



**MMN v Republic (Criminal Appeal E049 of 2022)
[2024] KEHC 12663 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E049 OF 2022
SM GITHINJI, J
OCTOBER 23, 2024**

BETWEEN

MMN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from Original Conviction and Sentence in the Lower Court
Criminal Case No. E081 of 2021 in the Chief Magistrate’s Court at Malindi
Before Hon E.K.Usui – Chief Magistrate in Chambers dated 30th August, 2022)*

JUDGMENT

Representation:

M/s Ochola for the State

Appellant in Person

1. MWN was charged in the lower court with a main count of incest, contrary to section 20 (1) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on diverse dates between 13th and 14th August, 2021 in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AKM a girl aged 14 years who is to his knowledge his niece.
3. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars hereof are that on diverse dates between 13th and 14th August, 2021 in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of AKM a child aged 14 years using his penis.



5. The prosecution case is that the complainant in this case who offered evidence as Pw-1 was living in Kakuyuni. She was in Grade 2 at [Particulars withheld] Primary School. She said she was 14 years old though did not know her year of birth. She was living in the same compound with the appellant who is a brother to her mother namely FR. The appellant was living with his wife and children in his own house.
6. On the night of 13th and 14th August, 2021 the appellant's wife was away. The appellant requested the victim to take care of his child as he went to watch Television. She did so. The victim slept in the appellant's house with the appellant's child. When the appellant returned he took his child away. He then returned to the victim and told her that he wanted to do something with her and should not tell anyone for he would be imprisoned. He promised her Kshs.500/=. He then removed his clothes and her panty. He went on her and inserted his penis in her vagina. She bled and he warned her not to scream. After that she went and slept in her mother's place. She told her mother what had happened. On 14/8/2021 the mother (FR) took her to Kakuyuni Police Station where they reported the case. The report was made to Pw-2 who investigated the case. He recorded the complainant's statement and issued her with a P3 form.
7. The P3 form was filled at Malindi Sub-County Hospital by Pw-3 on 16/8/2021. The clinical officer noted that her hymen was broken and there was blood oozing from her vagina. He concluded that there was vaginal penetration.
8. On 15/8/2021, the complainant had been taken to Malindi Sub-County Hospital for treatment. The treatment notes show she had pain in the vagina and waist region. There was bleeding from the vagina. The hymen was broken and there were tears noted. On 16/8/2021 age assessment was done within the said Health facility and according to the report made then, she was 14 years old. The appellant was consequently arrested and charged with the offences in the charge sheet.
9. The appellant in his defence stated on 14/3/2021 in the evening he was in Malindi and was travelling home. At 5.00Pm he called his wife to prepare. He wanted to watch a European Football match. At 9.45Pm a neighbour, Dw-2 called him to go and watch football. When the game ended he went back home. He found the door to his house open. He asked the children whether anyone was outside. They said someone left and they thought was him and that is why they did not scream.
10. His wife and a neighbour were there and heard all that. He denied the defilement allegation by the complainant.
11. Dw -2 said he watched football with the appellant on the material night. When they got home after the match, the appellant alleged his door was open and there were kids inside. Dw-2 heard that and went to sleep. The following day the appellant's sister arrived and alleged her daughter had been defiled. She alleged her brother had done it. He advised her to take the child to the hospital for examination.
12. The trial court analyzed the evidence and found that the main count had been proved by the prosecution beyond reasonable doubt. The appellant was convicted of the offence and sentenced to serve 25 years in prison.
13. Dissatisfied with the conviction and the sentence he appealed to this Court on the grounds that: -
 1. The prosecution did not prove their case beyond reasonable doubt.
 2. There was no cogent evidence connecting him to the offence.
 3. Discrepancies in the prosecution case were not weighed.



4. The defence was not adequately considered.
14. The appeal was canvassed by way of written submissions.
15. I have re-evaluated the charges, evidence on record, judgment of the Lower Court and sentence meted, grounds of the appeal and submissions.
16. The offence of incest is covered by section 20 (1) of the *Sexual Offences Act*, No.3 of 2006. It reads that; -

“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 18 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 consent of the female person.”
17. From the foregoing provision the ingredients for the offence are; -
 1. Family relationship. Here the accused and the victim must be related by blood, meaning they are within prohibited degree of consanguinity. In the case at hand there is no dispute that the appellant is a brother to the mother of the victim. The appellant is therefore an uncle to the victim or the victim is a niece to the appellant. He is therefore within the prohibited degree of consanguinity. The appellant was aware of the fact. They were living within the same homestead and the fact was obvious to him as well as the victim who described him as such. She said he is her uncle, on her mother’s side.
 2. The other ingredient is the age of the victim. Though this has no effect on culpability. It is vital in relation to the issue of consent and sentence. The victim though said she was 14 years old did not know the date of her birth. However, an age assessment was done which placed her aged at 14 years. There is no evidence suggesting her age could be otherwise. I find the evidence credible that she was 14 years old.
 3. I now move to the ingredient of penetration. Pw-1 stated that the appellant told her that he wanted to do something with her and should not tell anyone for if known he will be imprisoned. He promised to give her 500/=. He removed his clothes, then her panty and had sex with her which involved insertion of his penis into her vagina. She bled. These facts plainly show there was penetration. The treatment notes and P-3 form filled at Malindi Sub-County hospital shows her hymen was broken and there were tears. Blood was oozing from the vagina. It was opined that there was vaginal penetration. The medical findings corroborate the victim’s evidence to the effect that there was penetration. It leaves no doubt on penetration. Under this, it’s not entirely irrelevant to state that indecent act is part of the ingredient for the offence of incest. Even if penetration was not established and indecent act was, the offence would still subsist. In a charge of incest there is then no need to prefer an alternative count of indecent act as it serves no purpose.
 4. The last ingredient is proper identification or recognition of the appellant as the real culprit. The appellant was well known to the victim as an uncle who was living in the same homestead with her. He deliberated with her before commission of the offence. The incident happened in his own house. Though in his defence he suggested someone else could have done it as he alleged he went to watch football and upon his return found the door open, the allegation is



not well supported and is unbelievable. It does not offset the strong prosecution position that he is the real culprit.

18. His defence cannot be true. The evidence of Pw-1 is explicit and firmly founded that he is the one who penetrated her. She had no cause to fix him. The appellant knew well that he was committing a serious offence as he expressed to her that if she disclosed to anyone he will be imprisoned.
19. Given the foregoing I do find that the prosecution proved their case beyond reasonable doubt and the appellant was rightly convicted of the offence.
20. On sentence, the offence carries a sentence of life imprisonment. He was sentenced to serve 25 years' imprisonment which given the circumstances is a fair sentence, that is well balanced in terms of retribution. I find no need to interfere with the same. The appeal therefore lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Appellant present at Manyani Prison.
2. Ms Ochola for the State.

