



REPUBLIC OF KENYA



**SP v Republic (Criminal Appeal 50 of 2020) [2024] KEHC 5136 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 50 OF 2020  
DAS MAJANJA, J  
MAY 7, 2024**

**BETWEEN**

**SP ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and Conviction of Hon. V.M. Masivo, RM dated 3rd September 2021 at the Magistrates Court at Nanyuki, Sexual Offence Case No. E001 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant was charged in the Subordinate Court with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (Chapter 63A of the Laws of Kenya). The particulars were that on 26.12.2020, within Laikipia County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of KM, who was to his knowledge his step-sister. In the alternative, the Appellant was also charged with the offence of committing an indecent act contrary to section 11(A) of the *Sexual Offences Act*. The particulars were that on 26.12.2020, within Laikipia County, the Appellant intentionally and unlawfully touched the vagina of KM with his penis against her will.
2. The Appellant denied both charges and the matter was set down for hearing. The Respondent (“the Prosecution”) produced 5 witnesses; the complainant, KM (PW1), M M, KM’s daughter (PW2), Simon Lekel Lekelta, a security officer (PW3), Salat Guyo, a clinician at Nanyuki Teaching and Referral Hospital (PW4) and PC Damaris Ndun’gu, a police officer based at Ngaringiro Police Station (PW5). In his defence, the Appellant testified on his own behalf.
3. After hearing the case, the Subordinate Court rendered a judgment on 03.09.2021 where it found that Appellant guilty of the offence of incest and sentenced him to 13 years’ imprisonment. It is this decision that the Appellant has appealed against through grounds set out in his undated Petition of Appeal that



was filed in court on 13.09.2021 and later amended. The Appellant also relies on his written and oral submissions. The Prosecution opposed the appeal through the oral submissions of its counsel.

### **Analysis and Determination**

4. In *Okeno v Republic* [1972] EA. 32, the predecessor of the Court of Appeal laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court while bearing in mind it neither heard or saw the witnesses testify.
5. With the above in hindsight, I now proceed to determine the Appellant's appeal and in order to do so, it is necessary to reprise the evidence emerging before the trial court.
6. As stated, the Prosecution presented 5 witnesses. PW1 recalled that on 26.12.2020 at 3.00am, she was asleep in her house together with her daughter PW2 when the Appellant came to her home and told her that her father was calling her and all his children. She stated that the Appellant is her step brother as they shared a father. PW1 told the court that though the Appellant was outside, she knew it was him and recognized him from his voice. PW1 stated that he woke up PW2 told her she was going to hear what the father wanted to say. She left with the Appellant and in the course of the journey, the Appellant grabbed her hand, asked her for money as he was aware that she had been paid for some work. PW1 stated that the Appellant threw her on the ground where she fell on her back and he then penetrated her with his penis, "...through the place I use for giving birth" and then ejaculated.
7. PW1 recalled that the Appellant threatened to kill her if she raised alarm. She further stated that the Appellant penetrated four times in the bushes and that she asked him to marry her instead of killing her which he agreed. They then left for PW1's house at around 5.00 am where PW1 gave him Kshs 1,000.00 which he asked for. He ordered her to the bed where he sexually assaulted her until 6.00am. PW1 stated that PW2 was asleep at the time and that she woke her up but did not narrate what happened to her due to the Appellant's presence. PW1 stated that when the Appellant was asleep, she went to report to the Ngaringiro Police Station. Police officers came to her house and arrested the Appellant.
8. PW1 testified that PW2 has a separate room and that her house has 2 rooms and the wall separating the room is tiny. The house did not also have electricity and that while the Appellant was raping her at the house, she complained of pain. She recorded her witness statement at the police station and was taken to Nanyuki Teaching and Referral Hospital.
9. PW2 stated that on the material day she was at home with PW1 when she heard the Appellant outside the house and recognized him from his voice. That PW1 accompanied the Appellant as requested and that at 4.00 am she heard the sound of the door opening and heard PW1 and the Appellant entering PW1's room. That she heard her mother opening a box (sanduku) and asking the Appellant to take the money and further heard the Appellant answering that he does not want money but he wanted PW1. She stated that she was not able to recognize his voice as it was on a low tone and that she also heard her mother saying, "we ondoka kwani wee utosheki" but that the other person was not answering. PW2 stated that at 6:00 am PW1 wake her up to attend to cooking tea and PW1 left and returned with some police officers who arrested the Appellant.
10. PW3 recalled that on the material day at 6.00am, he was on night shift patrol when he met a woman at the gate crying claiming she had been raped. PW3 stated that she knew the woman as she worked in the company PW3 was guarding. He called the OCS Ngaringiro Police Station who commanded him to arrest the perpetrator before police officers arrive. That he took two other security officers and went to the woman's house where the suspect was asleep. PW3 stated that he was dressed up and they handcuffed him and took him away. He stated that the suspect was known to him as a neighbour. When



- questioned on the alleged rape, the Appellant answered that he was in his sister's house. That they took the suspect away and on the way he was placed in a police van and taken to Ngaringiro Police Station.
11. PW4 testified that he filled the PRC form on 29.12.2020 for PW1. PW4 stated that on physical examination, there were no physical injuries and that she had changed clothes and she was stable. That her vaginal analysis showed numeral pus cells and epithelial cells and the pregnancy test was negative. Urinalysis showed pus cells as well and HIV and VDRH were negative. PW4 stated that the presence of epithelial and pus cells showed evidence of sexual assault and that the hymen was broken on vaginal examination. PW4 also noted that there were some whitish discharge from her private parts. PW4 stated that the finding on PRC Form and medical P3 forms were similar and he produced them as evidence.
  12. PW5 recalled that on 26.12.2020 she was at Ngaringiro Police Station when PW1 appeared and reported a rape case against the brother who is Appellant. That they notified the KPR Officers to arrest the Appellant and that together with her colleagues they went and re-arrested the Appellant. PW5 confirmed that they escorted PW1 to hospital and that she concluded that PW1 was raped.
  13. In his defence, the Appellant testified and confirmed that he was arrested by KPR officers on the material day and taken to Ngaringiro Police Station and that he was then arraigned in court on 29.12.2020 when he got to learn of his alleged offences and he later took plea.
  14. In its judgment, the Subordinate Court identified three issues for determination; whether the Appellant was relative to the victim, whether there was an intentional indecent act or penetration of the victim's genitalia by the Appellant and whether the Appellant was positively recognized by PW1. On the first issue, it found PW1 gave evidence that was corroborated by PW2 that the Appellant was a step-brother of PW1 and that the Appellant did not deny in his defence that PW1 was his step-sister. Thus, the Appellant and PW1 met the definition of half-brother and sister as provided by section 22 of the *Sexual Offences Act*.
  15. On the second issue, the Subordinate Court considered the evidence of PW1 and section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) to find that PW1's testimony could be relied on even without corroboration as she was firm in her testimony and gave or recalled every detail well. The learned magistrate was satisfied that PW1 was telling the truth. He found that PW1's evidence was corroborated by PW2 and that the Appellant's arrest at PW1's room was confirmed by PW3. That whereas PW4's evidence was not reflective of the position as to the material time since he examined PW1 four days after the incident, the learned magistrate held that the absence of medical evidence is not decisive as to the fact of penetration which can be proved by oral testimony of the victim or by other circumstantial evidence. In any event, the subordinate court held that PW4's findings of epithelial and pus cells was evidence of corrosion.
  16. On the last and final issue, the subordinate court concluded that the identification was positive and without mistake as the Appellant and PW1 knew each other as step siblings and that PW2 and PW3 also saw the Appellant as he was being arrested from PW1's bed in the morning. Further, that the Appellant also admitted that he was arrested by the KPR officers and was just shy of stating where he was arrested from and whether he committed these offences or not. The Subordinate Court found that the defence did not displace the watertight evidence presented by the Prosecution witnesses that placed him at the scene of the crime and the learned magistrate thus rejected his defence. For these reasons, the Appellant was found guilty and convicted for the offence of incest.
  17. The Appellant is dissatisfied with this conviction and he urges the court to re-look at the evidence which he cites as having major discrepancies. I have gone through the said evidence and conclusions of the subordinate court and I am unable to agree with the Appellant for a number of reasons. First, since the Appellant was charged with the offence of incest, the subordinate court was rightly guided by



- the decision of this court in *GMM v Republic* [2019] eKLR that ingredients for the said offence are; knowledge that the person is a relative within the prohibited degrees and penetration or indecent act.
18. PW1 and PW2 testified that the Appellant was a step-brother to PW1 as they only shared a father. This evidence was not rebutted by the Appellant. Section 22 of the *Sexual Offences Act* states that in cases of the offence of incest, a brother includes a half-brother and that an accused person is presumed to have had knowledge of such a relationship at the time of the offence unless the contrary is proved. Since the Appellant did not refute this relationship, it follows that it was presumed that he knew PW1 was his half-sister at the time of the offence.
  19. On whether there was penetration or an indecent act, section 2 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”. PW1 gave evidence that the Appellant inserted his penis and euphemistically stated that it was, “through the place I use for giving birth”. She stated that she was penetrated in this fashion more than once in the bushes and in her house and that the Appellant even ejaculated inside her. The subordinate court found that her testimony was firm and unshaken and the learned magistrate believed her. The subordinate court was right to state that this evidence alone was sufficient to conclude that there was penetration as section 124 of the *Evidence Act* allowed the trial court to convict the Appellant on the evidence of PW1 as the victim of a sexual offence, if for reasons to be recorded, the trial court was satisfied that she was telling the truth. The trial court was satisfied that PW1 was telling the truth as it observed her demeanour and concluded as such. The evidence of penetration in my view was unassailable and I so find.
  20. Whereas the Appellant submits he was not subjected to any medical examination and that the medical examination on PW1 by PW4 was inconclusive, the Subordinate court was correct in its conclusion that the absence of medical evidence did not negate the fact of penetration which can be proved by the oral evidence of a victim of rape such as PW1 or by circumstantial evidence as was held by the Court of Appeal in *Kassim Ali v Republic* [2006] eKLR. In any event, there was sufficient evidence from PW4’s conclusion that the epithelial cells were indicative of corrosion and corroborated the evidence of penetration as was held by the court in *Rongino Ezra Kemboi v Republic* [2021] eKLR. It for these reasons that I find that the subordinate court did not err in finding that the ingredients of incest were proved.
  21. As to whether the identification of the Appellant was positive, my answer is in the affirmative. The Appellant was well known to PW1. PW1 was with him at night and in the morning and there could have been no mistake that he was her assailant. PW2 and PW3 were present when the Appellant was arrested in the morning after the incident from PW1’s house. The Appellant did not deny that he was arrested by PW3 in PW1’s house from her bed. There was no other person in the house on the material night other than the Appellant, PW1 and PW2 which leads me to conclude the identification of the Appellant by PW1, PW2 and PW3 was safe. Based on the elements of the offence of incest I have outlined and the evidence, I affirm the conviction.
  22. On the sentence, the Appellant submits that the 13-year imprisonment term was excessive and harsh since section 20(1) of the *Sexual Offences Act* provides for a minimum sentence of 10 years but the same is not mandatory. The said provision provides that a person found guilty of the offence of incest “...is liable to imprisonment for a term of not less than ten years” . In my view and contrary to the Appellant’s submission, the tenor of this provision is mandatory and also provides for a minimum sentence of not less than 10 years (see the Court of Appeal decision in *Fred Michael Bwayo v Republic* ELD CA CRA No 130 of 2007 [2009] eKLR). Therefore, the subordinate court did not err in meting out a sentence that was over 10 years. In arriving at the sentence of 13 years, the learned magistrate, in his sentencing ruling of 03.09.2021 considered that the Appellant was a first offender, the Appellant’s



mitigations, aggravating circumstances of the offence, that the incest was without consent, the number of times he committed the act, that the Appellant deceived the victim and took her to the bushes to commit the offence. It was also guided by the [Judiciary Policy Sentencing Guidelines](#) [2014]. I find that the subordinate court was properly guided and took into account relevant factors in arriving at the sentence and I therefore do not find a valid reason to interfere with the same.

**Disposition**

23. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED AND DELIVERED AT NANYUKI THIS 7TH DAY OF MAY 2024.**

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**A.K. NDUNG’U**

**JUDGE**

