



**WKK v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 9475 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E021 OF 2023**

**RL KORIR, J
JULY 24, 2024**

BETWEEN

WKK APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E041 of 2022 by Hon. Kiniale L. in the Senior Principal Magistrate’s Court in Bomet)

JUDGMENT

1. The Appellant was initially charged with the offence of defilement contrary to section 8 (1) (2) of the [Sexual Offences Act](#). The charge was later substituted and the Appellant was charged with the offence of incest contrary to section 20(1) the [Sexual Offences Act](#). The particulars of the charge were that on 23rd June 2022 at Bomet East Sub-County within Bomet County, the Appellant intentionally and unlawfully touched the vagina of L.C with his penis who was to his knowledge his daughter.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the charge were that on 23rd June 2022 at Bomet East Sub-County within Bomet County, he unlawfully touched the vagina of L.C, a child aged 3 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. The Appellant on the other hand closed his case without testifying or calling any witnesses.
4. In a Judgment dated 9th May 2023, the trial court convicted the Appellant of the charge of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) and sentenced him to serve life imprisonment.



5. Being aggrieved with the Judgment of the trial court, the Appellant, WKK appealed through an undated home-made Appeal against his conviction and sentence on the following grounds reproduced verbatim: -
 - I. That the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.
 - II. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence that were not adduced in court during the trial.
 - III. That, the learned trial Magistrate erred in law and fact by depending on evidence which was based on theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the prosecuting witnesses.
 - IV. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.
 - V. That I wish to be present during the hearing of my appeal and I also request court proceedings.
6. The Appellant relied further on the following grounds reproduced verbatim:-
 - I. That the learned trial Magistrate erred in law by not appreciating that the charge sheet was incomplete drafted/defective charge sheet.
 - II. That the trial Magistrate erred in law by awarding a life sentence which is against the spirit of the Constitution of Kenya and does not meet the objective of sentencing as listed in pages 15, paragraph 14 of the sentencing policy.
 - III. That the learned trial Magistrate erred in law not considering my mitigation.
7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Supreme Court of India explained the duty of a first appellate court in K. Anbazhagan v State of Karnataka and others Criminal Appeal No 637 of 2015 as follows:-

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed.....”
8. I proceed to consider the case that was before the trial court in the succeeding paragraphs.

The Prosecution’s Case.

9. It was the Prosecution’s case that the Appellant defiled L.C (PW2). PW2 testified that the Appellant beat her up in her private parts and thereafter bought her a soda and kangumu and asked her to go home.



10. NC (PW1) who was the PW2's grandmother, MCK (PW3) who was the victim's neighbour and No 256308 PC Irene Kemumo (PW6) who was the investigating officer testified that when they found PW2 on the material day, she was still bleeding from her private parts.
11. Paul Sigei (PW5) a clinical officer at Longisa Hospital testified that he examined PW2 and found that she had a freshly broken hymen and had a lot of vaginal bleeding. He further testified that he noted lacerations on PW2's vaginal wall and the presence of epithelial and pus cells. It was PW5's conclusion that PW2 had been defiled.
12. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant closed his case without testifying or calling any witnesses.
13. As earlier stated, the Appellant was convicted and sentenced to life imprisonment prompting this Appeal.

The Appellant's Submissions.

14. In his undated submissions filed on 5th June 2024, the Appellant submitted that the charge sheet was defective because the charge sheet failed to indicate the number and year of the Act from which the charge emanated from. That the charge sheet indicated "defilement contrary to section 8(1) (2) of the Sexual Offences".
15. It was the Appellant's submission that sentence as prescribed in section 8(2) of the Sexual Offences Act was mandatory and that it took away the trial court's discretion in sentencing. That recent case law showed that a trial court could divert from the mandatory minimum sentences. It was his further submission that courts are supposed to consider the circumstances of the case while sentencing.
16. The Appellant submitted that the Court of Appeal in Mombasa pronounced that a life sentence was unconstitutional as it did not uphold the dignity of an individual as provide under Article 28 of the Constitution of Kenya. The Appellant asked this court to grant him a lenient sentence.

The Prosecution's submissions

17. Through their undated submissions, the Prosecution submitted that the victim (PW2) was aged 3 years at the time the offence was committed. That the victim's birth certificate was produced as P.Exh 4 and further that the Appellant did not challenge the victim's age.
18. It was the Prosecution's submission that the Appellant was sufficiently identified through recognition. That the victim referred to the Appellant as "baba" and the victim's grandmother (PW2) confirmed that the Appellant was the father of the victim.
19. The Prosecution submitted that there was no doubt that the victim was defiled. That despite the victim being a child of tender years, she told the trial court that the Appellant beat her in her private parts. The Prosecution further submitted that PW3 found the victim weak, shivering and bleeding from her private parts.
20. It was the Respondent's submission that the clinical officer (PW5) found a lot of vaginal bleeding, a freshly torn hymen and a lot of epithelial and pus cells. That the clinical officer's conclusion was that the victim had been defiled.
21. The Respondent submitted that the Appellant failed to defend himself in the trial court and only filed submissions on Appeal. That he did not challenge their overwhelming evidence.



22. I have gone through and considered the trial court’s proceedings, the undated Grounds of Appeal, the undated Appellant’s written submissions and the undated Respondent’s submissions. The following issues arise for my determination:-
- i. Whether the charge sheet was defective and the consequences thereof.
 - ii. Whether the Prosecution proved its case beyond reasonable doubt.
 - iii. Whether the Sentence preferred against the Appellant was just and fair.

i. Whether the charge sheet was defective and the consequences thereof.

23. The Appellant contends that the Charge Sheet relied on by the trial court to convict him was defective as it failed to indicate the full name of the Act and its year. The substantive law on defective Charge Sheets is Section 134 of the [Criminal Procedure Code](#) which provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

24. The Court of Appeal in the case of [Isaac Omambia v Republic](#) (1995) eKLR stated as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the [Criminal Procedure Code](#) which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

25. As stated earlier in this Judgement, the Appellant was initially charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The charge sheet was amended and the charge of defilement was substituted with that of incest contrary to section 20(1) of the [Sexual Offences Act](#). The Appellant referred to the first charge sheet which contained the offence of defilement. That charge sheet ceased to exist once the amended charge sheet was filed and plea taken by the Appellant. In any event, and in reference to the first charge sheet, the failure to indicate the full title of the Act and the year i.e. the [Sexual Offences Act](#) No 3 of 2006 would not prejudice the Appellant in anyway as it was clear the kind of charge he faced.
26. Additionally, the Appellant was present in court when the application to amend the charge sheet was made on 20th September 2022 and he did not raise any objection. He took a fresh plea on the substituted charge on 22nd September 2022 and a plea of not guilty was entered by the trial court. The Appellant participated in his trial by cross examining all the prosecution’s witnesses.
27. Based on the above, I am satisfied that the charge sheet was properly drafted and the Appellant understood the charge he faced. In essence, the charge sheet was not defective and I therefore dismiss this ground of appeal.



ii. Whether the Prosecution proved its case beyond reasonable doubt.

28. The offence of incest is defined in section 20(1) of the [Sexual Offences Act](#) as:-

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 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 the female person.

29. In [F O D v Republic](#) (2014) eKLR, Majanja J (as he then was) held that:-

“While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest.”

30. Further, in [MG v Republic](#) (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) (27 October 2022) (Judgment), Mativo J (as he then was) held:-

“Thus the ingredients for the offence of incest are:

- 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.”

31. I agree with the above persuasive authorities which aptly explain the ingredients of the offence of incest.

32. Regarding the age of the victim, No 256308 PC Irene Kemumo (PW6) who was the investigating officer stated that PW2 was aged 3 years. She produced a late registration of birth document as P.Exh 4. NC (PW1) who was the victim’s grandmother testified that PW2 was aged 3 years at the time the offence was committed. Further, the trial court (Hon. Kiniale) observed on the record that the child was of tender years, declared her vulnerable and appointed an intermediary to assist in her testimony.

33. I have also looked at the birth document (P.Exh 4) and it shows that PW2 was born on 15th September 2018. It is therefore my finding from the overwhelming evidence above that at the time of the commission of the offence being 23rd June 2022, PW2 was aged 3 years old.

34. With regard to the issue of identification, the victim (PW2) in her testimony referred to the Appellant as “baba” which translates to father. She testified that he took her to his home and beat her in her private place which she pointed to the court. NC (PW1) who was PW2’s grandmother stated that the Appellant was PW2’s father and her neighbour as they all lived in the same area. She told the court that she left her granddaughter with her other children and upon returning, she learnt from the children that the granddaughter (PW2) had been taken by her father (the Appellant) and she returned home while crying. She reiterated this testimony upon cross examination.



35. MCK (PW3) stated that the Appellant was PW2's father and was well known to her as he would normally come and pick PW2, feed her then return her. She stated upon cross examination that they all came from the same area.
36. Based on the testimonies above, it is clear to me that the Appellant and the victim (PW2) were well known to each other. The victim referred to the Appellant as her father and further, the Appellant was well known to his neighbours as the victim's father. Their (PW1 and PW3) testimonies on identification were not shaken on cross examination. In my view, this was evidence of recognition and it was free from any doubt. The identifying evidence was both direct through the evidence of the victim as to who "beat her" in her private parts and also from the surrounding circumstances from PW3 who on finding the child missing asked the other children where she was and they informed her that her father had taken her. PW3 later found the child shivering and bleeding.
37. Flowing from the above, it is my finding that the Appellant was positively identified as the perpetrator of the offence.
38. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. Penetration can be proved through the evidence of the victim corroborated by medical evidence.
39. I thus proceed to carefully evaluate the victim's testimony and other oral evidence presented by the Prosecution witnesses.
40. The victim (PW2) testified that the Appellant beat her in her private parts and she bled. I have noted from the trial court proceedings that the victim pointed to her private parts while referring to the place where the Appellant beat her. MCK (PW3) who was the victim's neighbour testified that on the material day at around 5 p.m., she found the victim outside their home and she was shivering and bleeding from her private parts. PW3 testified that PW2 told her that the Appellant beat her (and pointed to her private parts). That she raised an alarm and neighbours (including the Appellant's sister) came and took PW2 to the police station.
41. NC (PW1) testified that she found PW2 at the police station and PW2 looked weak, sickly and bled from her private parts. That PW2 told her that the Appellant had beat and showed her where she was hit (in her private parts). PW1 further testified that they took PW2 to Longisa County Referral Hospital for treatment. No 256308 PC Irene Kemumo (PW6), the investigating officer testified that she found PW2 actively bleeding from her private parts.
42. Paul Sigei (PW5) testified that he examined the victim (PW2) and found that she had a freshly broken hymen, lacerations on her vaginal wall and was bleeding. That upon further laboratory tests, he found the presence of epithelial and pus cells. It was his conclusion that PW2 had been defiled. PW5 produced the treatment notes, P3 Form and PRC Form as P.Exh 1, P.Exh 2 and P.Exh 3 respectively.
43. I have looked at the exhibits and the findings on the treatment notes, P3 and PRC Forms mirrored the testimony of PW5. I accept the medical evidence and PW5's conclusion that the victim (PW2) had been penetrated. It is therefore my finding that the Prosecution proved the element of penetration to the required legal standard. The medical evidence corroborated the victim's evidence of having been "beaten" in her private parts.
44. For the offence of incest to hold, the Prosecution had to establish that the Appellant was a relative of PW2. The victim referred to the Appellant as "baba" meaning her father and PW1 and PW3 all testified that the Appellant was the victim's father.



45. I however disagree with the trial court that there was nothing to confirm beyond reasonable doubt that the Appellant was the victim's father. There was sufficient evidence from the victim (PW1) and MCK (PW3) who was the victim's grandmother that the Appellant was the victim's father. PW3 testified that the Appellant would come and pick PW1, feed her and return her. It is the reason why on the material day, the children who were playing with PW1 were not alarmed when the Appellant came and took PW1 to his house. They knew him to be her father.

46. The Appellant had a rebuttable presumption that he knew of the relationship between him and the victim prior to the commission of the offence. Section 22(3) of the *Sexual Offences Act* provides:-

An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

47. Besides, the fact of a father/daughter relationship was one within the Appellant's special knowledge and he had the evidential burden under section 111(1) of the *Evidence Act* which provides:-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

48. The Appellant by virtue of not presenting his defence or cross examining the Prosecution's witnesses on his relationship with the victim, failed to rebut the presumption that he was the father of PW1. The Appellant had the chance to cross examine the victim (PW1) and challenge her testimony when she called him "baba" but he did not.

49. The above testimony coupled with the victim's testimony where she called the Appellant "baba" leaves no doubt in my mind that the Appellant was the victim's (PW1) father. It is my finding that the Prosecution proved the ingredients for the offence of incest and thus proved their case beyond any reasonable doubt. The trial Magistrate fell in error when she held that the Prosecution had not proved that the Appellant was the father of the victim.

iii. Whether the sentence preferred against the Appellant was severe.

50. Having found that the Prosecution had proved the offence of incest, the penal section is found in section 20(1) of the *Sexual Offences Act* which provides:-

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 the female person

51. By virtue of the victim being 3 years old, the Appellant was to face a life sentence. I however agree with the Appellant that a life sentence was indeterminate in nature and the same was declared unconstitutional. The Court of Appeal in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) pronounced itself as follows:-

“We note that the decisions of this court relied on by the appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

52. I am guided by the above authority to consider a determinate sentence in favour of the life sentence as prescribed by section 20(1) of the *Sexual Offences Act*.
53. In analysing the circumstances of the case and from my appreciation of the evidence on record, it was clear to me that the Appellant penetrated PW2 who was aged 3 years thereby causing her massive damage and pain. It is very disturbing and alarming to this court that the Appellant would violate a defenceless toddler in the most dehumanising way possible, robbing her off her innocence and inflicting physical and psychological torture, the effects of which may follow her for a very long time affording her a scarred life.
54. I have also taken into consideration the Assistant Chief's (PW4) testimony that the Appellant was a habitual offender and when he was arrested, he was armed with a panga and wanted to fight anybody who wanted to arrest him. After considering the circumstances of this case, it is my view that the Appellant should serve a deterrent custodial sentence. Such a sentence would serve the critical purposes of punishing the Accused and keeping the community safe.



55. In the end, the life sentence passed by the trial court is vacated and substituted with 40 years imprisonment. The sentence will run from 23rd June 2022 being the date of his arrest and pre-trial custody.

56. The Appellant has 14 days right of appeal to the court of appeal.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 24TH DAY OF JULY, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr Njeru for the State and Siele (Court Assistant).

