



REPUBLIC OF KENYA



**KENYA LAW**  
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**TKC v Republic (Criminal Appeal E026 of 2021)  
[2023] KEHC 1879 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1879 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E026 OF 2021**

**RL KORIR, J**

**MARCH 8, 2023**

**BETWEEN**

**TKC ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Conviction and Sentence by Hon. P.J. Aduke, RM in  
Bomet Resident Magistrate's Court Sexual Offence Number 50 of 2020.)*

**JUDGMENT**

1. The Appellant was charged with the offence of attempted incest contrary to Section 20 (2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on the August 14, 2020 in Chepalungu sub-county within Bomet County, the Appellant being a male person, attempted to cause his penis to penetrate the vagina of JC, a child aged 12 years who was to his knowledge his daughter.
2. The Appellant was arraigned in court to take plea on August 19, 2020 where he pleaded not guilty to the charge. The matter proceeded to full trial with the Prosecution calling five (5) witnesses in support of their case.
3. At the close of the Prosecution case, the Appellant was placed on his defence and Section 211 of the [Criminal Procedure Code](#) explained to him. He elected to give unsworn testimony and called no witnesses in his defence.
4. By Judgement dated July 9, 2021, the Appellant was convicted as charged and sentenced to 10 years imprisonment.



5. Being dissatisfied with the conviction and sentence, the Appellant filed a Petition of Appeal on August 18, 2021 where he raised 7 grounds of appeal reproduced verbatim as follows: -
- i. That he pleaded not guilty during the entire trial.
  - ii. That the learned trial magistrate erred in both law and fact by sentencing him to 10 years imprisonment while basing her conviction on PW1, PW2, PW4 and PW5 who were incredible witnesses.
  - iii. That the learned trial magistrate misled herself in both law and fact by convicting him to 10 years imprisonment basing her conviction on uncorroborated, contradictory, tainted and shoddy evidence.
  - iv. That the learned trial magistrate erred in both law and fact by rejecting his concrete defence thus shifting the burden of proof to the defense side.
  - v. That the learned trial magistrate misdirected herself both in law and fact by not considering his untouchable and compelling mitigation. (sic!)
  - vi. That he requests and prays for the court proceedings to be availed as his defence witness during the hearing and disposal of the appeal as per section 22 (1) of the Constitution of Kenya. (sic!)
  - vii. That he wished to be present during the hearing and disposal of his appeal in a bid to a fair trial.
6. This Court issued directions on July 28, 2022, for the parties to canvass the appeal by way of written submissions.

#### **The Appellant's Submissions.**

7. The Appellant's submissions are dated and filed on March 5, 2023. He submitted that the victim testified that she was 11 years old which contradicted with the testimony of PW2, the victim's mother, who told the court that the victim was 12 years old. Secondly, he submitted that the victim testified that he put his private parts on her private parts yet the medical examination indicated that her hymen was intact and that there were no tears or lacerations on both labia. He urged the Court to rely on the evidence of PW5 the investigating officer who confirmed that from the evidence of the medical officer, the victim was never defiled.
8. Lastly, the Appellant submitted that he should have been examined in hospital to confirm the said act. That the trial court relied on the evidence of PW2, his wife who bore a grudge with him because of a land issue.

#### **The Prosecution's Submissions.**

9. The Prosecution submissions are dated October 12, 2022 and were filed on October 17, 2022. With respect to the ingredient of age, they submitted that the victim's age was proven by her health card (P.Exh1) alongside the age assessment form (P.Exh3). They submitted that the victim was 12 years old at the time of the offence and the same was not controverted by the Appellant.
10. On consanguinity, the Prosecution submitted that PW1, PW2 and PW3 testified that the Appellant was the victim's father and relied on Section 22 of the Sexual Offences Act.



11. The Prosecution further submitted that the medical evidence on Record [P.Exh 2(a) and 2(b)] indicated that the victim's hymen was intact and that there were no bruises or lacerations. Thus, the act of penetration did not occur. However, they submitted that the testimony of the victim indicated that the Appellant had removed her pant and touched her underwear while PW2 testified that she walked in on them and found the Appellant bent over towards the victim, in the process of the act. That this evidence demonstrated an attempt to defile the victim in an act of incest.
12. With respect to identification, the Prosecution submitted that the Appellant was well known to the victim as her father and that PW2 who walked in during the incident properly identified her husband as the perpetrator. On the Appellant's defence, the Prosecution submitted that he merely gave denials when he alleged that his wife had framed him because he found her having an affair with one Robert Sang. That the said allegations were an afterthought because the Appellant neither questioned PW2 on the same nor called any witnesses to support his allegations.
13. Lastly on sentence, the Prosecution submitted that the court afforded the Appellant an opportunity to mitigate and he opted not to do so. That the trial court was guided by the pre-sentence report in handing down its sentence and therefore the Appellant was deserving of the minimum sentence that was handed over to him. The Prosecution asked the Court to dismiss the appeal.
14. On a first appeal, it is the duty of the court to subject the entire trial evidence to a fresh scrutiny and arrive at its own findings of the case. This was clearly stated by the Court of Appeal in *Kiilu & Another vs. Republic [2005]1 KLR 174:-*  
  
' 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; 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.'
15. I have perused the trial Record, the Petition of Appeal filed on August 18, 2021, the Appellant's defence and the Respondent's submissions dated October 12, 2022. I have isolated two issues for determination as follows:-
  - i. Whether the offence of attempted incest was proven by the Prosecution to the required standard.
  - ii. Whether the Sentence was lawful and just.

## **Analysis of Issues**

### **Whether the offence of attempted incest was proven by the Prosecution to the required standard**

16. The [Sexual Offences Act](#) No 3 of 2006 provides for the offence of attempted incest under Section 20 (2) as follows:-

#### **Incest by Male Persons**

- '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.

2. If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.
3. Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as 'section 114 orders' under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.'

17. It follows then that for this offence to stand, the Prosecution must prove the following ingredients:-

- a. Knowledge that the person is a relative.
- b. An attempt to Penetrate or commit an Indecent Act.

18. Section 22 of the *Sexual Offences Act* provides for the test of the relationship between an accused and the victim. It states as follows:-

#### **Test of relationship**

- '1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the first degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not.
2. In this Act -
  - a. 'Uncle' means the brother of a person's parent and 'aunt' has a corresponding meaning;
  - b. 'Nephew' means the child of a person's brother or sister and 'niece' has a corresponding meaning;
  - c. 'Half-brother' means a brother who shares only one parent with another;
  - d. 'Half-sister' means a sister who shares only one parent with another; and



e. 'Adoptive brother' means a brother who is related to another through adoption and 'adoptive sister' has a corresponding meaning.

3. An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

4. In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act No 8 of 2001.

19. The persuasive authority of *BNM vs Republic Mombasa Criminal Appeal No 223 of 2009 [2011]* eKLR explained section 22 clearly as follows:-

' Does this fact that no biological or blood ties exist between the two negate a charge of Incest? The answer is to be found in section 22 of the *Sexual Offences Act* which deals with 'Test of relationship'. S. 22(1) provides as follows:

'22(1) In cases of the offences of Incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.'

'My own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child. Therefore by dint of this s.22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'loquo parentis' can legally be charged and indeed convicted of the crime of Incest with her.

In her evidence the complainant made a brief statement in which she said that her 'daddy' whom she positively identified in court put his finger into her vagina.'

20. In the present case, the victim PW1 and her mother PW2 both testified that the Appellant was the father of the victim. The victim referred to the Appellant as 'Baba' while PW2 confirmed in her testimony that she had been married to the Appellant since 2002 and that he was the father of PW1. Further to this, this Court takes judicial notice that the Appellant knew the victim to be his daughter in accordance with section 22(3). I find that the issue of consanguinity was adequately proven by the Prosecution and there was no contention about it.

21. Penetration is defined under section 2 of the Act as:

' The partial or complete insertion of the genital organ of a person into the genital organs of another person.'



22. The Prosecution adduced evidence of penetration through the evidence of the victim. She testified that her father removed her pant and put his private part in her private part. PW2, the victim's mother on the other hand testified that she found the Appellant in bent-over position with the victim.
23. PW4, Bernard Kipkorir Bore testified that he medically examined the victim at Siongiroi Centre. It was his testimony that the hymen was intact, that there were no tears or lacerations on the labia and all tests came back negative. He formed the opinion that there was no actual penetration and produced the P3 Form (P.Exh2a) and Treatment notes (P.Exh2b).
24. From the above evidence, there was no penetration occasioned on the victim. The evidence however indicates that the Appellant was in the process of committing the said act before his wife PW2 walked in on him. Section 388 of the [Penal Code](#) defines attempt in the following terms:
1. Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.
  2. It is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.
  3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.'
25. The victim testified that on the material day, the Appellant pulled her and stood over her. He then touched her private parts and inserted his private parts into her private parts. PW2 testified that she caught the Appellant in the act. She stated that she found the Appellant in a bent over position over the victim and that prompted her to raise an alarm. The medical evidence however demonstrated that the victim's hymen was intact and that there were no lacerations, which means that there was no evidence of penetration.
26. In *Keteta v R (1972) EA 532, 534*, Madan Ag CJ (as he then was) stated thus:-
- ' A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.'
27. The fact that PW1 testified that her father wanted to commit the said act upon her and asked her not to scream or else he would kill her, coupled with the evidence of PW2 that she found the Appellant in a suggestive position with the victim demonstrates to this Court that he intended to and was in the process of starting to commit the act. Thus, he carried out the overt acts intended towards actualizing the offence of incest against his daughter.



28. What is clear to this court is that, in an attempt to defile the victim, the Appellant ended up committing an indecent act against her. This is evidenced by her testimony that he touched her private parts. Section 2 of the *Sexual Offences Act* defines indecent act as follows: -

' Indecent act' means any unlawful intentional act which causes-

- a. 'Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;'

29. In his defence, the Appellant merely stated that he had caught his wife with another man called Robert Sang, that he was reading the bible on the material day and that Robert Sang was the one who arrested him and took him to the police station. This defence in my view does not cast any doubt on the evidence already produced by the Prosecution.

30. Further, the Appellant stated in his submissions that the charges against him were based on a grudge with his wife for a parcel of land. I dismiss this as an afterthought because he never raised it during cross-examination. It remains clear that if PW2 had not walked into the house at the time when she did, the minor would have been defiled by her father and the offence of incest would have been actualized. However, in the circumstances, he ended up committing an indecent act as already demonstrated in this analysis and this is sufficient evidence to prove the ingredients outlined in the definition of attempted incest.

31. It is therefore my finding that the elements of the offence of attempted incest were adequately established by the Prosecution to the required standard and I hereby uphold the conviction.

#### **Whether the Sentence was lawful and just.**

32. The *Sexual Offences Act* provides that a person who is convicted of the offence of attempted incest will be sentenced to a term of imprisonment for a period not less than 10 years. This was the sentence meted by the trial court.

33. It is axiomatic that sentencing is a reserve of the trial court. This is because, the trial court has the privilege of receiving evidence first-hand and observing the demeanour of a convicted person throughout the trial. Thus, an appellate court must be reluctant to interfere with a trial court's exercise of its discretion.

34. This Court is mandated to consider the sentence meted by the trial court and only interfere with the same where it is satisfied that the trial court meted out an illegal sentence or misdirected itself in sentencing or meted an excessively harsh sentence. This mandate is enshrined in section 354 (3) (a) and (b) of the Criminal Procedure Code which provides thus:-

' 3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

a. in an appeal from a conviction-

- i. Reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried



by a court of competent jurisdiction; or

- ii. Alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
- iii. With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

b. In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;'

35. During sentencing, the Appellant chose not to tender any mitigation. I have considered the Probation Report dated August 4, 2021 in the trial Record and noted that the Appellant maintained that he did not commit the act and that his wife who was involved in extra-marital affairs framed him to get him out of the way for her to be with her lover. The same report also indicated that the Appellant was remorseful and wanted to be reunited with his children who had suffered during his absence.

36. This Court is cognizant of the offence with which the Appellant has been convicted. At the same time, this Court balances this against the Appellant's right to be sentenced in an appropriate and just manner.

37. In the case *S vs Scott-Crossley 2008 (1) SACR 223 (SCA)* at para 35 it was held thus:-

' Plainly, any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

38. I have reviewed the circumstances of this case and noted that both the Appellant and his wife PW2 have 6 children between them and the victim impact statement filed by the probation officer indicated that the family was desirous of burying the hatchet caused by the commission of the offence and making a new start. In particular the probation report has stated that the victim has forgiven the Appellant and bears no further grudge against him. It is my view therefore that in the circumstances of this specific case that a further custodial sentence will serve no further useful purpose. The Appellant has had time to reflect on his indiscretion and actions and the life of his family.

39. In the end, I consider the period served sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 8<sup>TH</sup> DAY OF MARCH, 2023**

.....



**R.LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellant, Mr. Njeru for the State, and Siele, Susan (Court Assistants)

