



**NMK v Republic (Criminal Appeal 40 of 2023)
[2024] KEHC 6376 (KLR) (3 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 40 OF 2023**

DR KAVEDZA, J

JUNE 3, 2024

BETWEEN

NMK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence of the
Chief Magistrate’s Court at Kibera Sexual Offence Case No.E029 of
2022 delivered by Hon. C. Mwaniki (PM) on 28th August 2023)*

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on the 18th March 2022 at around 0500 hrs. at Ananda Marga area of Kangemi location, Dagoretti Sub County within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of L.S.W, a child aged 5 years 8 months who was to his knowledge his daughter.
2. In the alternative, the appellant was charged with committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 18th March 2022 at around 0500 hrs. at Ananda Marga area of Kangemi location, Dagoretti Sub County within Nairobi County, he intentionally and unlawfully touched the vagina of L.S.W, a child aged 5 years 8 months.
3. He pleaded not guilty to the offence. After a full trial, he was found guilty of the offence of incest and convicted accordingly. Consequently, he was sentenced to serve thirty (30) years imprisonment. Being aggrieved by his conviction and sentence, the Appellant filed the instant appeal.
4. In his petition of appeal and written submissions, the appellant argues that the offence was not proved as the court relied entirely on circumstantial and hearsay evidence. He urged that the evidence was



contradictory and could not sustain a conviction. He further urged that the elements of the offence were not proved and that he had been framed for the differences he had with his wife. The respondent did not file a response or submissions despite being given time to do so; nevertheless, this court will proceed to render its judgment in the interest of justice.

5. As this is a first appeal, I am enjoined to consider all the evidence and reach an independent decision whether or not to uphold the judgment. In so doing, it is necessary to set out the facts as they emerged before the trial court. See *Okeno v Republic* [1972] E.A 32.
6. The child (PW1) gave unsworn testimony after a *voire dire*. She narrated to the court that it was on a Friday morning when her father removed her clothes while I bed and inserted his penis into her vagina. Her mother had gone outside the house for a short call at the time of the incident. Her father then warned her against telling anyone of the incident and threatened to cut her with a panga if she did. He also took a hammer and gestured that he would hit her on the head if she told anyone. She put her clothes back on before her mother got back to the house. Later on, when she wanted to pass urine and went to do it on a potty and it is then that she noticed her urine had blood. Her mother also noticed the same and immediately took her to hospital.
7. PW1's mother, Selina (PW2), told the court that on the 18th March 2022, she woke up at 4:30am and prepared breakfast for her husband who usually left early. They lived in a rental single room on the first floor of a residential building and that the toilets were outside on the ground floor. At around 5 am, she went downstairs to the toilet and left her daughter asleep with the lights on and the television off. However, when she returned to the house, she found her daughter awake and the television was on. PW1 then told her that her father had said that he would hit her (PW1) with a hammer on the head. She however urged PW1 to go back to sleep and that her father would not hit her. It was her evidence that PW1 was nervous.
8. Later on, at around 7am, PW2 took PW1 out of bed to pass urine in the potty and she noticed that PW1's urine was bloody. Thereafter, PW1 urinated more frequently and each time the urine was bloody. PW2 decided to take PW1 to the hospital where PW1 intimated to the doctor what had happened. She then reported the matter to the police and with the assistance of children's rights activists, she took PW1 to Nairobi Women's Hospital where PW1 was examined and treated. During cross examination, PW2 confirmed that there was a hammer and a slasher in the house. She also confirmed that PW1 had not taken a bath prior to her examination at the hospital.
9. PW3, John Njuguna a Clinician at Nairobi Women's testified that PW1 was examined at the hospital on the 18th March 2022. It was his evidence that the examination revealed that PW1's labia majora was swollen and that the hymen was torn. There was also a foul-smelling discharge with stains of blood and the conclusion was that PW1 had been defiled. He produced the P3, GVRC (Gender Violence Recovery Centre) and Post Rape Care (PRC) forms as exhibits.
10. PW4, PC Benson Wakahim, was the investigation officer. It was his testimony that on 18 March 2022 at about 17.19hrs, while he was in the office, he got a report from PW1 and her mother. PW1 was immediately rushed to the hospital for examination. She recorded their statements and received the P3 and other sexual assault examination forms which were duly filled out. He also obtained PW1's certificate of birth and the panty she (PW1) was wearing on the date of the incident, and produced the same as exhibits. PW4 concluded the investigations and charged the appellant with the offence.
11. When put to his defence, DW1, the appellant herein denied committing the offence and testified that on the material day, he woke up at 4 am, took a bath and breakfast then left the house. It was his testimony that his wife (PW2) prepared the breakfast and went back to sleep and that during this time, PW1 was not awake. He stated that he left around 4:20 am and that PW2 locked the door. He denied



having threatened PW1 with a hammer and maintained that he loved PW1 very much. He alleged that the charges were trumped up against him by his wife, with whom he had differences with. He also argued that the offense could not have occurred within the short time frame of about five minutes when PW2 had gone downstairs to the washroom. He further faulted the prosecution for failure to call neighbours as witnesses and failure to conduct any DNA test.

12. Having revisited the record and considered it in the light of the appellant's submissions, the only issues arising for determination are whether the prosecution proved the offence of incest against the appellant to the required standard and whether the sentences were proper.
13. In determining whether the offence charged was proved, the court ought to first consider whether the evidence on record established the offence of incest as against the appellant. Section 20(1) of the [Sexual Offences Act](#), defines incest as follows:

“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..... is guilty of an offence termed incest.”
14. The prosecution has to prove that the appellant committed either an indecent act or one that causes penetration. Under section 2 of the [Act](#), an indecent act means:

“an unlawful intentional act which causes any contact with the genital organs, breasts, or buttocks of another, but does not include an act that causes penetration.” Penetration on the other hand is defined as, “partial or complete insertion of the genital organs of a person into the genital organs of another person.”
15. In this case, PW1 gave a detailed account of how the father removed her clothes and inserted his male genital organ into her vagina just when her mother had stepped out to go to the washroom downstairs, as they all lived in a single room on the first floor of a residential building. The father then threatened PW1, saying he would cut her with a panga if she disclosed the incident to anyone, and even took out a hammer threatening to hit her to further intimidate her. PW1's evidence was further corroborated by the medical testimony of PW3 who produced the P3, GVRC and the PRC. It was PW3's testimony that on examination, PW1's labia majora was swollen and her hymen was torn. There was also a foul-smelling discharge with stains of blood and the conclusion was that PW1 had been defiled.
16. PW1 identified the appellant as the father, and indeed, his name appears on the victim's birth certificate. The appellant did not challenge the fact that he was PW1's father. The case of mistaken identity does not even arise.
17. On the element of age, the prosecution proved that the complainant was 5 years and 8 months of age. The evidence of the investigating officer (PW4) who tendered the complainant's birth certificate proved the element of age beyond doubt. The same was not controverted by the appellant.
18. The appellant complained that he was convicted on the basis of the testimony of PW1 whose credibility was questionable. Under section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya), the court may convict an accused person on the basis of uncorroborated evidence of a child if it is satisfied that



the child is telling the truth. Despite the complainant's evidence having been corroborated by the testimony of PW3, the trial magistrate found the complainant to be candid and held:

“There is no doubt that at the time S. I knew the accused person.... she described in sufficient detail what happened. Her recollection of the actual act was vivid...my observation of her demeanour of the minor [sic] as she testified satisfied me that she was truthful and candid.”

19. In the circumstances, I find that the evidence of the prosecution witnesses, together with the medical evidence proved that PW1 had been defiled and it was the appellant who had defiled her. Contrary to the appellant's assertions, penetration was thus proved.
20. In light of the sufficient evidence I have set out, I find that it was not fatal for the prosecution to fail to call any neighbours as witnesses as submitted by the appellant. Section 143 of the *Evidence Act* does not require a party to call all or any witness to prove a particular fact. The evidence before the court was credible and sufficient to establish the offence of incest.
21. It was also the appellant's contention that he was not subjected to any medical examination or DNA test to link him to the offence. In my view, such evidence was not necessary, and in any event, the trial court found that there was sufficient medical evidence in support of PW1's testimony which was trustworthy as to the person who had defiled her. In *Aml v Republic* [2012] eKLR (Mombasa), the Court of Appeal upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

This was further affirmed in the case of *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

“... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.”

22. On the allegation that the appellant's defence was not considered, it is clear from the record that the appellant in his sworn evidence mainly denied the allegations and as such the trial magistrate in the judgement held that he did not cast any doubt to the prosecution's case. I equally find that the appellant's defence that he did not commit the offence and that he was framed by the complainant's mother (PW2) holds no water and did not at all rebut the strong case advanced by the prosecution against him. Just because the holding did not go his way, did not mean that his defence was disregarded.
23. The appeal on conviction therefore fails.
24. As regards the sentence, the appellant has submitted that the same was harsh and excessive. Section 20(1) of the *Sexual Offences Act* provides that any male person who commits incest with a female person who is under the age of eighteen years shall be liable to imprisonment for life. In sentencing the appellant to thirty (30) years the trial magistrate considered the mitigating factors advanced by the appellant as well as the need to impose a deterrent sentence.
25. The sentence imposed is for protection of society against predators like the appellant. It is my finding and holding that the sentence imposed was lawful, appropriate and justified in the circumstances. I find no reason to interfere with the same. It is affirmed.



26. The appeal is dismissed for lacking in merit.

Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JUNE 2024.

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

