



**MK v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 1044 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E041 OF 2021
GMA DULU, J
FEBRUARY 13, 2023**

BETWEEN

MK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original judgment of Hon. A. Ndungu in Makindu Senior Principal Magistrate's Court CMCR (S.O) No.08 of 2017 pronounced on 30th September, 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with two main counts of incest contrary to section 20(1) of the *Sexual Offences Act* and two alternative counts of committing an indecent act with a child contrary to section 11(1). He was convicted on the two main counts of incest.
2. Count 1 of incest, on which he was convicted, was based on particulars that on diverse dates between December 29, 2016 and February 24, 2017 in Kibwezi Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of SN a child aged 17 years who to his knowledge was his daughter.
3. Count II on the other hand, was based on the particulars that on diverse dates between December 29, 2016 and February 24, 2017 in Kibwezi Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of FN a child aged 16 years who to his knowledge was his daughter.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel Mwongela & Company advocates and relied on the following amended grounds of appeal –
 1. That the learned trial magistrate erred both in law and fact by convicting the appellant where no sufficient evidence was tendered to support the charges against him.



2. That the learned trial magistrate erred both in law and fact by finding that the appellant had defiled the complainant in spite of the fact that the medical evidence was not sufficient enough and was not conclusive to point at the appellant's guilt.
 3. That the learned trial magistrate erred both in law and fact by convicting the appellant on the basis of hearsay evidence which is inadmissible in law.
 4. That the learned trial magistrate erred both in law and fact by failing to interpret the inconsistencies in the prosecution case in favour of the appellant.
 5. That the learned trial magistrate erred both in law and fact by failing to consider in totality the evidence of the appellant tendered in his defence which was very clear and consistent and which if it was considered by the trial magistrate would have led to the appellant's (acquittal?)
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Joseph Mwangela & Company for the appellant and the submissions filed by the Director of Public Prosecutions.
 6. This being a first appeal, I have to start by reminding myself that this court is duty bound to evaluate all the evidence on record afresh and come to its own independent conclusions and inferences. See *Okeno -vs- Republic* (1972) EA 32.
 7. I have evaluated all the evidence on record. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant gave sworn defence testimony and did not call additional witnesses.
 8. The elements of the offence of incest are first penetration of a sexual nature, second the relation between the victim and the culprit, and the third element is the identity of the culprit.
 9. Both the victims Pw1 and Pw2 claim that they were penetrated sexually. They were girls, aged below 18 years. The medical evidence was that each had the hymen broken though not freshly. Pw2 testified that she was pregnant by another person, whose name was not given in the evidence. Pw1 was said to be 17 years and Pw2 16 years at the time of the alleged incestuous acts.
 10. In my view, from the evidence on record, the prosecution proved beyond any reasonable doubt that indeed the two girls were penetrated sexually.
 11. With regard to the relationship between the appellant and the two victims, the evidence on record on both the prosecution and the defence side, is that the appellant was the father of both. Pw1 was her daughter with another woman. Pw2 was his daughter with his present wife Pw3 RMM. I find that the prosecution proved beyond any reasonable doubt that the two girls were daughters of the appellant.
 12. I now turn to the third element of the identity of the culprit. The evidence connecting the appellant to the incidents of incest is that of the two victims. Under the proviso to section 124 of the *Evidence Act* (Cap 80) such evidence needs no corroboration to sustain a conviction, provided it is believable and so believed by the trial court on reasons to be stated in the proceedings.
 13. In my view, the evidence of both Pw1 and Pw2 is not believable. First, though Pw1 stated that at the mother Pw3 knew that she had a pregnancy by the appellant which was aborted, the mother Pw3 denied such knowledge. With regard to Pw2, the pregnancy she said she had was, according to her own evidence, by another man not the appellant.
 14. In addition to the above, the teacher to whom the first report is said to have been made, was not called by the prosecution to testify and no explanation was given for the failure. Further, there is evidence on record from both the mother Pw3, and the appellant, that the two girls shifted to the house of Pw4



because of fear of disciplinary action for failing to go to the church choir and coming home late, not because of sexual harassment.

15. Thus in my view, their evidence is rendered doubtful and is not believable. On that account, in my view, the trial court should have given the benefit of doubt to the appellant, in these serious incestuous allegations made against him, and acquitted him.
16. I will thus quash the conviction and set aside the sentence imposed.
17. Consequently, and 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 13TH DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

