



**JKG v Republic (Criminal Appeal 69 of 2019)
[2024] KEHC 11961 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 69 OF 2019
RC RUTTO, J
OCTOBER 4, 2024**

BETWEEN

JKG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon. R. Kefa (SRM) at Nyeri Magistrate Court Sexual Offence Case No. 36 of 2018 delivered on 11th December 2019)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of incest by male persons contrary to section 20(1) of the *Sexual Offences Act* Cap 63A has lodged this appeal against his conviction and sentence to serve life imprisonment.
2. The appeal is premised on the following grounds as per the Amended Grounds of Appeal dated 15th June 2022, that: -
 - a. The Learned trial Magistrate erred in both law and fact in failing to appreciate that the charges as preferred were wrongly preferred contrary to the provisions of Article 157 (6) (a) of *the Constitution* of Kenya hence incurably defective.
 - b. The Learned trial Magistrate erred in law and in fact in failing to consider that the critical elements of defilement namely the penile penetration and identity were not proved despite the serious coaching of the victim to get even with the Appellant occasioning a serious miscarriage of justice.
 - c. The Learned trial Magistrate erred in law and in fact in failing to consider that there were material discrepancies capable of unsettling the various grounds occasioning a prejudice.



- d. The trial Magistrate erred in law and in fact in failing to conduct a proper voir dire examination on the alleged victim contrary to Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya.
- e. The trial court erred in law and fact in not considering that the instant matter was fueled by a domestic feud between the Appellant and his brother in law and his wife on the other side hence a grudge.
- f. The trial court erred in law and fact in failing to appreciate that the instant matter was not proved to the required standards.
- g. That and without prejudice to the instant appeal, the sentence of life imprisonment is and remains harsh and manifestly excess contrary to Section 20 (i) of the *Sexual Offences Act* as 'shall be liable to' hence not mandatory.

B. Background

3. The Appellant was initially charged and convicted of the offence of defilement at Mukurweini Law courts and sentenced accordingly. On appeal, the appeal was allowed and his conviction and sentenced quashed. The High Court, however ordered for a retrial before the Chief Magistrate's court at Nyeri. That re-trial is what forms the basis of this instant appeal.
4. In the re-trial, he was charged with the offence of incest by male persons contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the diverse dates between 15th July 2016 and 29th July 2016 in Mukurwe-ini sub-county within Nyeri county, being a male person, he caused his penis to penetrate the vagina of GWK a female person, who was to his knowledge, his daughter.
5. In the alternative, he 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 of the offence were that on the diverse dates between 15th July 2016 and 29th July 2016 in Mukurwe-ini sub-county within Nyeri county, he intentionally touched the vagina of GWK, a child aged 8 years with his penis.
6. The appellant pleaded not guilty and to prove its case, the prosecution called 7 witnesses.

Prosecution's case

7. After a voir dire examination, the court ordered that PW1, GWK. gives unsworn testimony. She testified that she was 10 years old and that one night, while she was sleeping with her sisters, the appellant came and did "bad manners" to her. That the appellant took his thing for urinating and inserted it between her legs (she pointed in between her legs as recorded by the trial court) and that she felt pain.
8. She identified the appellant as the one on the dock called K. She testified that she informed her head teacher, Ms. Mwai, who then took her to the hospital. She also stated that the appellant lived with them. During cross-examination, she reiterated that the appellant did "bad manners" to her and emphasized that she was not coached to say this. She further clarified that she did not claim to have been beaten to make the statement that the appellant did "bad manners" to her.
9. PW2, LG, the head teacher of [Particulars Withheld] Primary School testified that on 29/7/2016, at around 7 a.m., she noticed a pupil walking with difficulty and slowly. She informed the teacher on duty and later she met PW1 in the company of her sister, WK. She attempted to find out what the problem was but PW1 did not respond. Consequently, PW2 used PW1's sister to communicate



- with her whereupon she informed them that their father had done "bad manners" to PW1, which was why she was walking with difficulty. PW2 testified that she informed the teacher on duty, and PW1 confirmed the incident. She further stated that the accused, who had dreadlocks, was the one who had defiled PW1.
10. In cross-examination, she stated that she discovered that PW1 had been defiled by her father and that PW1 confirmed the incident in her office.
 11. PW3, David Mwangi Mugambi, the Assistant Chief of Gakithuini Sub-location in Mukurweini, testified that on 29/7/16, at around 9 a.m., his chief, Carol Njeri, called him to inform him that the head teacher of [Particulars Withheld] Primary School wanted to see them. He stated that together with the chief, they proceeded to the school, where they were informed that one of their pupils, GWK, was walking with difficulty. He testified that they summoned the pupil, interrogated her, and learned that her mother had been chased from home by her father. He testified that he was present when the appellant was arrested. In cross-examination, he stated that the child told them the appellant had chased their mother away when the incident occurred, and they did not interrogate the mother.
 12. PW4, No. xxxxxx Freshia Muhindi, stated that she was attached to Mukurweini Police Station and was the investigating officer in this matter, having taken over from PC Kimeli, who passed away on 1/7/2017. She testified that PC Kimeli had recorded his statement, and she recognized his signature. She stated that the minor was escorted to the hospital on 29/7/2016, where a PRC and P3 form were filled out. She requested the court to admit into evidence treatment notes from Mukurweini Hospital. She produced the birth certificate indicating that the victim was born on 1/6/2008, with MWK listed as the mother and JKG as the father.
 13. On cross-examination, she confirmed that the case related to defilement and that she was not aware that the appellant beat the complainant on the morning of the incident. She testified that the appellant beat and chased away PW1's mother before committing the offence.
 14. PW5, Dr. Gor Gooday, testified that she was a Senior Medical Doctor at Mukurweini Hospital. She stated that she recognized the handwriting and signature of her colleagues, Dr. Esther, with whom she had worked at PGH Nyeri and Ann Kiragu, who had filled out the PRC form, having worked with her as well. The treatment notes, P3 form and PRC were admitted under Section 77 of the *Evidence Act*. Dr. Gooday testified that the complainant visited the hospital on 3/8/2016, alleging that she had been defiled by a person well known to her. She observed that the complainant's clothes were not torn but were dirty. She also noted that the general medical examination which was reported by the teacher indicated a change in the complainant's walking style. She stated that the approximate age of the injuries could not be determined and that PW1 was prescribed antibiotics and painkillers. She further testified that it was noted that the external genitalia was red, broken hymen, no discharge noted, no blood and there were signs of forceful penetration. The P3 form was produced as PExh. 3.
 15. PW6, Anne Kiragu, a clinical officer at Mukurweini Sub-county hospital stated that she had clinical notes for GWK who was eight years old who was brought to Mukurweini hospital on 29/7/2016 on allegations of being defiled by a person known to her. She testified that the complainant was brought to hospital by a teacher who noticed her change of walking style. She further testified that PW1 reported that it was her father who took her to bed, removed her underpants used her private parts which made her feel pain. On genital examination she stated that there was no bleeding or discharge noted, labia minora was very red and hymen was broken. She testified that the HIV and Syphilis test was negative, the urinalysis was fine, the vaginal swab showed an infection due to high pus cells indicating that there was a sexually transmitted disease. That she put the complainant on antibiotics and referred her for counselling.



16. She further stated that the complainant expressed fear of meeting her father. Her psychological assessment indicated that she appeared younger than her age, was anxious, had a flat affect, but her speech was clear, she had good cognitive function and memory. During cross-examination, she confirmed that she referred the complainant for testing for sexually transmitted diseases. She noted that the complainant was unkempt, and her labia minora was reddish. She testified that the area was painful to the touch, the complainant walked with her legs apart, and there was no vaginal discharge.
17. PW7, BW, stated that her sister, GWK told her that she had been defiled by their father, that at that time, she was staying at their grandfather's house, and not at home, as their mother had left. She testified that the complainant had stated that their father removed her from their bed and took her to his bed removed her clothes and inserted his penis into her vagina and that the next day she went to school. She also testified that the complainant had been beaten by their father and that was why she was afraid of telling anyone.
18. She stated that she reported what her sister told her to the headteacher who then informed the assistant chief and their pastor. They then proceeded to Gakindu Police Station to report the matter and were issued with a P3 form, and then went to Mukurweini hospital where the complainant was treated. Later their father was arrested.
19. On cross-examination, she stated that she was not at home when the incident occurred. She testified that it was the teacher who noticed that PW1 was walking with difficulty and asked her to inquire what had happened. She confirmed that she recorded her statement and that what she told court was based on what she heard from her sister.
20. At the close of the prosecution case, the court found that the prosecution had established a prima facie case and the appellant was placed on his defence. He chose to give sworn evidence and did not call any witness.

Defence Case

21. DW1, JKG, testified that David Mwangi, a relative, visited his home while he was with his wife and asked him to inform Kibichu not to cut trees. Kibichu had been contracted to cut trees that he had sold to New Light School. DW1 stated that David demanded Kshs 10,000 before Kibichu could continue cutting the trees. He added that David was a caretaker at New Light School and that there was a dispute regarding the tree-cutting deal, where DW1 was supposed to earn Kshs 3,000 out of Kshs 5,000. That this dispute led to an argument between David and DW1 and his wife, resulting in his wife leaving their home on 20/7/2016. DW1 also mentioned that he had started reconciling with his wife, but David opposed the reconciliation. That on 19/7/2016, David and his brother-in-law assaulted DW1. He was rescued by two members of the public, treated at a hospital, and issued a P3 form. DW1 further stated that David was arrested on 27/7/2016 and was taken to Mukurweini Police Station on 28/7/2016. He claimed that David was later taken to Kingongo Prison and that they framed him for defiling his own daughter.
22. Upon being cross-examined, DW1 testified that he has six children and that his wife left their matrimonial home in July 2016, leaving the children behind. He stated that David is his wife's brother and that both David and his wife conspired against him. DW1 mentioned that David was arrested for assaulting him and was charged at Mukurweini Law Courts. He added that his wife returned home after his arrest.
23. The trial court evaluated the evidence on record and found that the prosecution had proved its case. The appellant was convicted as charged and sentenced to life imprisonment.



24. It is that decision that aggrieved the appellant necessitating the filing of this appeal. He prays for the Appeal to be allowed, conviction quashed and sentence set aside.

The Appeal

25. The appeal is as set out in the earlier paragraphs of this judgment. The appeal proceeded by way of written submissions with the Appellant relying on his undated written submissions filed on 19th October 2022 while the Respondent relies on the written submissions dated 7th November 2022.

a) Appellant's Submissions

26. The appellant in his submissions addressed the grounds of appeal summarily as below: -
- a. Wrongfully being charged contrary to Article 157 (6) of *the Constitution* of Kenya.
 - b. Critical elements of defilement not proved.
 - c. Material discrepancies.
 - d. Improper voir dire examination.
 - e. Domestic feud.
 - f. Lack of proof.
 - g. Sentence being excessive and harsh contrary to Section 20 (1) of the *Sexual Offences Act*.
27. The Appellant submitted that his wife and brother-in-law, held a grudge against him, and influenced the complainant, to proffer these charges hence should not be disregarded.
28. The Appellant contended that the initial charge was brought by an incompetent authority. He argued that the police lacked the constitutional and procedural mandate to charge the accused, rendering both the charges in the initial case, which was returned for retrial on appeal, and the current charges null and void. He relies on the case of *Humphrey Kariuki v ODDP [2022] eKLR*.
29. On whether the elements of defilement were proven, the Appellant submitted that PW1's testimony —indicating that she was sleeping with Wabiru and Margaret and that someone came and committed "bad manners" against her is questionable and implausible. He further contended that Wabiru and Margaret were not interrogated or called as witnesses, contrary to the provisions of Section 143 of the *Evidence Act*. The Appellant argued that the law requires proof of penetration and identification of the organ involved, which, according to him, was not demonstrated by the evidence. He cited the case of *Joseph Njuguna Gachara v Republic, HCCRA No. 96 of 2014*, in support of this argument.
30. The Appellant also argued that PW1's act of pointing between her legs during testimony does not necessarily indicate her genital organs, and refers to *Julius Wambua v Republic [2019] eKLR*. Additionally, he contended that the medical evidence muddled the issue, and that the evidence of PW1 being infected with a sexually transmitted disease was not substantiated, thus undermining the charge. He relied on *Ben Maina Mwangi v Republic [2006] eKLR*.
31. Moreover, the Appellant submitted that PW5 and PW6 failed to establish a connection between the alleged offense and the Appellant, and that it cannot be presumed that the breakage of the hymen resulted from penile penetration. He relied on the case of *P.K.W v Republic, Criminal Appeal No. 186 of 2010*. The Appellant further contended that the evidence of PW2 suggested a potential frame-up and that PW2's testimony was not meticulous. Specifically, PW2 suspected Wabiru Kiragu, not PW1,



of walking with difficulty. He referenced *J.O.O v Republic* [2015] eKLR, urging the court to analyze the evidence without assuming facts that were not presented.

32. Regarding material discrepancies, the Appellant argued that PW2 observed WK, not PW1, walking with difficulty; PW6 accepted PW1's evidence despite noting that PW1 appeared to be below the age she had stated; PW4 produced a PRC form dated 29/6/2016, which was a month before the alleged incident in July; PW7 provided evidence related to an incident on 27/9/2016, which occurred two months after the alleged incident; and PW7 mentioned that Mary Wabiru was defiled by unknown persons. The Appellant asserted that these discrepancies are not minor but material. He referenced the cases of *John Mutua Musyoku v Republic* [2017] eKLR and *John Afuna Angula v Republic Criminal Appeal No. 277 of 2006*, urging the court to consider these discrepancies as creating reasonable doubt about his guilt.
33. Regarding the issue of the voir dire examination, the Appellant submitted that the court should recognize the insufficiency of the information recorded by the trial court, which leaves the court to assume whether the examination was properly conducted. He relied on *Johnson Muiruri v Republic* [1983] eKLR 447.
34. On the issue of a domestic feud, the Appellant contended that he did not anticipate that the issues between him and PW1's mother would escalate to this level. He asserted that it was coincidental that the dispute arose at the same time he had disagreements with PW1's uncle and brother-in-law, which could have provided motive for them to orchestrate such animosity against him.
35. On the issue of proof not meeting the required standard, the Appellant submitted that the contradictions in the evidence indicated its unreliability. He argued that he is not required to create a myriad of doubts but rather a single circumstance that creates a reasonable doubt. Consequently, he asserted that he was entitled to the benefit of the doubt he had created and, therefore, that should be considered.
36. On the issue of the sentence being harsh and excessive, the Appellant requested the Court to exercise its revisionary powers and discretion under Articles 22, 23, 47, and 50 of *the Constitution* of Kenya. He urged that if the trial court's decision is upheld, the sentence be reduced. He relied on the case of *Francis Karioko Muruateti v Republic* [2017] eKLR, among others.

b. Respondent's Submissions

37. The respondent opposed the appeal in its entirety and submitted on the issues as raised in the grounds of appeal.
38. On the issue whether the Appellant was properly charged, the Respondent relied on the same authority cited by the Appellant, namely, *Humphrey Kariuki Ndegwa v Republic*, Constitutional Petition No. E495 of 2021. It urged that while it was declared that lawful prosecution can only be instituted, undertaken, and terminated by the Director of Public Prosecutions, the Learned Judge explicitly stated that this declaration shall not apply to previously instituted criminal proceedings. The Respondent noted that the ruling was delivered on 23rd May 2022, and the Appellant was arraigned for retrial on 1st August 2016, thus, the law cannot act retrospectively.
39. Regarding whether the charges against the Appellant were proved beyond reasonable doubt, the Respondent submitted that Section 22 of the *Sexual Offences Act* was fully complied with, and it was established beyond a reasonable doubt that the victim and the Appellant were father and daughter. The Respondent further submitted that the ingredients of the offence, including age, penetration, and the identity of the perpetrator, were satisfactorily proved.



40. On the issue of age, the Respondent submitted that the victim was 8 years old at the time of the alleged defilement by the Appellant and was 10 years old when she testified. The Respondent further submitted that a birth certificate confirming the victim's age was provided by the Investigating Officer.
41. Regarding penetration, the Respondent submitted that PW1 described the act of penetration, which was corroborated by medical evidence provided by two medical professionals, PW5 and PW6. That this evidence, presented through a P3 form and a Post-Rape Care form, confirmed that the victim's labia minora was red and her hymen was broken. The Respondent further submitted that the trial court assessed the victim's demeanor and found her a believable witness. That the court provided reasons for relying on Section 124 of the *Evidence Act* and for finding that corroboration was not necessary. The Respondent relied on the cases of *J.W.A v Republic* [2014] eKLR and *Mohamed v Republic* [2006] eKLR, both of which state that corroboration is not required. Additionally, the Respondent submits that the law does not mandate a specific number of witnesses to prove a particular fact, citing *Alex Lichodo v Republic* [2006] eKLR in support of this position.
42. On the identity of the perpetrator, the Respondent submitted that the victim is well known to the Appellant and consistently identified the Appellant as the perpetrator.
43. Regarding assertions of contradictions and inconsistencies in the prosecution's case, the Respondent submitted that the alleged discrepancy concerning PW5 and PW7 where the PRC Form was dated 29/6/2016 and PW7 provided evidence relating to 27/9/2016 is misleading. The Respondent invited the court to review the record and urged that the Appellant had not identified any material contradictions or inconsistencies.
44. On whether the voir dire examination was properly conducted, the Respondent submitted that prior to receiving PW1's testimony, the trial Magistrate conducted an inquiry to determine whether the witness understood the meaning of telling the truth and the consequences of lying. A brief interview was conducted during which PW1 indicated to the court that "a person who tells lies goes to Satan." The Respondent thus asserted that the procedure for voir dire was not flawed and was adhered to.
45. On whether the Appellant was framed due to an existing grudge with his wife and PW3, the Respondent submitted that although the Appellant maintained this defense, the trial court found that he had not substantiated the allegations, as he did not present any evidence to support his claims. The Respondent further submitted that none of the civilian witnesses who testified knew the victim's mother or the alleged uncle but only became aware of the incidents after observing the victim's condition and interrogating her.
46. On sentence, the Respondent submitted that given that the victim was 8 years, the law provides for a sentence of life imprisonment. The Respondent urged that the Appellant did not present any mitigating factors that would warrant a reduction of the life imprisonment sentence.
47. Ultimately, the respondent urged the court to dismiss the appeal and affirm the findings of the trial court.

Analysis and determination

48. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwala v R* {1957} EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR.



49. Having considered the record of appeal as well as the rival submissions by parties, I discern the following issues for determination:
- a. Whether the Appellant was properly charged.
 - b. Whether voir dire was properly conducted.
 - c. Whether the offence of incest was proved beyond reasonable doubt;
 - d. Whether there were contradictions and inconsistencies in the prosecution's case.
 - e. Whether the sentence meted on the Appellant was harsh and excessive.

a. Whether the Appellant was properly charged

50. The Appellant contend that the police did not have the mandate to charge him and relied on the authority of *Kinoti & 7 others v Chief Magistrates Court Milimani Law Courts & 4 others; Sanga & 2 others (Interested Parties) (Constitutional Petition E495 of 2021) [2022] KEHC 11622 (KLR) (Constitutional and Human Rights) (23 May 2022) (Judgment)* where the police were deemed not to have the mandate to charge.
51. While I agree with appellant assertion, and having read the cited authorities, I observed that the constitutional court while issuing its directions/orders held inter alia, thus: -

“Given the potential effect of the instant judgment in the criminal justice system in Kenya, the instant judgment would not apply to previously instituted criminal proceedings.”

52. Further, as has been submitted by the respondent, the Constitutional petition above was delivered on 23rd May 2022 whereas the Appellant was arraigned before court for retrial on 1st August 2016. He therefore, cannot be said to benefit from the above jurisprudence. In that regard, this ground of appeal fails.

b. Whether voir dire was properly conducted

53. The Appellant submitted that the voir dire examination excluded an indication to unearth the understanding of PW1 about the consequences of telling the truth and nothing but the truth.
54. The record clearly shows that before taking the evidence of the complainant, the trial court conducted an examination of her and made the requisite finding that she was intelligent enough to give an unsworn statement. The Court of Appeal in *Japheth Mwambire Mbitha v Republic* [2019] eKLR stated that the purpose of voir dire is to ensure that a minor understands the solemnity of the oath and, if not, at least the importance of telling the truth, which was achieved in this case.
55. Furthermore, there is no prescribed format for conducting a voir dire that is cast in stone. The Court of Appeal in *Maripett Loonkomok v Republic* [2016] eKLR held thus:

“We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See [*James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014.*](#)”



56. Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth...”
57. Consequently, I find that the voir dire conducted herein was sufficient and this ground of appeal is dismissed.

b. Whether the offence of incest was proved beyond reasonable doubt

58. Section 20 (1) of the *Sexual Offences Act* provides for the offence of incest by male persons. The section sets out the ingredients for the offence of incest as follows; proof that the offender is a relative of the victim, proof of penetration or indecent act, identification of the perpetrator and proof of the age of the victim.
59. On proof that the offender is a relative of the victim, it is not in dispute that the appellant was the victim’s father. This was admitted by both the victim and the appellant and further confirmed by the birth certificate. Hence it is not a contested issue herein.
60. On proof of penetration or indecent act, PW1 narrated that the Appellant had carnal knowledge with her. The trial court noted that PW1 pointed to the court where the perpetrator put his penis. She was later taken to hospital by her teacher after noting that she was walking with difficulty and upon establishing that she had reported being defiled. The medical evidence by PW5 and PW6 who examined PW1 on 3/8/2016 and 29/7/2016 respectively confirmed that upon examination, there were bruises on the vagina and broken hymen and tender labia minora which is consistent with penetration on PW1’s vagina. The clinical officer even noted that she had contracted a sexually transmitted disease. She was accordingly treated. The medical evidence corroborates what the complainant stated. In *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court stated that penetration can be proved by the victim’s evidence, medical evidence or other evidence.
61. Consequently, I find that the evidence of the victim, PW5 and PW6 was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.
62. The Appellant submitted that the trial court erred in relying on the evidence of PW1 as well as the medical evidence which were according to him contradicting on the face of it. However, without even delving into the alleged contradictions, which I will discuss it later in this judgment I take note that since sexual assault cases especially those involving minors are committed in secrecy at the exclusion of eye witnesses, the law came to the aid of such victims by dint of Section 124 of the *Evidence Act* which states that: -

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth...”



63. The above provision allows a court to convict an accused person solely on the victim's own evidence when the credibility of the witness is not in question and as long as the court is convinced and believes that the minor is speaking the truth. The Learned trial Magistrate indeed believed the evidence of the minor as clearly indicated in her judgment when she stated that;

“The testimony of PW1 does not require corroboration under the proviso of Section 124 of the *Evidence Act* Chapter 80 of the Laws of Kenya. The Court of Appeal in *Geoffrey Kioji v Republic*, Nyeri Criminal Appeal No. 270 of 2010 the court stated under the proviso of Section 124 of the *Evidence Act* where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim, the court shall proceed and convict the accused of the court is satisfied that the alleged victim is telling the truth. This court is satisfied that PW1 is telling the truth. I find no reason as to why she would frame the accused person who is her father.”

64. This court too, has no reason to doubt that the complainant told the truth. So even if the medical evidence was not to be considered, the victim's evidence as it stands is sufficient to warrant a conviction. Fortunately, though, the medical evidence confirmed that she was indeed sexually assaulted and thus the evidence of PW1 was corroborated.

65. Turning to identification of the perpetrator, I need not emphasize that the Appellant's identification was by way of recognition. He was well known to PW1 as her father. I hasten to add that the appellant does not dispute the fact that the victim knew him.

66. On the age of the victim, which is paramount in view of the sentence as prescribed under Section 20 (1) of the *Sexual Offences Act*, according to PW4 who produced the birth certificate that was handed over to her by the mother to PW1, it revealed that the complainant was 8 years old when the offence was committed. The complainant was born on 1st June 2008 thus 8 years as at 29th July 2016.

67. Flowing from the foregoing I find that the prosecution proved all the ingredients of incest. I find no reason to disturb the finding of the trial court.

d) Whether there were contradictions and inconsistencies in the prosecution's case

68. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. See the case of *Mwangi v Republic* [2021] KECA 345 (KLR).

69. Consequently, the issue here is whether there were indeed contradictions and inconsistencies and if so were the inconsistencies and contradictions of such a degree that they prejudiced the appellant.

70. The appellant alleged that there were material discrepancies in that PW2 testified that she saw Wabiru Kiragu walking with difficulty and not PW1; that PW6 believed the evidence of PW1 yet she had stated that in her judgment, PW1 was below age; that PW4 produced PRC form dated 29/6/2016 which was a month before the alleged incident in July; that PW7 gave evidence regarding an incident of 27/9/2016 which was two months after the alleged incident; and that PW7 alluded to Mary Wabiru having been defiled by unknown persons.

71. I note that what is termed as material discrepancies by the Appellant all involve identification of the victim and whether she was sexually assaulted. Looking at the testimony of, PW2, it is clear that she noticed a pupil walking with difficulty and slowly. She informed the teacher on duty and later she met PW1 in the company of her sister, Wabiru Kiragu. She attempted to find out what the problem was but PW1 did not respond. Consequently, PW2 was requested to ask her sister PW1 what had



transpired whereupon she informed them that their father had done "bad manners" to PW1 which was why she was walking with difficulty. PW2 also testified that PW1 confirmed the incident. I do not see any contradiction in the above evidence of the PW2 in that nowhere in her statement did she state that he saw Wabiru Kiragu walking with difficulty. Further, by PW6 stating that by stating that the child was below the age does not contradict the fact that her age was stated as being 8 years.

72. I further take cognizance of the fact that, as an appellate court, I did not have the advantage of observing the demeanor of the witnesses. Therefore, given that the trial court observed and found the victim to be persuasive and credible, I find no reason to disturb this finding. I thus find that there are no inconsistencies as mentioned by the appellant and no prejudice has been occasioned to the Appellant and therefore dismiss this ground of appeal.

f. Whether the Appellant was framed owing to an existing grudge with his wife and the brother in law

73. The Appellant stated that there was a grudge between him, his wife (the mother of PW1), and his brother-in-law. That the grudge led to the charges being framed against him and that PW1 was coerced into lying. This was the only defense he presented. It is established law that the burden of proof lies with the one asserting the existence of such a fact.
74. The Appellant made several claims in his defense but closed his case without presenting any evidence or calling any witnesses to prove his allegations of a grudge. More pertinently, he never raised this issue with PW4, the investigating officer when he was first arrested. Further when PW4 testified, the appellant equally never cross-examined him on the issue. The same issue was never put to the other prosecution witnesses when the appellant cross-examined them, in particular PW3 the Assistant chief who would have known of the existence of such 'bad-blood/grudge'. I thus find this ground devoid of merit and dismiss it.

g) Whether the sentence meted on the Appellant was harsh and excessive

75. The appellant was sentenced to life imprisonment. In passing sentence, the trial court stated: "the court has considered the accused is a first offender. He has not tendered any mitigation. Section 20 of the Sexual Offence Act provides for mandatory sentence. The accused is hereby sentenced to life imprisonment".
76. Section 20 (1) of the *Sexual Offences Act* is clear on the consequence of the offence with a child under the age of eighteen years. It states that the accused shall be liable to imprisonment for life. Clearly, the offence of incest that the Appellant was charged with carries a mandatory sentence of life imprisonment. The issue on sentence is however at the court's discretion and can only be interfered with on appeal if it was issued in error. Noting that the Appellant even had nothing to state on mitigation, I see no need of interfering with the trial court's sentencing.
77. However, the most recent decision by a 3-judge bench of the Court of Appeal in the case of *Akbonya v Republic (Criminal Appeal 269 of 2019)* (2024) KECA 327 (KLR) (15 March 2024) at Kisumu (Unreported) allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement.
78. Guided by the above decision, I affirm the life imprisonment sentence meted out with a rider that the same life imprisonment amounts to 30 years of imprisonment.
79. The upshot is that the appeal on conviction fails for lack of merit but the appeal on sentence upheld with a rider that the same life imprisonment amounts to 30 years of imprisonment to run from the



date of his conviction, factoring in any period spend in remand custody in accordance with Section 333 (2) of the Criminal Procedure Code.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant:

