



**MNK v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 8575 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E020 OF 2023**

**FR OLEL, J
JULY 17, 2024**

BETWEEN

MNK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Conviction And Sentence Delivered on 7th June 2023 By Hon
L.G.Rubu (SRM) at Mwingi Chief Magistrate Sexual Offence Case No E029 of 2021)*

JUDGMENT

A. Introduction

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 diverse dates between the 15th and 17th June 2021 within Kitui County intentionally and unlawfully caused his penis to penetrate the vagina of CKM his daughter, a child aged 11 years.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars were that diverse dates between the 15th and 17th June 2021 within Kitui County intentionally and unlawfully touched the vagina CKM his daughter, a child aged 11 years.
3. During trial the prosecution called five witnesses who testified in support of their case. The appellant was placed on his defence. He gave sworn evidence and called one witness to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of incest and proceeded to convicted him under section 215 of the criminal procedure code. He was subsequently sentenced to serve twenty (20) years imprisonment.



4. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on 29.06.23. The grounds of Appeal raised were that;
 - a. The trial Magistrate erred in both law and fact by not considering this was a framed case by the mother of the complainant (my estranged wife) who had promised to teach him a lesson.
 - b. The trial Magistrate erred in both law and fact by admitting the prosecution evidence adduced which was totally non-collaborative thus violating the provision under section 163 of the Evidence Act, Cap 80 laws of Kenya.
 - c. The trial Magistrate erred in both law and fact by convicting me relying on the doctors evidence without considering that this was misdirection since there is nowhere in the P3 form indicated whether the element of penetration was noted by the doctor who inspected the minor.
 - d. The trial Magistrate erred in both law and fact by not considering my Alibi defence which was strong enough to water down the evidence adduced before the trial court.
 - e. The trial Magistrate erred in both law and fact by convicting me relying on the identification by the complainant without considering that as a parent, I had the responsibility to reprimand her (PW1) from bad characters for a better future.
 - f. The trial Magistrate erred in both law and fact by not summoning key witnesses named in this case to clear doubt since all was fabricated and only hearsay.
5. The Appellant later filed Amended grounds of Appeal on 31st March 2024, which basically challenged the sentence passed as excessive and urged the court to resentence him to a lesser period as he was suffering from depression and was the soul bread winner of his family. He prayed that he be placed on Community service.

B. Facts at Trial

6. The PW1 CKM testified that she is 12 years and was born on 23.07.2010. One night during the month of June, while she was asleep with her elder sister and her younger siblings on the same room, her father (the Appellant) came, removed her from the bed, removed her underwear and did bad manners on her through her private part. She pointed to her vagina area to show where her father did the bad manners. She had woke up, and found him doing bad manners and told him she will tell on him to her grandmother. This prompted him to stop, he left and PW1 continued sleeping.
7. The following morning, she told her elder sister what had transpired at night. They called their mother who used to live and work in Nairobi and also informed her grandfather and their neighbor as to what had taken place. PW1 also informed the village elder, who took them to the Assistant chief and had the matter reported to the police. She was interviewed and taken to hospital where she was examined and later, the Appellant had been arrested.
8. It was her further evidence, that this was not the first incident. Previously, the appellant had defiled her and she had reported the incident to her grandmother, who cautioned the Appellant. She also disclosed that the Appellant was her step father, and had chased away her mother from home due to domestic differences.
9. Upon cross examination, PW1 stated that she was sleeping on the other side of the bed and her sister did not wake up during the incident. She reaffirmed that they resided together in the same house and it was the appellant who defiled her and not his cousin as he had alleged. After they reported this incident,



- the Appellant had become hostile and threatened to send her away. She reaffirmed that she had told the truth as to what had transpired.
10. PW2, EM, PW1, elder sister did testify that on 17.06.2021 she and her younger siblings NM and D has slept in one bedroom, with their father, (the Appellant) who slept on the floor, while PW1 has slept on the other room. Their mum was away as she had differences with the Appellant and he had kicked her out of the house. At some point in the night, PW1 called her. She went to her bed and asked her what was wrong, but PW1 remained silent. On that night they slept together. The following morning PW1 told her she would tell her something. Later after school PW1 told her that their father had lifted her clothes up and he knew what he had done to her. The next day they called their mother who promised to come back home. This incident became an issue, the Appellant chased both of them from home and told her not to enter his house. They went to the village elder Kasilu, and reported this incident, and were later taken to the police.
 11. PW2 further testified that she had no dispute with her father and he had never defiled her, though there was a day he met her after she had taking a bath and asked her to do bad manners with him but she refused. This incident had happened well before Kasyoka's incident. Further on the night of the incident, she had woken up by the commotion in PW1's room and that is when PW1 had called her for assistance. Upon cross examination PW2 reaffirmed that, she had been woken up by commotion in PW1's room and had not been coached by their mother to lie as against the Appellant.
 12. PW3, KM, testified that she was the mother of the victim PW1, who was aged 12 years old. That on 05.05.2021, her husband kicked her out of their marital home and she left behind her children as her husband ordered her to leave without them. On 18.06.2021 she received a call from, PW2, who had used their neighbour's phone and she did inform her that PW1 wanted to talk to her. PW1 informed her that her father had defiled her. PW3 took action by calling her mother in law and asked her to investigate these allegations. She summoned the Appellant but he denied any wrong doing.
 13. On 22.06.2021, PW2 called her again called again and informed her that the Appellant had again defiled PW1, she requested them to report this incident as she prepared to travel home to intervene. Three days later, she was informed by the village elder that the Appellant had chased PW1 away from home after they had formally reported the matter to the police. PW1 was later referred to the hospital and was medically examined. PW3 confirmed that this incident had occurred while she was away, but she had got the opportunity to interrogate her daughter, who told her that on the material night she had woke up to find her father on top of her and he had inserted his penis on her vagina.
 14. Upon cross examination she stated that she believed her daughter who told her that the appellant had defiled her twice. PW3 further denied fabricating this case and affirmed having told the court the truth. The appellant was taken to the Assistant chief and arrested from there.
 15. PW4 Dr Curtis Alice confirmed that she examined PW1 on 19.11.2021 and she had given a history of having being defiled twice by a person well known to her, on the night of 17.06.2021 and 22.06.2021. On examination her hymen was absent and she had an old scar of hymen. She had no infection. PW4 concluded that from her professional observation the patient had been defiled. She produced the medical documents into evidence. Upon cross examination she confirmed that she had six years work experience at Mwingi Level 4 Hospital and that PW1's hymen was absent, which confirmed that she had been defiled and was no longer a virgin.
 16. PW5 Police CSK, the investigating officer recalled that on 26.06.2021 she was assigned to investigate a case reported of incest concerning PW1. The report had been made by the assistant chief. She interviewed the minor (PW1), who narrated to her how on 17.06.2021 while asleep with her siblings in the same house, had woke up to find her father defiling her. She had slept on the floor while her



siblings were on the bed. She confirmed that that was the second time, she was being defiled by the Appellant, the earlier incident having occurred on 15.06. 2021. Eventually the area Assistant chief was informed and action taken.

17. PW5 also confirmed having interviewed, PW2 who confirmed that the incident happened and was the one who looked for means to call their mother (PW3). She produced the birth certificate into evidence. Upon cross examination PW5 confirmed that she did not witness the incident nor was the Appellant taken for medical examination as he had been arrested several days after the incident had occurred.

C. Defence Case

18. The appellant gave sworn evidence, and stated that the charges leveled as against him were false. He was PW1's step father and because she was a truant child, he had given her an ultimatum to leave his house, if she could not become a good child. PW1 was unhappy with his tough stance and that is why she had made false allegation as against him, supported by PW3, her mother, who too had colluded in this conniving scheme. He reiterated that he had been falsely accused, was innocent and urged the court to set him free.
19. DW2, KK, stated that the accused was her grandson and she had never seen him wrong anyone. The Appellant had been unmarried for a long period of time, but after sometime he came back home with a wife who had six children. The children were enrolled at the local school and the couple resided for two years after which they started to have differences. Eventually PW3, who was a teacher left home but left her children behind. She also warned DW2, that she would ensure the Appellant is arrested and imprisoned. One day while at home the Appellant was arrested and she later learnt that he had been accused of defilement.
20. Upon cross examination DW2 stated that when PW3 got an opportunity to be employed as a teacher in Nairobi, she left home and left her children behind. The cause of their rift with the Appellant was that PW3 had started to have a fling/affair with appellant's brothers and despite being cautioned, she would not listen to her husband.

D. The Appeal

21. It is now well settled, that Appellate Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno- v- Republic* (1972) EA 32 & *Pandya v. Republic* (1975) EA 366.
22. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion. See *Shantilal M. Ruwala- v-R* (1975) EA 57. Where it was stated that;

It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

23. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find that the issues for determination are;
 - a. Whether the prosecution discharged the burden of proof.
 - b. Whether the trial Magistrate failed to consider the Appellants Defence.



- c. Whether the sentence handed down was harsh and excessive under the circumstances.
24. The appellant was charged with an offence of incest by a male person contrary to section 201(1) of the sexual offences Act No 3 of 2006 and in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act No 3 of 2006.
25. Section 20 of the sexual offences Act, 2006 provides for the offence of incest by a male person as follows;
- “ 20. Incest by male person
- Any person who commits an indecent act or act which causes penetration with a female person who to his knowledge his daughter, granddaughter, sister, mother, niece, aunty or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years”
- Provided that, if it 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 indecent act was obtained with the consent of the female person”
26. Consequently, the ingredients for the said offence are as follows
- i. Proof that the offender is a relative of the victim
 - ii. Proof of penetration or indecent Act.
 - iii. Identification of the perpetrator.
 - iv. Proof of the age of the victim.
27. The act proceeds to define penetration under section 2 to mean “the partial” or complete insertion of the genital organs of a person into genital organs of another and defines indecent Act to mean “any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration.”
28. Finally, section 22 of the said Act identifies the test of relationship in the following manner;
- Section 22(1) of the said Act
- In case of the offence of incest, brother and sister includes half-brother, half sister and adoptive brother and adoptive sister and a father includes a half father and uncle of the first degree and a mother includes a half mother and an aunty of the first degree whether through lawful wedlock or not.
- Section 22(2) of the said Act further provides
- a. Uncle means the brother of a person’s parent and aunty has a corresponding meaning (emphasis added)
 - b. “Nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;
 - c. “half-brother” means a brother who shares only one parent with another;
 - d. “half-sister” means a sister who shares only one parent with another;



- e. And “adoptive” brother means who is related to another through adoption and “adoptive sister” has a corresponding meaning
29. It flows therefore from the above provision’s that there must exist a defined relationship between the offender, which relationship is contemplated under the *Act*. As such, any other relationship not contemplated under the Act does not pass the test of relationship under the *sexual offences Act*.
30. In this instant Appeal, PW1 – PW3 confirmed that indeed the Appellant was their father/husband, and this fact too was confirmed by the Appellant himself and his witness DW2, who both confirmed that PW1 was his step daughter. On the issue of age, PW5 produced the minors birth certificate Entry No xxxxxxxxxx, which confirmed that PW1 was born on 23.07.2010 and thus by the time the incident occurred, the child was 11 years in Age.
31. Further PW1 did testify that on two occasions, in June 2021, when they were asleep at night, the Appellant came, removed her underwear, shirt and shirt and proceeded to rape her. It was her testimony that; “proceeded to do bad manners on my private part..... Witness points at her private part (i.e vagina area/region) to show where her father did bad manners..... I woke up and found him doing bad manners on me”.
32. When the second defilement incident happened on 17.06.2021, PW1 called her elder sister PW2 to come to her bed, for solace and protection. On the said night, they ended up sleeping together. PW1 later revealed to her that the Appellant had defiled her. They reported this incident to their mother PW3, and the village elder, who took action and through the assistant chief had the matter reported to the police. PW4 Dr Alice Curtis also produced the P3 form, and treatment notes which confirmed that the hymen of the PW1 had been broken and had an old scar, though PW1 did not have any infection.
33. A review of the evidence on record, leads to the irresistible conclusion that the prosecution presented overwhelming evidence which prove that indeed the Appellant had defiled his step daughter, who sought immediately protection from her elder sister, and the following day took deliberate steps to have issue exposed. Finally, on identification, this was a clear case of recognition of a crime undertaken by an immediate family member, known to the victim and his identification was not in doubt. The upshot is that all the ingredients to prove incest were sufficiently proved and the Appellants conviction cannot be faulted.
34. The Appellant in his submissions faulted admission of PW1 evidence, on the basis that she was a minor and was allowed to give sworn evidence, yet she did not understand the meaning of Oath and/or the solemnity of the occasion. The Appellants apprehension is misplaced as voire dire examination was done and the trial magistrate clearly noted that “Am not satisfied the witness appreciates the sanctity of oath. She can give unsworn testimony.” The law of voire dire is that if the child does not understand the meaning of oath, his/her unsworn evidence can still be accepted and corroborated with other independent evidence to balance and find out where the truth lies.
35. Secondly the Appellant further faulted the trial magistrate for failing to consider the defence raised that PW1 was a truant child, and was being used by her mother PW3 to settle marital fallout scores. If all evidence adduced by the prosecution was considered and weighed as against his evidence, the trial court ought to have found in his favour. The appellants allegation of his defence not being considered by the trial Magistrate is not true, as the trial magistrate dutifully considered the same at paragraph 9-10 of her judgement and found that the defence raised had glaring inconsistencies and did not displace the prosecution evidence.



36. The final issue raised by the Appellant was the sentence handed down was harsh and excessive. He was unwell and the long period of confinement would further put a strain on him. The Appellant also urged this court to also consider the period he had spent in custody and invoke provisions of Section 333(2) of the *criminal procedure code* to have the same included as part of his sentence.
37. Sentencing parameters are carried out at the discretion of the court but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharashtra* at paragraph 70 – 71 where the court held;
- “Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”
38. In the case *R v. Scott* (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –
- “There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed...one of the purposes of punishment is to ensure that the offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender.”
39. The Appellant was charged with the offence of incest by male persons contrary to section 20(1) of the *sexual offences Act* No 3 of 2006, with the alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *sexual offences Act* No 3 of 2006. The appellant was convicted of the main charge and sentenced to serve twenty (20) years imprisonment. Section 20(1) of the *sexual offences Act* No 3 of 2006 provides 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 indecent act was obtained with the consent of the female person.”
40. It is obvious that the Appellants was given a proportionate sentence, which was far less severe than what is provided for in law. Looking at the circumstances of the case, the age of the minor and particulars of mitigation as pleaded before the trial court I do find that the sentence melted out to be fair and proportional.
41. As regards section 333(2) of the *Criminal Procedure Code*, The Appellants has a right to be treat equally before law and not to be discriminated against. He was arrested on 02.07.2021 and during the period of trial spent the entire period in remand. The Appellant must enjoy benefit of the period spent in custody



E. Disposition

42. I do find and hold that, this Appeal made as against conviction and sentence passed in Mwingi Chief Magistrate court Criminal case (S.O) No E029 of 2021, by Hon I.G. RUHU (SRM) dated 7th June, 2023 is unmerited and the same is dismissed.
43. The Appellant sentence will run from 02.07. 2021 and not 07.06. 2023, when sentenced by the trial court and this review is made pursuant to provisions of Section 333(2) of the [criminal procedure code](#).
44. Right of Appeal 14 days.
45. It is so ordered.

JUDGMENT WRITTEN, READ AND SIGNED AT MACHAKOS THIS 17TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of July, 2024.

In the presence of:-

Appellant present from Kamiti maximum prison

Mangare/Otulo for O.D.P.P

Susan/Sam Court Assistant

