



**Republic v JMM (Criminal Appeal E007 of 2023)
[2024] KEHC 5064 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E007 OF 2023**

RK LIMO, J

MAY 14, 2024

BETWEEN

REPUBLIC APPLICANT

AND

JMM ACCUSED

JUDGMENT

1. The Appellant herein was initially charged with the offence of defilement vide Kyuso Principal Magistrate S.O. Case No. 009 of 2022. The charges were later amended to incest contrary to Section 20 (1) of the *Sexual Offences Act* when the prosecution noticed that the victim was a daughter to the appellant.
2. The particulars of the offence were that on 30th April 2022 at around 0200 Hours in Kitui County he intentionally caused his penis to penetrate the vagina of LM a female person who was to his knowledge his own daughter aged 12 years.
3. The appellant denied committing the offence but after trial where 5 witnesses were availed by the prosecution he was found guilty and convicted. Below is a summary of the evidence tendered.
4. LM (PW1), the complainant in the case told the trial court that she was in class 7 and was born on 28.5.2010. She recalled that on 30th April 2022 she was sleeping with her sister in her room and her mother was away at the time having disagreed with their father. The child stated that while they were sleeping, her father, the appellant crept into their bedroom at 1am and defiled her. This how she narrated the ordeal:

“I tried to cry and he started pinching me. He removed my inner clothes. He removed his underwear. He put his penis inside my vagina. I cried and AK heard. He did not use a condom.....I felt a lot of pain....”



5. The complainant added that the appellant flashed a torch and left adding that at that time her sister named AK was already up.
6. She stated that the following day, their father told them to go to the shamba which they did and worked at the farm till 1pm.
7. She testified that the following day they went back to the shamba and that later her sister AK went to the stream to fetch water and met one Mureithi and that she later informed her that she had borrowed a phone to call their mother and informed her of what had happened to her.
8. She testified that her mother came and on 3.5.2022 she took her to Mumoni Police Station and later to Kyuso Hospital for medical examination and treatment.
9. SG (PW2) the complainant's mother testified that the complainant was twelve years old at the time having been born on 28th May 2010. She testified that she left her home on 2nd May 2022 for her parents' home after the appellant beat her. That she had been away for four days when she received a call from her older daughter AK who informed her that the appellant had defiled the complainant. She stated that she asked her children to meet her at their grandparents' home which they did and she examined the complainant's private parts and found that it was torn and swollen. She testified that she reported the matter to the police and later took the complainant to hospital.
10. In cross examination, she maintained that she received a call from her daughter on 1st May 2022. That she reported the incident to the police and that she told her sister in law about it as well. She denied framing the appellant.
11. AK (PW3), an elder sister to the complainant testified and largely corroborated what the complainant had state. She stated that she was asleep with her sister in their bedroom when she heard her sister cry and when she got up to find out what the problem, she saw her father (the appellant) herein defiling her. She stated that the ordeal lasted about 30 minutes and that the appellant had a gas lighter which made it possible for her to recognize him. She testified that the following day they went to the shamba and on 2.5.2022 she met a neighbour named Mureithi and borrowed a phone to call her mother. She stated that she informed her mother about what had happened to her younger sibling. She stated that her mother came and action was taken by reporting the matter to the police on 3.5.2022.
12. Ruth Mutua (PW4) a Clinical Officer from Kyuso Hospital testified that the complainant was taken to Kyuso Hospital on 3.5.2022 with a report that she had been defiled. She testified that she examined the complainant and found her stable and with no physical injury. The medical officer stated that the girl had a whitish discharge and her hymen was completely broken. She opined that she had been defiled and put her on treatment after carrying out some lab tests which turned negative. She assessed the age of the complainant at between 11-12 years and tendered P3 form she filled and signed as P EXB 1, Treatment sheet as P EXB 2 and age assessment as exhibit 4.
13. PC 118967 Zipporah Moragia (PW5) the investigating officer testified that the matter was reported at Mumoni Police Station on 3rd May 2022. She testified that she accompanied PW1 to Kyuso sub-county hospital where she was examined. She proceeded that the appellant was arrested on 7th May 2022.
14. The Appellant gave a sworn statement in court. He testified that the complainant was his youngest daughter. He denied committing the offence and testified that he started having domestic issues with his wife in 2017. He proceeded that in 2019, his eldest daughter started having an affair with a man and that she dropped out of school in 2020. He testified was bought by his wife because of controlling his daughters. That the two quarreled over the same issue and his wife threatened to have him jailed. That she also threatened to have him jailed because he refused to burn some charcoal and that the two



of them even fought which resulted in her running away from their home. He testified that his wife was spreading rumors of his arrest and stated that he had been framed.

15. The trial court as observed above evaluated the evidence and found that the prosecution had proved its case against the appellant and convicted him sentencing him to serve 20 years imprisonment.
16. Aggrieved by the trial court's decision, the appellant filed this appeal against the conviction and sentence and raised the following grounds;
 - i. That the learned trial magistrate erred in both law and fact by convicting the appellant on the fact that he had threatened his people in the homestead not to give the true evidence without considering that he had differences with wife alleged mother to the complainant PW1 herein.
 - ii. That the learned trial magistrate erred in both law and fact by relying on the doctor's evidence that the girl herein complainant vagina minor was broken without considering that the minor told the court during cross examination that she had a boyfriend who might have broken her minor this shifted the blame to the appellant.
 - iii. That the learned trial magistrate erred in both fact and law without conserving that appellant was not examined by the doctor to clear the doubt.
 - iv. That the learned trial magistrate erred in both law and fact by rejecting appellant cogent defense which challenged all witnesses evidence adduced by courts prosecution.
 - v. Your honour the learned trial magistrate erred in law and the evidence by failing to apprehend the total evidence that there existed a grudge and vendetta between the appellant and his wife herein.
 - vi. Your honour the appellant invokes not only the powers of the High Court of Kenya under article 165 (3) of the Constitution and the enacts of article 10,27 and 47 of the Constitution which banned not only his discretion and determination but also that he remained under the jurisdiction of the Constitution and not outside it.
 - vii. Your honour the trial magistrate hereby limited total evidence failed to enquire about the truth or otherwise at the allegations of the life of the complainant boyfriend who walked in appellant house hold harm and was the proxy to prosecute PW1 to induce and counsel PW1 to frame appellant.
 - viii. Your honour the trial magistrate and any other court abrogation and delegation of the appellant's rights to fair trial and democracy defeated the will of parliament enriched under Cap 3, 2006 act, the Sexual Offenses Act and contravened article 25,50 (2), (A) of the Constitution of Kenya.
 - ix. Your honour the trial magistrate act of failing to occasion article 35 of the Constitution of Kenya laud the access to in information act of 2015 means section 8 was contravened there to and hereby.
 - x. Your honour in consonance with the requirements of the international declarations and conventions of people and human rights civil and political rights of people deprived of liberty articles 10,14 thereof and access to information held and required to assist violated rights of fair trial, the high court occasion the presumption of the directed the cap 3, the sexual offences act of 2006 there to cap 75 provisions.



- xi. Your honour prudence demands accountability and transparency of public and state office duty that the learned trial magistrate failure to critically and exhaustively analyse the defense and the entire prosecution evidence gave a partisan verdict has broken the family of appellant into two fractures one of the appellant, the elder brother, the son one Patrick has been driven out of home of the appellant by his mother madam Gatuiru and the conclusion of boyfriend of complainant Mureithi Kangana and a young brother to chiefs and elders knowledge because he failed to support the conclusion to embezzle a devised vendetta to chase him out of his ancestral home of his father.
 - xii. Your honour in regard to sections 262-267 *criminal procedure code*, the appellant seeks that;
 - i. The high court of Kenya at Kitui invokes the defense of the *Constitution* article 2, 3 and 10 thereto in reference to total evidence and alleged embezzlement of police OB p3 form and statements.
 - ii. The high court interprets the domesticated international law in relation to household and family of Mureithi Mwaniki appellant herewith his son Patrick has been chased away by Gatiria the mother being elder son wanted to know why a stranger to the family one Mureithi Kang'ana was given the bow and arrow belonging to John Mwaniki Mwithi appellant herein because of drunkenness of appellant and fights with wife spilled over to divide the family between the appellant and his elder son Patrick and Gatiria another daughter Agnes and younger son Julius opposing camps and the alleged son in law to PW1 Mwikali Lena and complainant victim of incest on the other hand.
 - xiii. Your Honour, the appellant is guided by case 259 DZiwajiwa v R Malawe Wanjohi and 2 Others v R Mombasa High Court and Joshua Gichuki Mwangi v R CRA 88/2015 at Nyeri because the acts of PC Zipporah Maragia and medical expert were contrary to article No. 47, 50 (a) of the *Constitution* caused the appellant to suffer prolonged detention unconstitutionally for an excessive and severe sentence.
 - xiv. Your Honour, High Court mandate to call total evidence as under article 165 (3) of the *Constitution* read as together with articles 159 (2) (d) (e) 24 (1) (c) (d) 2 (b) (c) of the *Constitution*.
 - xv. Your Honour, the appellant finally seeks this Honourable Court to reduce the sentence to one third or quash it all together or order a retrial and admit evidence from sim cards of phone line numbers 0758xxxxxx of Ciankari used by Gatiriria, 0793xxxxxx of Mureithi Kan'gana the intruder to the family and boyfriend of LM complainant were with PW1 and his other number 0707xxxxxx.
17. In his written submissions, the appellant submits that he suffered prolonged detention. Further, that his family was broken by the actions of his wife. He submits that his wife and daughter, the complainant conspired to frame him because his wife was having an extra marital affair while the complainant had a boyfriend who the appellant did not like. The appellant alleges that his wife, the investigating officer and the medical doctor who testified in court all conspired to have him convicted so as to have the complainant was married off to another man.
18. The Respondent through the ODPP has opposed this appeal through written submissions dated 20th January 2024. The State submits that the prosecution was able to prove that the appellant was the father to the complainant and that it proved beyond reasonable doubt that the girl was defiled through the evidence of the complainant, her sister and medical evidence. They point out that all the elements



of the offence to wit age, penetration and recognition were proved. It submits that the allegations of being framed was an afterthought.

19. On sentence the Respondent contends that the same was lenient and there was no basis to disturb it. The Respondent at the conclusion part appears to have gotten mixed up perhaps due to some inadvertent copying and pasting but the same is ignored because it is just an inadvertent mistake.
20. This court has considered this appeal and the grounds raised which appear to have been drawn with little relevance to the issues at hand but the written submissions are relevant to the case. I have also considered the response made by the State. My duty as a first appellate court is to re-evaluate the evidence tendered and come to own conclusions.
21. The appellant was charged with Incest contrary to section 20(1) of *sexual Offences Act* which 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:

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”.

22. The issues brought up before this court are as follows;
 - i. Whether the prosecution proved its case at trial to the required standard
 - ii. Whether the sentence meted out was proper

(i) Whether the case was proved beyond reasonable doubt

23. To establish a charge of incest, the prosecution must have proven the elements of the offence which are;
 - i. The victim must be a female person under the age who is related to the perpetrator and the perpetrator had knowledge of the same
 - ii. An indecent act or an act that causes penetration
24. Was it established that the complainant was a relative of the Appellant? Evidence from PW1 was that the appellant was her father. PW2 also testified that she was married to the appellant and that the complainant was their last-born daughter. In his defence, the Appellant did not deny being the complainant’s father. He acknowledged that the complainant was indeed his child. The prosecution established that the victim was the appellant’s daughter.
25. On penetration, the prosecution’s case against the appellant also appears water tight.
26. The key evidence relied by the trial court to prove penetration is the complainant’s own testimony which was corroborated by the medical report presented by the medical officer. Evidence from PW1, the complainant was that she was at home on 30th April 2022 with her sibling and her father, the appellant as her mother was away at her grandmother’s home. She testified that she was sleeping with her siblings in the same bed on the edge when the appellant got into the room and she felt him removing her clothes. She stated that she tried to cry but he pinched her and proceeded to defile her for thirty minutes. She testified that she felt a lot of pain and that at some point he flashed a torch as he left for his house which was about twenty meters from where the complainant and her sibling slept. Her



testimony was that the complainant and PW3 followed the appellant and saw him enter his house. This was different from the testimony of PW3 who failed to mention that the two siblings actually saw him get back into his house after the assault. The only other discrepancy in their testimonies is the mention of a torch by PW1 while PW3 indicated that the appellant was holding a gas lighter. The two siblings however testified that they were both able to see the appellant, their father and were able to recognize him. Recognition of the appellant and the perpetrator was beyond doubt.

27. Medical evidence was tendered by PW4, (Ruth Mutua) a clinician from Kyuso hospital who testified that the complainant was attended to at the hospital on 3rd May 2022 having been brought in with a case of defilement. She testified that she examined the complainant and found that her genitalia was normal, that she exhibited while clear vaginal discharge but her hymen was completely broken which made an impression of defilement. In the P3 form, it is indicated that the hymen was freshly broken. She testified that she also sent the complainant for lab investigations and urinalysis but the results from both did not show anything significant. She tendered a P3 form, a Post Rape Care Form filled for the complainant on 3rd May 2022 as well as treatment notes. The documents were marked as PEXH1, 2 & 3 respectively

28. There is no doubt in light of the evidence of complainant (PW1), PW3 and the medical evidence tendered by PW4 that the element of penetration was proved beyond any doubt. The allegations that the appellant was framed by his wife holds no water and simply an attempt to use the differences he had with his wife as a scapegoat or shield to the heinous act he committed against his own daughter. I find that in his defence he faults his wife for implicating him and the reasons he gave were that he had an altercation with her but in his submissions he accuses her of adultery and wanting to marry another man.

29. On the element of age, incest is not an ordinary sexual offence. The prosecution was only required to prove that the complainant was aged below 18 years. This because Section 20 (1) provides;

With incest not being an ordinary sexual offence, the prosecution was only required to prove that the complainant was below 18 years old as provided for under Section 20 (1) of the *Sexual offences Act* which provides;

“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”.

30. The prosecution however went further and proved that the complainant was age 12 years. The evidence of the clinical officer (PW4) who tendered age assessment (P EXB 4) and P3 Form (P exh1) proved the element of age beyond doubt.

31. The appellant has asked the court to consider his evidence that there was a conspiracy orchestrated by his wife, the complainant, the police and even the medic to have him convicted and further have the complainant married off. But I have found above his accusations against his wife are inconsistent. The appellant’s defence did not controvert evidence tendered by the prosecution witnesses. The trial court also considered his defence well and made the following finding;

“Put on his defence, the appellant spent of the time attempting to show that the incident is part of a wider conspiracy of his estranged wife and that he is framed. But the victim and the elder sister came across as sincere and honest. PW2 testified that the accused has beat her several times before and it was not the first time. She had gone for 4 days as at the time when the incident happened during which she had gone to her mother’s house after a domestic



violence which happened on 26th April 2022. She only got to know after PW3 borrowed a cell phone and called her. This court is of the view that the accused defence is desperate to shift blame on his wife who herself is a victim of his brutality.”

32. The trial court analyzed the appellants’ statement of defence in detail and weighed it against the evidence tendered by the prosecution and gave its reasons for disregarding it.
33. This case has re-evaluated the defence put forward and has already rendered itself as aforementioned.
34. This court finds that the prosecution proved all the ingredients of the offence against the appellant and the trial court reached the correct finding of guilt. I am satisfied that the conviction was safe and it is upheld.
35. On sentence, Section 20 (1) of *Sexual Offence Act* provides for life sentence when the victim of incest is below 18 years. I find that the sentence of 20 years imposed did not take into account the fact that the victim was aged 12 years and to that extent, the sentence was far too lenient and this court is inclined to interfere because even after finding that the offence committed by the appellant was “totally senseless and uncalled for” the trial court went ahead and meted out a sentence which in my view is not commensurate with the offence. In the premises, while I uphold the conviction, the sentence of 20 years is revised and the appellant will now Serve 30 years in Jail. He has 14 days right of appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

