



**ZKK v Director of Public Prosecutions (Criminal Appeal
E014 of 2023) [2024] KEHC 7209 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E014 OF 2023
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

ZKK APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Appeal against conviction and sentence in Tigania Criminal Case
No. 2465 of 2015 by Hon. P.M.Wechuli (RM) on 26th January, 2016)*

JUDGMENT

1. The Appellant was charged with the offence of with the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act* No.3 of 2006. Appellant was also charged with an alternative Charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. The offences were committed on diverse dates between the month of March and November 2015 against BK a girl aged 13 years who was Appellant's daughter.
2. Complainant stated that she used to live with her grandmother and that Appellant who is her father would visit and take her to the shamba and defile her. Sometimes in November, 2015, John Mwangi found Appellant in the act in a thicket in a shamba and he ran away leaving the complainant behind.
3. Geoffrey Muthomi Muriithi examined complainant on 19th November, 2015 testified that he had filed the P3 in respect of the complainant. He stated that the majora and minora were intact, the hymen was torn and complainant was 2 weeks pregnant. He produced the P3 Form as PEXH. 1.
4. Appellant was arrested on 17th November, 2015 from members of public that threatened to lynch him for defiling his daughter.
5. Having heard the case to its conclusion, the trial court convicted the Appellant for incest and sentenced him to serve 30 years' imprisonment



6. Aggrieved by the decision of the trial court, Appellant lodged the instant appeal citing 6 grounds of appeal which may be summarized as follows: -
 - a. The learned trial magistrate still erred in both matters of laws and facts by convicting the appellant without considering the adduced prosecution evidence
 - b. The learned trial magistrate still erred in both matters of laws and facts by convicting the appellant without considering the prosecution evidence was full of inconsistencies and uncorroborated hence Section 163 (1) of the *Evidence Act* (CAP 80) Laws of Kenya was not complied with.
 - c. The learned trial magistrate still erred in both matters of laws and facts by disregarding the appellant's defense without giving cogent reasons.
 - d. The learned trial magistrate still erred in both matters of laws and facts by relying on the attributed evidence of the prosecution witnesses without considering that the same was insufficient and unsatisfactory in law
7. I have considered the evidence on record in the light of the grounds of appeal and the submissions filed on behalf of the DPP Appellant not having filed any.
8. Whereas the clinical officer stated that the complainant was two weeks pregnant, no evidence was tendered in the form of pregnancy test results and the allegation of complainant's pregnancy was therefore not proved.
9. That then leaves the court with the evidence of a broken hymen. The clinical officer did not explain if it was an old scar or a fresh one that could be linked to the incident that was alleged to have taken place only two days before complainant was examined.
10. The issue for determination is whether a broken hymen is prima facie evidence of penetration. In *PKW versus Republic* [2012] eKLR, the Court of Appeal observed that:

“Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.”
11. From the evidence on record, the prosecution failed to demonstrate beyond reasonable doubt, that complainant's hymen was torn by an act of incest by the Appellant.
12. From the circumstances of this case, I find that the conviction and sentence were not safe. In the end:
 1. The appeal succeeds
 2. The conviction is quashed
 3. The 30 years' sentence is set aside



4. Unless otherwise lawfully held, Appellant shall be set at liberty

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

