



**DKM v Republic (Criminal Appeal E065 of 2021)
[2023] KEHC 1515 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E065 OF 2021
FG MUGAMBI, J
FEBRUARY 15, 2023**

BETWEEN

DKM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R.M. Amwayi, SRM dated 13th May 2021 in Sexual Offence Case No. 95 of 2020 in the Chief Magistrates Court at Mombasa)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to 20 years' imprisonment for the offence of Incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that in the month of August 2020 in Jomvu Sub County within Mombasa County he intentionally and unlawfully caused his penis to penetrate the vagina of EW, who was to the knowledge of the Appellant, his child aged 9 years.
2. The Appellant now appeals against the conviction and sentence as set out in the Amended Petition of Appeal filed on July 26, 2021. The Appellant also relies on his written submissions filed in court on June 20, 2022. The Prosecution opposed the appeal through the written submissions of its counsel filed on September 23, 2022.
3. During trial the Prosecution called four witnesses. PW1 was EW herself, the complainant. She gave an account of how the Appellant had lured her into her mother's bed, while her mother was away. The Appellant called her from playing with her friend. He removed her clothes and his clothes and defiled her. She also testified that it was not the first time that her father was defiling her, having done so previously and attempted on another occasion and failed. EW later informed her mother who testified as PW2. PW2 confirmed that she returned to the house at about 6:30pm and her daughter started crying then told her that she had been defiled by the appellant. PW 2 reported the matter to the village



elder and accompanied her daughter to Port Reitz Hospital. PW3 testified and produced the P3 form on behalf of the doctor who examined EW. PW 4 who accompanied EW to hospital also testified as the investigating officer in the matter.

4. The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave sworn evidence. He denied any wrong doing and stated that in the material month of August he had been going to work between 9:00am and leaving work at 5:00pm. It was his testimony that he was arrested on September 17, 2019 at about 1:00am and was neither interrogated about the incidence neither did he undergo a medical examination.
5. In his submissions to support his appeal, the Appellant argues that the Prosecution had failed to prove the case against the Appellant beyond reasonable doubt. His reasons are that the evidence of EW was controverted in cross examination and that it was not corroborated because the Prosecution failed to call the friend with whom EW was allegedly playing with, the landlady, Salma who was taking care of the children in the absence of PW2 and the village elder to whom the incidence was reported. It is also his case that the evidence of the prosecution witnesses was not accurately captured and that there were inconsistencies in the Prosecution evidence. The Appellants also cast aspersions on PW2's evidence that she did not confront the Appellant when EW told her that the Appellant had defiled her previously.
6. It is the Appellants case that the medical evidence was also not sufficient to confirm the offence and could not also be linked to him as he was not subjected to a medical examination. Finally, the Appellant argues that the sentence was harsh and excessive under the circumstances and states that the trial court should have exercised its discretion in determining a proportionate sentence for the Appellant who was a first offender.
7. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v. Republic* [1972] EA. 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) E.A, 32. Depending on the facts and circumstances of the case, the first appellate court may come to the same conclusions as those of the lower court or it may rehash those conclusions. There is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (See *David Njuguna Wairimu v Republic* [2010] eKLR).
8. Against this background, I have considered the evidence before the trial court both for the prosecution and defence and reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel. Arising from the law by dint of section 20 of the *Sexual Offences Act*, are the elements of the offence of defilement which the prosecution was required to prove beyond reasonable doubt. I shall consider the issues raised in the appeal against these elements. For the avoidance of doubt, the elements are:
 - a. Penetration
 - b. The identity of the perpetrator
 - c. Degree of consanguinity
 - d. The age of the victim



On Penetration

9. The Appellant submits that PW2 [sic] would not have gone back to play if her hymen was broken due to the alleged defilement because she would have been in pain. He seems to presuppose that there was no penetration and even if there was, the same cannot have been as a result of the alleged incident. According to the charge sheet, he was alleged to have defiled his daughter in the month of August 2022 and yet the P3 form was filled on September 17, 2022 and the PRC on September 12, 2002 and yet there was still redness of the vagina. It is further his case that in any case PW3 had testified that the redness of the vagina noted did not necessarily mean that there had been penetration by a man.
10. Penetration is defined in Section 2(1) of the [Sexual Offences Act](#) to mean

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
11. The fact of partial penetration was emphasized in the case of [Eric Onyanggo Ondeng’ v Republic \[2014\]eKLR](#). The Court of Appeal held that it is not necessary that the hymen be broken such that even partial penetration would suffice. Furthermore, quoting the Uganda Court of Appeal in [Twehangane Alfred v Uganda](#), Crim App No 139 of 2001, the Court further noted that it is not necessary that the hymen be ruptured for there to be penetration.
12. From the trial record, EW was categorical that it was the Appellant who caused penetration of her vagina with his penis. EW knew the appellant well. He was her father. There was no way that she would mistake her father’s identify. She had no reason to lie about the incidence. In fact she states that she loved her father and he loved her too and that they had a good relationship. The learned trial magistrate found the evidence by EW to be believable, consistent and coherent. In fact, despite her age, the trial court found that she understood the business before the court and the need to speak the truth and she could therefore give sworn evidence.
13. It is the Appellants case that there were inconsistencies in EWs testimony on what happened on that particular day. In particular, the testimony on whether the Appellant went to Taita after the offence yet PW2 testified that she found the Appellant sleeping on the couch that evening. There is also the testimony regarding where PW2 left the children including EW, when she (PW2) went to work. Not every discrepancy in testimony is fatal. I am persuaded by the Prosecutions submission in reliance with the case of Philip Nzaka Watu v R that human recollection is not infallible. In the words of the court, ‘some inconsistency in evidence may signify veracity and honesty’. I have considered the nature and extent of discrepancies and the evidence tendered as a whole by the Prosecution witnesses in this case and I find that there is nothing to signify fabrication or dishonesty. It would be unfair to presume that a child of tender years who has gone through such an ordeal would recollect everything with philosophical precision. In fact, like the trial court, I do find that under the circumstances, EW did abundantly well and was a truthful, believable and consistent witness.
14. The assertion by the Appellant that the medical evidence was not sufficient to confirm penetration is weakened by the wholesome testimony of PW3 in corroboration to that of EW. PW3 confirmed that upon examination of PW3 genitalia, the labia manora and majora were wounded, there was redness of the vaginal walls, that the hymen was not intact and that there was a fresh scar. While it may be true as confirmed that the redness observed would not necessarily point to penetration, the medical evidence must be taken wholesome. It was the conclusion by PW3 as a medical expert that the weapon of penetration was indeed a human penis and not an instrument. PW3 further confirmed that it was possible that the scar observed was still fresh because the same could take time to heal. The medical



finding negates the point by the Appellant that EW would not have gone outside to continue playing if she had been defiled.

15. It is the Appellant's case that the medical evidence that was presented to the trial court was not sufficient to link him to the offence. It is an established position that medical examination of a perpetrator is not a mandatory requirement to prove defilement. However, in appropriate cases such examination may be necessary depending on the circumstances of the case. An example would be where prove against the perpetrator would only be dependent on medical examination of the perpetrator or a DNA test. In such circumstances the court has discretion to order the examination. Section 36 of the [Sexual Offences Act](#) provides as follows: -

“(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

16. The Appeal before this court is a clear case where the court can rely on the testimony of the complainant alone to convict, without the need for medical examination if the learned trial magistrate for reasons to be recorded believed the complainant. The trial court guided itself properly on this account and recorded that the evidence by EW was believable and consistent. This requirement is provided for under Section 124 of the [Evidence Act](#) as follows:

- a. “Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap. 15), where the evidence of an alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
- b. 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.”

17. It has also been held that the evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of [Fappyton Mutuku Ngui v R](#) (2014) eKLR where a similar issue of medical examination of the perpetrator was considered, the Court of Appeal stated:

“In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2's testimony which was trustworthy as to the person who had defiled her.”

18. On that account I therefore find that the Prosecution proved the element of penetration beyond reasonable doubt. I say this because the Appellant submits that the failure to invite the evidence of Zawadi, EW's playmate, the landlady, mama Salma and the village elder to whom the incidence was reported, weakened the Prosecution case. The Respondents argue that these witnesses were not crucial for their case. For instance, Zawadi did not see the Appellant lure EW to the house because she had been called by her mother. The testimony of Mama Salma was also not critical because on the material



day EW had not been taken there when the incidence occurred. The evidence of the landlady and the village elder was hearsay evidence and therefore of little probative value. In this regard I am also cognisant of the provisions of Section 143 of the Evidence Act that,

“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact”

19. The test on how many witnesses the Prosecution needs to call should depend on what is required to prove an offence beyond reasonable doubt and should not necessarily result to a superfluity of witnesses as was held in the case of Keter v Republic [2007] EA 135. This is more so considering that the need for corroboration is not a mandatory requirement in sexual offences. I find that even without having called these witnesses, the Prosecution proved its case to the required standards.

On The Identity Of The Perpetrator And Degree Of Consanguinity

20. The evidence of identification by EW of the perpetrator was reliable and satisfactory as it was based on recognition. It is not disputed that the Appellant is the father to EW. He is named as such in her birth certificate which was produced by PW2. The Appellant in any case confirmed the EW was his first born child. This disposes of the issue of consanguinity.

The Age Of The Victim

21. The age of EW is also not in dispute having been conclusively provided in the birth certificate.

On The Sentence

22. The Appellant was sentenced under the provisions of section 20(2) of the Sexual Offences Act which provides that:

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:
- (2) 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

23. The above provisions infer a minimum and a mandatory sentence. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. In Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR it was stated that:

‘...To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences



24. In the same vein, sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo vs R.*, and *Wilson Waitegei V Republic* [2021] eKLR).
25. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender’s responsibility over third parties should affect the sentence. There is a sound argument also for first-time offenders, for instance, who are not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence deters others from such heinous crimes. (See *BW v Republic* KSM CA Criminal Appeal No 313 of 2010 [2019] eKLR, *Christopher Ochieng v Republic* KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR and in *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No 93 of 2014).
26. The Appellant was provided an opportunity to mitigate in the trial court where he stated that he is a first offender and that ‘he suffers from insanity occasionally and has chest and eye problems’. The trial court took the mitigation into consideration. The converse is also true that the Appellant had been placed in a position of trust and protection of the child EW. He obviously took advantage of her instead of protecting her. The traumatic experience will linger in her life forever and she will have to live with the shame and mental trauma caused to her by this savage act. What about the feelings of betrayal by her very own father?
27. That said, it is the duty of this court to ensure that the sentence meted is lawful. I am guided by the Court of Appeal decision in the case of Bethwel Wilson Kibor vs. Republic [2009] eKLR where the court reaffirmed the principle that where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody”. Similar guidance is contained in the Judiciary *Sentencing Policy Guidelines* (2014) in the following terms:
- “The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
28. The learned trial magistrate who sentenced the Appellant did not specifically mention that they had taken into account the period that the Appellant had been in custody. I have perused the trial court record and found that the Appellant was arrested on September 17, 2020 and remained in custody.
29. In conclusion, I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of defilement were proved by the Prosecution against the Appellant. I find no reason whatsoever to vary the sentence. I affirm the conviction and sentence save to add that the sentence will run from the date when the Appellant was arrested which is September 17, 2020.

SIGNED, DATED AND DELIVERED AT NAIROBI VIA VIRTUAL PLATFORM THIS 15TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE

