



**FO alias POO v Republic (Criminal Appeal E004 of 2024)  
[2024] KEHC 5139 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E004 OF 2024**

**KW KIARIE, J  
MAY 15, 2024**

**BETWEEN**

**FO ALIAS POO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.47 of 2021 of the Senior Principal Magistrate’s Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)*

**JUDGMENT**

1. FO alias POO, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on diverse dates between June 2021 and October 2021 within Homa Bay County, being a male person, caused his penis to penetrate the vagina of MA, a female aged twelve years who to his knowledge was his daughter.
3. The appellant was sentenced to serve thirty (30) years’ imprisonment. The appellant was in person. He has appealed against both conviction and sentence. He raised grounds of appeal as follows:
  - a. That the offence of incest was not proved to the required standard.
  - b. That the learned trial magistrate erred in both law and fact by sentencing the appellant to 30 years without withstanding that the birth certificate was not brought before the court to confirm the complainant’s age.
  - c. That the trial court failed to comply with Article 50(2)(g) and (h) of the Constitution of Kenya 2010.



- d. That the trial magistrate further erred in both law and facts by convicting the appellant without observing that the medical report tendered by the prosecution side had exonerated him from this act.
  - e. That the sentence was harsh and excessive.
  - f. That learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard.
  - g. The learned trial magistrate erred in law and fact by depending on evidence based on theory and conspiracy, and the prosecution witnesses did not prove the offence beyond a reasonable doubt.
4. The state opposed the appeal and contended that the offence's ingredients were proved to the required standards.
  5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence before the lower court afresh and drawn my conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
  6. Section 20 (1) of the *Sexual Offences Act* provides:

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:
  7. Flowing from the provisions of this section, the ingredients of incest are as follows:
    - a. The accused must be a male;
    - b. The victim must be a female;
    - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
    - d. He must know the relationship; and
    - e. There must be penetration.
  8. The prosecution adduced evidence that MA, the complainant herein, is the appellant's stepdaughter. The appellant confirmed this in his testimony. He said she was his daughter.
  9. MA (PW1) told the court how the appellant could arrive home late and drunk. Her mother was employed in Kisii as a house help at the time. Since she was the eldest child, she was the one opening for the appellant. He then started going to her bedroom. Severally, he caressed her breasts, buttocks and genitalia. He eventually defiled her. This was in June 2021. He went on defiling her in the subsequent months. In August 2021, she fell sick, and when her mother took her to hospital, she was found to be pregnant.
  10. The appellant did not stop defiling her despite being threatened that the matter would be reported. In October 2021, she informed her cousin, and both reported to the police.



11. Other than the complainant's evidence, the evidence adduced against the appellant was circumstantial. In the case of *Mohamed & 3 Others v. Republic* [2005]1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

Earlier, the Court of Appeal in the case of *Republic v. Kipkering Arap Koskei & another* 16 EACA 135, had held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

12. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

13. Julius Omondi Odingo (PW3) produced a report on the complainant on behalf of his colleague, Serem. She was examined on the 15<sup>th</sup> day of December 2021. The hymen of the complainant was torn, and she was pregnant. This was corroborative of the complainant's evidence that she had been defiled.
14. In his defence, the appellant said he had never differed with the complainant and that she could not tell a lie against him. There was no evidence on record to suggest that she had falsely implicated him.
15. Therefore, the learned trial magistrate had all the reasons to believe she was telling the truth; the appellant defiled the complainant.
16. The appellant contended that the sentence was harsh and excessive. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *JAMES v. REX* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v. SHERSHEWSITY* (1912) C.CA 28 T.LR 364.

17. The proviso to section 20 (1) of the *Sexual Offences Act* states:

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. In the instant case, the appellant stated that the complainant was about twelve years old at the time of the offence. She was undoubtedly under eighteen years old. The sentence meted out cannot be said to be excessive and harsh; it was proportional to the offence.
19. The appeal is dismissed for lack of merits.

**DELIVERED AND SIGNED AT HOMA BAY THIS 15<sup>TH</sup> DAY OF MAY 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

