



**Makau v Republic (Criminal Appeal E123 of 2022)
[2024] KEHC 17219 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E123 OF 2022
TM MATHEKA, J
SEPTEMBER 18, 2024**

BETWEEN

BONFACE MUTUKU MAKAU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. On 17/11/2022 the appellant was, after a full trial found guilty and convicted of incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to 20 years imprisonment.
2. The charge was that on 27/7/2022 at Kibwezi sub county, Makueni county he being a male person intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of GMM a girl child aged 14 years' old who was to his knowledge, his sister. In the alternative he had been charged with committing an indecent act with a child contrary to section 11A of the same [Act](#) on the same date, time and place by causing his penis to touch the vagina of GMM a child aged 14 years.
3. Aggrieved by the conviction and sentence, he brought this appeal on the grounds that the learned trial court erred in law and fact:-
 - By failing to observe that the prosecution evidence was untenable, unworthy and uncontroverted.
 - By shifting the burden of proof to the appellant
 - By failing to note the inconsistencies and discrepancy in the case for the prosecution. Failing to summon witnesses mentioned by the prosecution and accused for examination. Not evaluating the evidence to get the truth.
4. The appellant seeks that the appeal be allowed and conviction be quashed and sentence set aside.



5. As a first appellate court I am duty bound to re-evaluate the evidence on record, and draw my own conclusions always bearing in mind that I never saw or heard the witnesses testify see *Okeno v R* [1972] EA 32.
6. I have read the record and adopt the summary of the evidence by the subordinate court.
7. Parties canvassed the appeal by way of written submissions. I have considered the submissions and the record and the following issues arise for determination:-
 - Whether the charge of incest was proved beyond a reasonable doubt.
 - Whether the trial court shifted the burden of proof to the appellant.
8. On the first issue – the prosecution needed to prove the ingredients of incest and they relied on *DMK v R* [2022] eKLR where the court laid down the ingredients thus:-
 - Proof that the offender is related to the victim
 - Proof of penetration
 - Proof of identity of the perpetrator
 11. Proof of age of the victim.
9. Section 20 of the *Sexual Offences Act* provides the offence of incest thus:
 1. A male person who commits an indecent act or an act which causes penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term not less than 10 years.
 2. There is a proviso that if the victim is under 18 years old the accused person shall be liable to imprisonment for life.
 3. In this case there is no doubt that the appellant and the victim are siblings – the victim said so and the appellant confirms that the victim is his sister with whom he lived with his family.
10. With respect to the age of the victim, she told the court she was born on 8/12/2008 there is a certificate of birth indicating that date of registration of birth was 23/6/2022 and given on 11/8/2022 hence her age is not in dispute.

Was there penetration?

11. The complainant told the court that on the material night about 11:00pm she was sleeping when the appellant's wife came to call her that the appellant was calling her. She went out – the appellant sent the wife – one Esther Mboki back to sleep, he then demanded sex from her. She refused. He was armed with a knife – he put papers in her mouth, pulled down her biker and panty, forced her to the ground and forced himself into her inserting his thing urinating thing into hers. She said at first it refused – but he forced it and it was very painful. When he was done he sent her back to sleep. She told his wife whose response was that her husband could not do such a thing. The next day was a Saturday when she went to school she told the guidance and counseling person, one Patience what her brother had done to her. She was taken to hospital.
12. The form PRC shows that she was examined on 6/8/2022. She had not attended any health facility before then – and the general examination showed that she had vulval oedema and a broken hymen whitish per vaginal discharge. The P3 was also completed on the same date.



- The injuries were said to be 10 days old, caused by a blunt object.
13. On 27/7/2022 was a Wednesday – the next day 28th, a Thursday, the following day – a Friday – the matter was reported to Patience on 6/8/2022 – 10 days later and that is when action was taken – the chief was called, police were informed and she was taken to hospital. The medical evidence was that the injury was caused by a blunt object, the hymen was broken, the vulva was oedema, and the conclusion was that there had been sexual intercourse
 14. From the evidence on record, the complainant upon telling the wife of the appellant what happened to her – the appellant’s wife having told her that her husband could do no such thing remained with no resolve until 6/8/2022 when during a guidance and counseling session she told the guidance and counseling person what her brother had done to her.
 15. In my view that explains the hiatus between 27th July 2022 and 6/8/2022 when the matter was reported. It is also evident from the record that it is upon her telling the guidance and counseling person what had transpired at home that action was taken. The matter was reported to the relevant authorities and it is on this day that she was taken to hospital. When she says, I was taken to hospital the same day – it is clear she means the same day that she reported the incident to Patience who took it upon herself to report the matter. Clearly that explains the apparent contradiction.
 16. The complainant’s situation presents the typical case where a child is living with relatives who take care of her and her needs including her schooling. When the abuse happens the child has no one to tell within that environment for fear of upsetting the environment of assistance. In addition, where it is the male head of the house situation, the spouse may be in denial or also in fear of losing the breadwinner – and eventually the abuse remains unreported and undealt with, leaving the victim with scars for life.
 17. The complainant told the court she told the aunt what her brother had done but her aunt refused to accept that her husband could do such a thing.
 18. The prosecution did not call appellant’s wife to testify against the appellant but the appellant was at liberty to call his wife as a witness if he so pleased to rebut the evidence of the complainant, he never did – This is not to say that he had any obligation to prove his innocence but it is to deal with the issue he raised that the prosecution did not call his wife as a witness.
 19. This is what the *Evidence Act* states at section 127. Competency of parties and spouses.
 20. In civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.
 21. In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person: Provided that—
 - i. the person charged shall not be called as a witness except upon his own application;
 - ii. save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
 - iii. the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.
 22. In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—



- a. with the offence of bigamy; or
 - b. with offences under the *Sexual Offences Act* (No. 3 of 2006);
 - c. in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.
23. In this section "husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom
1. Evidently either the prosecution had the liberty to call the appellant's wife as a witness but neither of them did. It is understandable on the part of the prosecution that they could have forfeited the witness considering her attitude to the offence. There was no explanation why the appellant did not call her yet she was at home that night.
 2. It is my view that the prosecution not only established that there was penetration – but that the same was committed by the appellant.
 3. In addition the learned trial court clearly recorded the reasons for believing the child – against a back drop of absent investigations – the record shows that the Investigating Officer did not visit the scene, did not carry out thorough investigations of the case despite the child telling the full story to police – e.g. the place where it happened, the papers that were stuffed in her mouth.
 4. However, from the testimony of the child, surrounding circumstances, I am persuaded that the child was telling the truth.
 5. In the circumstances, I find that the appeal is not merited – the same is dismissed, the conviction is sustained and sentence upheld.
 6. Right of appeal 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 18/9/2024

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MUMBUA T MATHEKA

JUDGE

CA Ms Nelima/Ms Elizabeth Ms Nyakibia for State Appellant present

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

