



REPUBLIC OF KENYA



KENYA LAW
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**JMM v Republic (Criminal Appeal E041 of 2022)
[2023] KEHC 761 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E041 OF 2022
GMA DULU, J
FEBRUARY 10, 2023**

BETWEEN

JMM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original judgment of Hon. E.M Muiru
in Kilungu Principal Magistrate's Court Criminal Case (S.O)
No.8 of 2021 (E002 of 2021) pronounced on 28th July 2021)*

JUDGMENT

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the [Sexual Offences Act](#). The particulars of offence were that on diverse dates between the month of January 2021 and March 9, 2021 at unknown time within Makueni county, being a male person caused his penis to penetrate the vagina of AKM (name withheld) a female child aged 13 years who was to his knowledge his daughter.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006, the particulars of which being that between the same dates and at the same place, touched the vagina of AKM a child of 13 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main count of incest, and sentenced to 20 years imprisonment.



4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following grounds:-
 1. That the learned trial magistrate erred in law and facts when he convicted and sentenced him without observing that the charges before court were defective for both being at great variance with the evidence.
 2. That the learned trial magistrate erred in law and facts by convicting him without considering that there was no evidence to prove penetration without which the prosecution should (sic) not prove the offence of defilement to the required standards in law of beyond reasonable doubt.
 3. That the learned trial magistrate erred in law and facts in shifting the burden of proof to the appellant misapprehending and misdirecting herself on the evidence hence arriving at the wrong conclusion.
 4. That the learned trial magistrate erred in law and facts by convicting him without properly applying section 124 of the *Evidence Act* and for using uncorroborated evidence hence arriving at the wrong conclusion.
 5. That the learned trial magistrate erred in law and facts when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons.
 6. That the learned magistrate erred in law and facts when he failed to consider that the evidence by the prosecution witnesses fell short of any proof in criminal cases of this type.
 7. That the learned trial magistrate erred in law and facts by failing to note that the burden and standards of proof by the prosecution case was not proved (sic) beyond reasonable doubt as provided for under the law thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that it was a miscarriage of justice.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, and those filed by the Director of Public Prosecutions.
6. This being a first appeal, I am reminded that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
7. In proving their case, the prosecution called four (4) witnesses. The appellant, on his part, tendered sworn defence testimony and did not call any additional witness.
8. The elements of the offence of incest with a child are first, the age of the victim who should be below 18 years; secondly, the relationship between the victim and the accused; thirdly, the fact of sexual penetration; and lastly, the identity of the culprit.
9. With regard to the age of the complainant or victim, there is no dispute that she was born on May 25, 2007. The complainant Pw1 AKM stated so. Her mother Pw2 JKM also stated so. There is no contest raised on that evidence. I find that the prosecution proved beyond reasonable doubt that the complainant was aged 13 years at the time of the alleged incident.



10. On the second element of the relationship between the complainant and the appellant, the prosecution evidence from Pw1, Pw2, and even the appellant himself is consistent. They are father and daughter. Thus the second element of the offence is proved.
11. With regard to penetration of a sexual nature, the complainant Pw1 stated that she was penetrated severally on different nights between January and March 2021.
12. The clinical officer Pw4 Eric Kasiamani stated that he examined Pw1 and found that the hymen was broken, and thus concluded that there was sexual penetration. There was no medical evidence however, that the penetration was on the date or dates alleged.
13. In my view, the fact that a hymen is broken is not per se evidence of sexual penetration. The hymen can be broken for other various reasons. In my view also, the evidence of the complainant, Pw1 does not satisfy the provisions of section 124 of the *Evidence Act* (cap 80), as there is no tangible reason why she could not inform the mother Pw2 or any of her siblings about such alleged acts before going to the police. Her evidence is not believable, and in my view, the trial court should have treated it as such. The trial court should not have relied on Pw1 evidence to find that penetration was proved.
14. With regard to the identity of the culprit, in my view, the evidence of the single alleged victim witness Pw1 in this sexual offence case, is not believable.
15. The first reason is that the sexual incidents are said to have occurred at night, and Pw1 does not attempt to describe how she came to identify the alleged culprit to be the appellant, knowing that nights are usually times of darkness. The identification of the culprit is thus in doubt.
16. Again, her failure to inform any relative is very ominous. It creates a doubt, which should have been given to the appellant.
17. Thirdly, the defence of the appellant is clear that the report to the police by Pw1, might be as a result of measures of home discipline which he was instilling on Pw1 during corona virus curfew. It is also instructive that Pw2, the mother of the complainant who lived in the same house, testified on oath that it was not possible for such an incidents to have occurred without her getting to know, in view of how they lived and slept in that same house.
18. I thus find that the prosecution did not prove beyond reasonable doubt that he appellant was the culprit.
19. Thus the conviction cannot stand. The sentence imposed will also have to be set aside.
20. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 10TH DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

