (3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.
- (4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the *Children Act* (No 8 of 2001).”

25. Section 2 of the *Children Act* defines a step-parent as one who is married to the child’s biological mother or father. The same law defines a parent as the mother or father or any person who is conferred parental rights by the law. Parental responsibility was conferred upon the appellant by virtue of the fact that he was married to the mother of the victim. The law required him to protect the victim and put her best interests before anything else.



26. Penetration as defined under Section 2 of the *Sexual Offences Act*, means ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person’. The appellant is alleged to have committed an act which caused penetration of the victim, who is his step-daughter. From the evidence adduced, PW1 stated that the appellant did not have sex with her once and that he had bragged of having sex with her sister as well. That her mother was aware that the appellant was defiling her but she did not do anything about it. PW4 testified that when she examined the victim, she noticed that there was a torn hymen caused by penial penetration, there was foetal implantation and the victim was 12 weeks pregnant. That she took some samples from the victim’s private parts and sent the same for analysis by the government chemist. There was no evidence of DNA analysis findings.
27. It is on this basis that the appellant stated that the case was not proved beyond reasonable doubt. In his submissions in this appeal, the appellant stated that he could not have defiled the child because she is not reported to be HIV positive yet he himself is HIV positive. It is my view that for purposes of this offence, the element of penetration should be proved in isolation of all other factors. That is to say, if the appellant was positively identified and the medical examination proves that there was penetration, even in the absence of evidence the appellant is the father of the child born to the victim, there is sufficient evidence that there was penetration.
28. It does not even matter that the appellant and the victim had the same diseases. In any event, PW4 observed genital warts on both the appellant and the victim. Further, the appellant’s HIV status cannot be dragged into the issue at hand to exonerate him. However, I shall not go into any further details on this line of thought because there is enough evidence to show that the appellant defiled the victim. Given my sentiments hereinabove, I find that the lack of DNA evidence did not negatively impact the prosecution’s case and does not change the fact that the elements of the offence were sufficiently proved beyond reasonable doubt.
29. The appellant stated that the trial magistrate erred in law and fact by disregarding his evidence without giving cogent reasons. I have perused the judgment of the trial court and I have noted that the trial magistrate analysed all the evidence available and found that none of it was discredited by the appellant’s defense. It was the appellant’s duty to punch holes in the prosecution’s evidence so that any reasonable doubt may be adjudged in his favour, but he failed to do so. The circumstances of the case are unshaken by the defense given and the trial magistrate simply applied the evidence produced to convict the appellant.
30. As to whether the sentence imposed on the appellant was harsh and excessive, the trial magistrate sentenced the appellant to life imprisonment. Section 20(1) of the *Sexual Offences Act* provides:
- “(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”
31. The law prescribes a sentence of not less than 10 years imprisonment. The trial magistrate exercised his discretion on the matter and found that the sentence of life imprisonment was sufficient in the circumstances. However, the Court of Appeal has frowned upon the indeterminate nature of a sentence of life imprisonment in the case of *Julius Kitsao Manyeso v Republic*, Malindi Court of Appeal Criminal Appeal No 12 of 2021. The sentiments were echoed in the case of *Evans Nyamari Ayako v Republic*, Kisumu Criminal Appeal No 22 of 2018.
32. In the end, I find that the appeal partially succeeds with orders as follows:



- a. The trial court’s finding on conviction is hereby upheld; and
- b. The sentence of life imprisonment is hereby set aside and substituted with a sentence of 40 years imprisonment to run from the date of conviction.

33. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF APRIL, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the State

