



**NKM v Republic (Criminal Appeal E015 of 2022)
[2024] KEHC 8854 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E015 OF 2022**

S MBUNGI, J

JULY 19, 2024

BETWEEN

NKM APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from both conviction and sentence of 10 years imprisonment meted on the appellant in the Chief Magistrate's Court at Muranga in Sexual Offence No. E 003 of 2021 by SRM Hon S.K Nyaga on 4th May, 2022)

JUDGMENT

1. This appeal arises from the judgement of the Honourable S.K Nyaga delivered on 4th May, 2022 in the Chief Magistrate's Court at Muranga. 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 of the charge were that on the diverse dates between December, 2020 and the 16th day of February 2021 at unknown time within Muranga county (The accused) intentionally caused his penis to penetrate the vagina of PNM his mother aged 87 years.
2. The appellant faced an alternative charge of committing an indecent act with an adult Contrary to Section 11(a) of the Sexual Offences Act No 3 of 2006. The particulars of the charges are that on the diverse date's month of December and 16th February, 2021 unknown time in Muranga County, intentionally touched the vagina of PNM with his penis against her wish.
3. The Appellant in his appeal requests that: -
 - a. The conviction be quashed.
 - b. The sentenced be set aside



- c. He be set at liberty forthwith.
4. The appellant, lodged five (5) grounds of appeal as follows: -
 - i. That, the learned trial magistrate erred in matters of law and fact by convicting and sentencing the appellant on the prosecution case that was not proved beyond any reasonable doubt.
 - ii. That, the learned trial magistrate erred in matters of law and fact by convicting and sentencing the appellant on evidence that was full of contradictions, and inconsistencies discrepancies.
 - iii. That, the learned trial magistrate erred on matters of law and fact by convicting and sentencing the appellant on a scanty and unsubstantiated evidence.
 - iv. That, the learned trial magistrate erred on both matters of law and fact by not considering the appellants plausible defence.
5. The court directed the appeal be disposed off by way of written submissions.
6. The parties filed the written submissions.

Analysis of The Submissions

Appellants submissions

7. The appellant submitted that his conviction and sentencing was unsafe for it was based on contradictory evidence, scanty, and substantiated evidence.
8. He also submitted that the trial court never considered his defence.
9. On sentencing he faulted the trial court for imposing minimum mandatory sentence against him thus failing to exercise judicial discretion on sentencing.
10. He cited several authorities in support of his submissions.

Respondents submissions

11. The respondent submitted in opposing the appeal that the appellant was properly convicted and sentenced.
12. All the ingredients of the offence were proved beyond reasonable doubt.
13. The ingredients proved (i) penetration (ii) lack of consent (iii) identity of the perpetrator (iv) age.
14. On the issue of the sentence, respondent submitted that the sentence was proper and was within the parameters of the law.
15. I have looked at the proceedings, submissions and the grounds of appeal.

Issues for Determination

- i. Whether the prosecution case was proved beyond reasonable doubt against the appellant.
- ii. Whether the trial court misdirected itself by imposing minimum mandatory sentence against the appellant.



Determination

16. This being the first appeal, it is the duty of the Honourable court as the first appellate court, to re-examine, re-evaluate, and reconsider the evidence afresh and make its own conclusion on it. This was the holding of the court of appeal in *Okeno v Republic* [1972] EA 32 as thus; An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic*) [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v Republic* [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's conclusions. 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 had the advantage of hearing and seeing the witnesses, (See. *Peters v Sunday Post*, [1958] EA 424)."
17. The evidences captured in the proceedings at the lower court can be summarized as follows: -
18. PW1 the complainant /victim PNM testified and said that she knew the accused who is her last born. She is the biological mother of the accused person. That on between the month of December 2020-10th February 2021 her son (accused person) went to her at night and she opened her door for him. She gave him food and after eating the accused put her down and undressed her. The accused proceeded and had sexual intercourse with her at the kitchen. The accused later left after committing the act and never came back again. She stated the incident happened once. She gave evidence that she informed Beatrice Wangui of the incident and went to Muranga Level 5 hospital for treatment. She went to hospital and was issued with treatment notes Prosecution Exhibit 2 and P3 form was issued prosecution Exhibit 1. She said that she's illiterate, her eyes were a bit sickling, the kitchen was well lit. The Accused did not eat before committing the offence. She did not have any dispute with the accused. They used to stay together, she used to feed him. She did not scream as she was surprised. On Cross examination she said that she could not remember the date of the incident since that time she became disoriented. She further said that accused had ambushed her and could not tell whether he was drunk or not.
19. PW2 told the court that on 25th February 2021 that her mother (PW1) told her that the appellant (her brother) had sexual intercourse with her and that she was swelling on her vagina. She also told the court of how the appellant had reported them to the area district officer alleging that her and her siblings they were saying that the appellant raped their mother.
20. PW3 testified on how PW2 disclosed to her that their mother had told her that the appellant had sexual intercourse with her. Her and PW2 took the complainant (PW1) to Muranga level 5 hospital for treatment. She also told the court of how the appellant had reported them to the area district officer alleging that her and her siblings they were saying that the appellant raped their mother
21. Clinical officer (PW4) at Muranga Level 5 hospital gave evidence and stated that PW1 was brought to the facility on 22/3/2021. PW1 reported that in December 2020 a person well known to her, his last-born son, raped her and threatened her using a panga not to disclose the information.
22. PW5 the investigating officer testified on how the report was made at the police station and the investigations done.
23. In his defence the accused denied committing the offence. He dismissed the case as a frameup for since the demise of his father in 1989 he started having differences with his sibling's over inheritance and his sisters want him arrested so that he cannot claim his inheritance.



24. That on 26th March 2021 Margaret one of his sisters called him and told him that he did not have any inheritance since his brother called him and told him the same. He decided to report to the pastor one Bernard Kamau and the area chief.
25. On 15th March 2021 he met at the Chief's office and his siblings told the chief that he had raped his mother. He was then arrested and taken to Muranga police station, the 17th March he was charged before court.
26. The offence of incest is created under section 20(1) of the *sexual offences act*.

“20(1) 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 a female person.”

27. To prove the offence the prosecution has to prove the following: -
- i. The relationship between the accused and the complainant
 - ii. Age of the complainant
 - iii. Penetration
 - iv. Identity of the perpetrator

28. Relationship

It is not disputed that the accused is the son of the complainant. The accused admits so.

29. The age of the complainant

It is not disputed that the complainant is aged 87 years

Penetration

30. The complainant recalled how the accused allegedly put her down and undressed her and proceeded to have sexual intercourse with her.

PW4 a clinical officer upon examination noted that there were healed scars on the vagina of PW1 and opined that PW1 had been raped. The accused in his submissions maintained that the penetration was not proved for the complainant could not be believed because she suffered from mental disorientation as well as dementia. The medical examinations were first conducted on 10/3/2021 and the findings could not have proved any penetration. The findings were that, the complainant had an old scar on her labia majora and had infections. It is not said what infections were diagnosed. He submitted that the case of pain complained off by the complainant on or there about 25/2/2021 was as a result of infection. Though it is doubtful as to why she was delayed for two weeks to be taken to hospital. No mention of anything else that could have resulted to pain during urination except the infection. He said that was normal due to poor hygiene on the elderly people. The presence of the scar by itself could not and cannot be a total proof of penetration. There are many causes which can result to scar on labia majora as it is the outer side of the vagina which protect the inner parts. In the case of *Samuel Itagi*



Muhira v Republic appeal No. 113 of 2015 (unreported) the court of appeal held that a P3 form which fails to disclose the age of the injury in case of defilement cannot be relied upon to prove the guilt of the accused. The age of the injuries was not given by the clinical officer and thus could not have been attributed to the alleged crime. He further submitted that the P3 itself was confusing as the case itself.

The referencing indicated 26/16/3/2021 which was a deviation from the date referred by the OCS on 10/3/2021. It also took the doctor more than 2 weeks to fill the P3. No mention who had kept the P3 and how it was kept, why so kept, who came into contact with it and all the variations on dates. On part B paragraph 5 no comment by the doctor. All these omissions were suspicious. I have noted the omissions raised by the accused; I find that the omissions do not lessen the evidence of PW1 and PW4 and find that the ingredients of penetration was proved.

Identity of perpetrator

31. The prosecution submitted that PW1 positively identified the appellant. The appellant is son to PW1. The offence took place in PW1'S kitchen which was well lit for an offence of rape there is close contact and as such chances of identification are very high and as such there was positive identification with a possibility of zero error.
32. The accused on his part submitted that the identification of the perpetrator was not safe and sound to warrant a conviction. He referred the court to the case of *Wamunga v Republic* [1989] KLR 424 where the court of appeal stated: it is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or error before it can safely make it the basis of a conviction.
33. He submitted that the offence was allegedly committed at night although it was said the place was well lit the source and the nature of light was not explained, especially given that the complainant said she had sick eyes and further she might have been shocked to correctly identify the assailant for she said she was ambushed.
34. I have carefully considered the accused defence on this; I dismiss it for it is not in dispute that the accused is the son of the complainant. They used to stay two of them in the home. As submitted by the accused, they were in good terms and even the complainant served the accused with food on the fateful date, again offence of this nature the parties have to come into contact, therefore the complainant had enough time to see the accused very well.
35. The doctor who examined the complainant said she was well, he did not say that she was suffering disease of the mind. She was in fair general condition. Therefore, she was able to see well and recognize the assailant.
36. In view of the above, I find that the ingredients of identity of perpetrator was well proved. There is no evidence that the complainant had grudge against the accused such that she could think of framing him up. The differences between the accused and his sisters and brother cannot be extended to their mother, am satisfied that the complainant told the court the truth. I am alive to provisions of Section 124 of the *evidence act* which allows the court to convict on the sole evidence of a victim of sexual offence if it is satisfied that the victim is been truthful.
37. All in all, I find that the trial Magistrate correctly convicted the accused person for the prosecution adduced water tight evidence. Therefore, I uphold the conviction and find the accused appeal has no merit and it is hereby dismissed.



Sentence

- 38. The accused asked court to consider his mitigation which I have. The punishment for the offence of incest is provided for in Section 20(1), it attracts a sentence of not less than ten years on conviction.
- 39. I have taken into account the circumstances in which this offence was committed. the accused took advantage of his own mother who was very old and defenseless. The law requires old people to be protected from all forms of violence.
- 40. The trial court in sentencing the accused person took into consideration the time the accused took in custody in line with Section 333 of the *Criminal Procedure Code*.
- 41. The trial court also sought for the pre-sentencing report. I have looked at the accused mitigation and the pre-sentencing report; I have found no reason to disturb the sentence passed by the trial court. The trial court took into account all the relevant factors.
- 42. In conclusion I find the appellant's appeal has no merit, the same is dismissed. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED ON 19TH DAY OF JULY, 2024 BY HON MR. JUSTICE S MBUNGI

HON S. MBUNGI

JUDGE OF THE HIGH COURT

In the Presence/Absence of

- 1. Appellant /Advocate.....
- 2. Respondent /Adorate.....
- 3. Court Assistant.....

