



REPUBLIC OF KENYA



KENYA LAW
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**FK v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 2593 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E035 OF 2022**

LW GITARI, J

MARCH 23, 2023

BETWEEN

FK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. FK, the appellant herein, was charged before the Chuka Chief Magistrate's Court with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on diverse dates between 2015 and January 7, 2019 in Meru South Sub-County within Tharaka Nithi County, the appellant, being a male person, caused his penis to penetrate the vagina of AKK a female person who was to his knowledge his daughter.
2. The appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. The appellant was also charged with a second count of being found in possession of narcotic drugs contrary to section 3(1) as read with Section 3(2) (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* in that on 13/1/2019 the appellant was found in possession of bhang, to wit 2 grammes valued at Kshs 60/- which was not in medical preparation. The appellant denied the charge. After the full trial he was convicted but the trial magistrate did not pass a sentence for this offence.
4. After a full trial, the learned magistrate found the Appellant to be guilty on the main count and he was sentenced to serve life imprisonment.
5. Being dissatisfied with the said decision, the Appellant initially instituted the present appeal against the sentence only. In filing his written submissions, the Appellant opted to abandon the grounds of



appeal dated October 21, 2022 which were mainly against the sentence and based his appeal on the following grounds:

- a. That the honourable trial magistrate erred in both laws and facts by relying to the advanced evidence of the prosecution witnesses – PW1 and PW2 which was riddled with a lot of doubts thus contravening sections 163(1) and 165 of the [Evidence Act](#).
 - b. That the honourable trial magistrate erred in law by not evaluating on evidence on records which was not proved beyond any reasonable doubt as he left aside evidence on record and misdirected himself that the Appellant slept in one bed with the complainant (PW1) in the same room.
6. The appeal was canvassed by way of written submissions. The Respondent’s submissions were filed on January 12, 2023 which was before the Appellant filed his supplementary grounds of appeal and written submissions on February 2, 2023. The Respondent’s submissions therefore only addressed the issue of the sentence meted against the Appellant as pleaded by the Petitioner when initially filing the present appeal.

The Submissions

7. It was the Appellant’s Submission that since the complainant was examined the same date of the incident and no semen was found nor penetration injuries, then there was no evidence to incriminate him of the offence charged. The Appellant further faulted the trial court for not finding that he was framed by PW2, who is the complainant’s aunt, and the area manager. The Appellant thus maintained that he has never slept on the same bed with the complainant or had sexual intercourse with her. He thus urged this Court to cast the benefit of doubt in his favour and acquit him forth with.
8. On its part, the Respondent submitted that the Appellant has not satisfactorily demonstrated that the grounds set in his appeal exist to necessitate this court to interfere with his sentence. According to the Respondent, the sentence meted out on the Appellant is within the law as prescribed for under section 20(1) of the [Sexual Offences Act](#) which provision is couched in mandatory terms. That under the said provision, the Appellant cannot benefit from any other sentence other than life sentence. The Respondent thus submitted that the Appeal lacked merit and should be dismissed.

Issue for Determination

9. It is now trite principle in law that parties are bound by their pleadings. As noted above, the Appellant herein abandoned his appeal on sentence and submitted only on his conviction. Thus, the main issue for determination is whether the prosecution proved its case against the Appellant to the required standard of beyond any reasonable doubt.

Analysis

10. This being a first appeal, this Court is bound to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of [Okeno v Republic](#) [1972] EA 32. Guided by this authority, below is a summary of the evidence adduced by the parties.



The Prosecution's Case

11. KK (PW1) was the complainant herein. She stated that she was 17 years old and that the Appellant is his father. That on diverse dates between 2018 and 2019, the Appellant would go home where she was staying with him, tell her to remove her clothes, and then defile her. That he would insert his penis in his vagina, and defile her every week on Fridays and Saturdays until 2019. That he would sometimes use a condom and other times he would not use protection. Further that the Appellant threatened to kill her if she would divulge that information.
12. According to PW1, she decided to report the incidents to the area manager (PW2) on January 11, 2019. That the following day, the Appellant was arrested and PW1 was escorted to Chuka General Hospital where she was examined and found to be 3 months' pregnant. That she consequently gave birth to her child on September 9, 2019.
13. PW2 was VM, the area manager. She confirmed that both PW1 and the Appellant were his area residents and were staying in the same house. She corroborated PW1's testimony that on January 11, 2019, PW1 went to her and reported that the Appellant was defiling her. PW2 then reported the matter to the area Chief, JMK (PW4). The following day, PW2 and PW4 raided the appellant's house together with one CRM (PW3). That the appellant opened the house and they found him sleeping with PW1 on the same bed. Further that they recovered 5 condom packets, an empty packet of condoms and 2 grams of bhang which were placed on a stool next to the bed. That PW1 did not have an underpant.
14. CRM (PW3) testified that he was an area manager. He corroborated PW2's testimony that they raided the appellant's house on January 12, 2019 and found the Appellant sleeping with the PW1 on the same bed.
15. JMK testified as PW4. He stated that he is the area chief of Kathangani Location. That he received a report from PW2 on January 11, 2019 that PW2 was being defiled by her father, the Appellant herein. That they went to their house and found the Appellant sleeping on the same bed as PW1.
16. Grace Nyakio (PW5) testified that she was a Government Analysts. That she received exhibits of plant material from PC Ketemba and on analyzing the same, she found that it was bhang. She produced a report dated June 19, 2019 and an Exhibit Memo as P Exhibit 9 and 8 respectively.
17. PW6 was Ngetich Benard. He received some buccal swap samples from CPL Miriam Ong'any of Chuka police Station, with a request that he analyses the same in order to determine paternity. The samples were from the Appellant, PW1, and PW1's child. After examining the same, he concluded that there were 99.99% chances that the Appellant was the father of PW1's child. He signed the report dated March 9, 2020 which she produced as an exhibit.
18. PW7 was Joseph Mwenda Mirigwa, a clinical officer based at Chuka District Hospital. He produced a PW1's P3 Form on behalf of one Hillary Kagicu whose handwriting and signature he stated he was familiar with as they worked together for over five (5) years. It was his testimony that physical examination on PW1, she had a small wound on the left ankle joint which was swollen but could not have been occasioned by the perpetrator. That nothing of significance was noted on her physical body but when lab tests were done, pregnancy turned out positive. He produced the treatment notes, the PRC Form, and the P3 Form as P. Exhibits 2, 3, and 4 respectively.
19. PW8 was PC Irene Kemboi, the investigating officer in this case. She recalled that on January 13, 2019 at around 1.00 p.m., the chief of Kithangani location called the OCS Chuka Police Station and informed him that they had arrested a suspect and his daughter. CPL Kandie and PC Letambul went and picked the two and brought them to Chuka Police Station. They were also given 6 condoms (P Exhibit 6),



one torn (used) condom (P Exhibit 7), and 2 grams of bhang (P Exhibit 5). It was her testimony that a DNA test was conducted and it was found that the complainant's child was the biological child of the Appellant.

Defence Case

20. From the evidence adduced by the complainant and the appellant in his defence there is no dispute that the complainant was the biological child of the appellant. In his defence he confirmed that the complainant is his daughter. The essential element that the appellant had knowledge that the complainant was his relative is not in dispute and I need not belabour the point. The Appellant testified as the sole witness in his defence. He confirmed that the complainant herein is her daughter. That the complainant's mother disappeared when the complainant was five months old and that the Appellant is the one who has raised her. According to him, he was framed by the sub-area who allegedly comes from the same area as his wife. That the complainant's mother was framing him so that she could take her daughter away. He maintained that he has never had sexual intercourse with her daughter and that she was not pregnant by the time of his arrest.

21. The law on the offence of incest is provided under section 20 (1) of the [Sexual Offences Act](#) which states 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 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.”

22. From the above definition, the essential elements for the offence of incest are an intentional indecent act, with knowledge that the person is a relative.

23. The relationship between the appellant and the complainant was proved and admitted by the appellant.

It was the complainant's testimony that out of the evil acts of her father she conceived and bore a child. It was also the testimony of PW7 the clinical officer, that when this matter came to light and the complainant was examined at the hospital, pregnancy test was positive. This was on 11/1/2019. Later on 9/9/2019 she gave birth to a baby girl. FN In the course of investigations, a DNA test was conducted on the child FN The result of the DNA as testified by PW6 was that there were 99.99 chances that the appellant was the father of the said child.

24. On the second element of penetration, it was proved by the testimony of the complainant and the Forensic evidence of PW6. Finally, the age of the victim is an essential element in charge of incest as the sentence is determined based on the victims age. The age of complainant was not stated in the particulars of the charge. The complainant gave evidence in court on 13/8/2020 and told the court she was seventeen years old. She testified that the appellant started defiling her when she was fifteen (15) years old. The doctor who examined her when filling the P3 form found that she was about 14 years old. The learned trial magistrate found that, “she could have been fifteen (15) years when the incest started. The sentence provided under section 20(1) is a minimum of ten years. The proviso to the section is that where it is proved that the female person is under the age of eighteen (18) years the accused shall



be liable to imprisonment for life. The term shall be liable must be interpreted to mean that it is a mandatory sentence and the offender shall be sentenced to life imprisonment upon conviction.

25. In this case I find that the prosecution proved that the age of complainant was below the age of eighteen years at the time the offence was committed. Her testimony and the medical evidence proved her age to the required standards of beyond any reasonable doubts. This was sufficient evidence to link the Appellant to the offence. The prosecution discharged its burden to prove the ingredients of the charge beyond any reasonable doubts
26. The defence of the appellant was a sham. From the prosecution's evidence, it is the complainant herself who reported the matter to the area manager. Upon being cross-examined by the appellant she stated that it was not Murugi who instructed her. The testimony of the complainant was well corroborated that the appellant had sexual intercourse with her over a period of time and impregnated her.
27. In the circumstances, on the sentence, although the Appellant abandoned this ground by filing supplementary grounds of appeal, the sentence meted out against him was lawful as it is the mandatory sentence provided for in law under the provisions of section 20(1) of the *Sexual Offences Act*.
28. The appellant was convicted for the offence of under count 2 on the charge sheet. The learned trial magistrate failed to impose a sentence under that count.
29. I therefore direct that the appellant shall be produced before the learned trial magistrate on 28/3/2022 for her to pass sentence on the 2nd count. A production order to issue. Proceedings shall be virtual.

Conclusion

30. For the reasons stated, I find that this appeal is without merits.

31 Order:

This appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 23RD DAY OF MARCH 2023.

L.W.GITARI

JUDGE

23/3/2023

