



REPUBLIC OF KENYA



KENYA LAW
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**DK v Republic (Criminal Appeal 123 of 2019)
[2023] KEHC 1023 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 123 OF 2019
JWW MONG'ARE, J
FEBRUARY 15, 2023**

BETWEEN

DK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. C. Obulutsa in Eldoret Chief Magistrates' Criminal Case No.4835 of 2015 delivered on 19th July, 2019)

JUDGMENT

1. The Appellant was charged with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars of the offence are that on the 15th August, 2015 in Eldoret West District within Uasin Gishu County, being a male person, he caused his genital organ namely penis to penetrate the genital organ namely vagina of EC, a female person who is known to be his daughter.
2. 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](#). The particulars of the offence were that on the 15th August 2015, in Eldoret West District within Uasin Gishu County, he intentionally touched the vagina of EC, a child aged six years.
3. The Appellant pleaded not guilty and the matter proceeded to full hearing. Upon considering the evidence adduced in court, the testimonies of the witnesses and the defence of the Appellant, the trial magistrate convicted him of the main count and sentenced him to 20 years imprisonment.
4. Being aggrieved with conviction and sentence the Appellant instituted the present appeal vide a petition filed on 23rd June, 2019. The petition is premised on the following grounds;
 1. That (I) am aggrieved the trial court erred in law and fact by convicting and sentencing (me) on coached evidence.



2. That the trial court erred in law and fact by failing to hold that the age of the complainant was not conclusively proved.
3. That the learned trial magistrate erred in law and in fact by failing to hold that the accused own child was used to prefer false charges against him.
4. That the trial court erred in law and fact to hold that the medical evidence did not conform to penetration.
5. That the trial magistrate erred in law and in fact by shifting the burden of proof to the accused person.
6. That the trial court erred in law and in fact as it failed to give consideration to the Appellants' defence evidence.

The parties filed submissions on the appeal.

Appellant's Case

5. The Appellant submitted that the witnesses were coached to give evidence against him as she testified that she was 'told to say you did tabia mbaya'. Further, that the medical evidence failed to document that there was penetration. He urged that the circumstantial evidence before the court was circumstantial and a fabrication. There existed a grudge between the Appellant and the family and this led to the framing up of the charges.
6. It was the contention of the Appellant that it was not clear where the court formed the opinion that the Appellant committed the offence. He urged the court to consider the time spent in remand and pre-trial in accordance with section 333(2) of the *Criminal Procedure Code* as the trial court failed to do the same. Further, that he has been actively participated in the rehabilitation programmes in society and is remorseful and repentant, he will serve as a role model if given a second chance. He urged that his appeal be allowed.

Respondent's Case

7. Learned counsel for the respondent opposed the Appeal and submitted that the offence of incest was proved beyond reasonable doubt. The complainant's age was proved by way of age assessment.
8. Further, penetration was proved by the production of two P3 forms alongside treatment notes which all led to the conclusion that the injuries were consistent with the history of penetration. He stated that the Appellant was the complainants' father therefore, identification was by recognition. He admitted that he was the complainant's father in cross-examination as well.
9. Learned counsel for the state submitted that the trial court was very lenient when it sentenced the Appellant to 20 years imprisonment. He urged the court dismiss the appeal and uphold the conviction and the sentence.

Analysis And Determination

10. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged as was held in *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala -V- R.* (1975) EA 57). It is not the function of a first appellate



court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

11. Upon considering the petition of appeal and the submissions of the parties, the following issues arise for determination;
 1. Whether the prosecution proved its case beyond reasonable doubt
 2. Whether the sentence was harsh/excessive

Whether the prosecution proved its case beyond reasonable doubt

12. The offence of incest is stated in Section 20(1) of the *Sexual Offences Act* as
 - (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, 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.
13. It follows that the ingredients for the offence of incest to be proved are Knowledge that the person is a relative Penetration or Indecent Act

Penetration

14. There were two P3 forms produced in support of the evidence on penetration, the first one was dated 24th August, 2015 and the second one was dated 19th August, 2015 prepared at Moi Teaching and Referral Hospital and Ziwa Hospital. The same were produced alongside treatment notes from Ziwa Hospital. Evidence produced at the hearing ascertained that injuries stated therein were consistent with a history of penetration. Further, the evidence was corroborated by the testimonies of the medical officers.

Knowledge that the person is a relative

15. The complainant testified that the Appellant was her father. The identification of the Appellant was by recognition. He never disputed his identity during the trial. To top it all off, the Appellant admitted that he was the father to the complainant during cross-examination.
16. There was an age assessment conducted on the complainant and produced in court. It established that the complainant was aged 8 years old at the time of the offence.
17. The upshot of the foregoing is that the elements to prove the offence of incest were satisfied. I find that the trial court did not err in its conviction of the Appellant.

Whether the sentence was harsh/excessive

18. The sentence prescribed for the offence of incest with a person under the age of 11 years is life imprisonment. The trial court sentenced him to 20 years imprisonment which was, in my view, very lenient on their part considering the offence he had committed. As to discretion of the trial magistrate



I am persuaded by the holding by the court in *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

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 Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

19. The upshot of the foregoing is that courts are allowed to use their unfettered discretion and determine the appropriate sentences.
20. I have considered the circumstances of the case, the mitigation of the Appellant and the submissions of the parties I am satisfied that the trial magistrate exercised his discretion judiciously and find no reason to disturb the sentence. The appeal is hereby dismissed, sentence and conviction upheld. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF FEBRUARY 2023

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J.W.W. MONGARE

JUDGE

Judgment delivered virtually in the presence of;

Appellant is Present

Ms. Sakari holding brief for Ms. okok- Prosecution Counsel

Loyanae- Court Assistant.

J.W.W.MONGARE

JUDGE

