**MKK v Republic (Criminal Appeal E058 of 2019)**
**[2023] KEHC 3407 (KLR) (5 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3407 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E058 OF 2019**

**SM MOHOCHI, J**

**APRIL 5, 2023**

**BETWEEN**

**MKK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal against Conviction and sentence in CMCC SO No. 188 of 2016 - Eldoret, Republic v MKK by H.O BARAZA, S.P.M. delivered on 01.04.2019)***

## JUDGMENT

1. The Appellant contests his conviction and imprisonment to three (3) life sentences in three (3) counts of the offence of Incest contrary to Section 20 (1) of the *Sexual Offences Act*.

2. The particulars with regard to the 1st count was that: -

> " On the 1st day of August 2016 at [Particulars Withheld] Estate in Eldoret East Sub-County within Uasin Gishu County, the Appellant being a male person caused his penis to penetrate into the vagina of MJ , a girl aged 8 years who to his knowledge was his daughter".

3. The particulars with regard to the 2nd count was that: -

> " On the 1st day of August 2016 at [Particulars Withheld] Estate in in Eldoret East Sub-County within Uasin Gishu County, the Appellant being a male person caused his penis to penetrate into the vagina of EJ, who to his knowledge was his daughter".

4. The particulars with regard to the 3rd count was that;

> " On the 1st day of August 2016 at [Particulars Withheld] Estate in Eldoret East Sub-County within Uasin Gishu County, the Appellant being a male person caused his penis to penetrate into the vagina of RC who to his knowledge was his daughter".

5. Aggrieved of the conviction and sentence, the Appellant preferred the Appeal on the 9th April 2019 relying on five (5) grounds as follows: -

   a. That the trial magistrate erred in law and facts by convicting when the Appellant's fair trial rights were violated;

   b. That the trial magistrate erred in law and facts by convicting the Appellant on manifestly insufficient evidence;

   c. That the trial magistrate erred in law and facts by convicting the appellant on evidence not proved beyond reasonable doubt;

   d. That the trial magistrate erred in law and facts by convicting the Appellant on uncorroborated and unreliable testimonies of the complainant; and

   e. That the trial magistrate erred in law and facts by convicting the Appellant against the provisions of section 20(1) of the *Sexual Offences Act*.

6. On the December 17, 2020 the Appellant sought leave to amend his appeal and the same was allowed on the February 24, 2021 and a further order allowing the amendment within 14 days was made on the September 22, 2021.

7. The Appellant eventually filed his amended grounds on the January 9, 2022 clearly long after the leave granted had lapsed. This Court however shall allow the amended grounds as a basis of determination of the appeal.

8. The amended grounds of appeal had three (3) grounds being: -

   a. The trial magistrate erred in law by acting on the wrong principle of law and upheld an unlawful sentence. The proviso of section 20(1) of the *Sexual Offences Act* provides for a sentence of 10years up to life imprisonment. Life imprisonment is not a mandatory sentence;

   b. The trial magistrate erred in law and in fact by awarding a life imprisonment to the appellant but failed to note that penetration of the three complainants was not was not proved; and

   c. The appellant's defense was not considered.

**Appellant Case**

**Ground One Evidence of complainants improperly received**

9. The appellant relied on the case of *Johnson Muiruri vs Republic* (1983) KLR 445, where voire dire examination is improperly that; the trial magistrate failed to appreciate his duty to record the terms in which he was persuaded and satisfied that the child understood the nature of Oath and failure to record the solemnity and nature of the oath

10. The Appellant submitted while relying on the case of *Patrick Wamunyu Wanjiru vs Republic* (2010) KLR and in the case of *Joseph Opondo vs Republic* Appeal No 91 of 1999, that the trial court failed

in adopting the mandatory procedure in conducting voire dire examination, that the learned trial magistrate failed:-

a. To record the terms in which he was persuaded and satisfied that the child understands the nature of oath.

b. To record the inquiry as to the child's ability to understand the nature of oath.

**Ground Two Prosecution case not proofed beyond reasonable doubt**

11. It was the appellant's submission that, the testimony of the complainants did not in any way support the charge sheet that indicated the dates of the alleged offences, while on the other hand the complainants, that is PW1, PW2, PW3 in their testimony in chief were not able to mention dates of the alleged offence and posed the question, how did the framers of the charges arrived at the dates on the charge sheet yet the complainants could not recall the dates they were defiled? Furthermore, on the charge sheet it is indicated that the Appellant did penetrate with his penis into genitalia of the complainant. On their testimonies in chief, complainants did not mention penis nor the genital organ as is on the charge sheet instead they stated and I quote, "he then took his *dudu* and put it in my *susu*?

12. The Appellant took issue with the statutory provision in section 8 (1) of the Sexual Offence Act No 3 of 2006, the definition of defilement as partial or complete insertion of penis into genital organs. Arguing that the law does not mention "*dudu*" nor "*susu*" thus the words of the complainants were far from the dictates of the *Sexual Offences Act*.

**Defective Charge Sheet**

13. That the trial magistrate erred in law by convicting the Appellant on a defective charge sheet in that the AGE of the complainants was not disclosed.

**Penetration**

14. It was the Appellant's submission that no evidence of penetration was adduced by prosecution witnesses (1,2,3) and that the medical evidence of PW8 concluded the findings were suggestive for defilement." Which to him is no proof of penetration and he sought reliance on the *Arthur Mshilla Manga v Republic* [2016] eKLR where the court held an examination by the doctor on the same day did not find any discharge or bruises by the hymen was missing. There was no evidence that the hymen was torn freshly as to indicate that it was a result of the penetration by the Appellant. There was no evidence, therefore, that the hymen missing was related to the vent of the same days because if it were so, the clinical officer would have noted.

**Ground Three.**

**Appellant's defence was not considered.**

15. The Appellant submitted that his sworn statement of defence was not given an objective and open-minded analysis by the trial magistrate before arriving at a conviction and sentence. That the court had a duty to analyse the appellant's defence against all other prosecution evidence.

**Respondent's Case**

**Whether the prosecution's case was proved beyond reasonable doubt?**

16. The Respondent submitted that the Appellant was proved to be a relative of the three victims and PW1-PW3 testified that the Appellant was their father and the birth notification cards produced bears the Appellant's name and that the relation was undisputed by the Appellant.

17. As to whether penetration was proved against the Appellant, the Respondent submitted that PW1, PW2 and PW3 testified how they were defiled which testimony was corroborated by PW8 which showed that the victims had old healed hymenal tears and it was their submission that the Complainants were defiled severally by the appellant.

18. On the Issue of age of Complainants, the Respondent submitted that PW1 testified of her age being 8 years old while PW2 and PW3 were 10 and 5 years old which evidence was corroborated by PW5 who produced their child health record cards that indicated PW1 was born on May 7, 2008 and PW2 was born on 11th November, 2006 and that all complainants were below the age of 11 years.

**Whether the trial magistrate imposed an unlawful sentence**

19. The Respondent submitted that Section 20(1) of the *Sexual Offences Act, 2006* provides for a penalty of life imprisonment where the victims are below the age of eighteen (18) years old and that the magistrate was well within the law when he imposed the sentence and that the sentence imposed was proper and legal under the circumstances.

**Whether the Appellant Defense was considered?**

20. The Respondent contended that the Appellant's defence case was an afterthought and that the theory of being framed by the wife and her relative, the chief could not displace the prosecutions case as it is the chief that rescued the Appellant from members of the public who wanted to instill mob violence upon him. That the Appellant's Alibi alluded in his submission was never part of his defence during trial.

21. The Respondent urged for the dismissal of the appeal for lack of merit.

22. This is a first appeal. The duty of the first Appellate Court in criminal cases was restated in the case of *Charles Mwita v Republic*, CA Criminal Appeal No 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

> " In Okeno v R [1972] EA 32 at page 36 the predecessor of this Court stated: - "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA. 336) and to the appellate court's own decision on the evidence".

23. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (Shantilal *M. Ruwalla v R* [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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, see *Peters v. Sunday Post*, [1958] EA 424.

24. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of *Gabriel Njoroge v. Republic* [1988-85]1 KAR 1134, that: -

> "As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the questions of fact as on the question of law to demand a decision of the Court of the first appeal and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] EA 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law."

25. The grounds of appeal in both the petition of appeal and amended grounds of appeal are replicated, calling for the court to cluster and refine them as follows in three (3) Issues: -

    a. Whether the prosecution's case was proved beyond reasonable doubt?

    b. Whether the Appellant Defense was considered? and

    c. Whether the trial magistrate imposed an unlawful sentence?

**Determination.**

26. To prove its case, the prosecution called eight witnesses, namely, MJ (PWI), EJ (PW2), RC (PW3), CC (PW4), LR (PW5), P.C Wanjala Mayende (PW6) and PN (PW7) and Dr. Taban Tokosan (PW8).

27. PWI testified that she was eight years old and that she was a standard one pupil at [Particulars Withheld] Primary School and that the Appellant was her father. She explained that she used to live with him together with her siblings, namely, EJ and RJ. EJ is the one who used to cook for them. Her evidence was that the Appellant did what she termed "tabia mbaya" (bad manners) to her.

28. She explained that the Appellant asked her to remove her clothes and get onto his bed and she duly complied. He then put what she termed "his dudu" into her "susu". She said that she felt a lot of pain during the act and in the morning, she went to school and reported what had happened to her to one Madam Purity.

29. PW1 was later taken to Moiben Police Station and to Moi Teaching and Referral Hospital for treatment. She said that the Appellant who she referred to as "Baba" told her not to tell anyone about the incident. She clarified that she knew "susu" and "dudu" as parts of the body which are used to urinate.

30. PW2 told the court that the Appellant is her father. She was a standard 2 pupil at [Particulars Withheld] Primary School and was 10 years old.

31. Her evidence was that the Appellant told her to remove her clothes and lie while facing up. He then took his "Dudu" and put it in her "Susu". She said that she felt a lot of pain during the act. She later reported what had happened to one Madam P . She remained in school until 1.00pm when Madam L picked her and her sisters and took them to Referral Hospital where they were treated.

32. PW3 said that the Appellant did bad manners to her before threatening to kill her if she told anyone.

33. PW4, the Assistant Chief of Chepkoilel Sub-Location testified that on 2nd August 2016 at around 10.00am, she was in his office at [Particulars Withheld] Estate when the one Mr. S , Head Teacher of

[Particulars Withheld] Primary School called him and sought to know if she was in the office. he then went to his said office and reported that there were two children who had been defiled in his School.

34. She then advised him to bring the two children to be taken to[Particulars Withheld] Estate Dispensary but the Nurse there referred them to Moi Teaching and Referral Hospital. He then called the Community Heath Volunteer Chris Koech and told him about the incident. The Community Health Volunteer gave him one L mobile phone number. She called the said L nd the two discussed how they could rescue the girls. They went to their said school and took the children to Moiben Police Station where they recorded statements.

35. Having rescued the victims, she went back to their local centre. Members of the public were irked by the report against the Appellant. They arrested him and sought to lynch him and that she had to call police officers to the scene to rescue him.

36. PW5 told the court that she works with an organization called RCA Watoto Wazima Initiative as a Field officer. She testified that on 2nd August 2016 at around 7.00pm she was on her way home when she was called by one Grace, a Community Health volunteer, who reported that there were children who were suspected to have been defiled at [Particulars Withheld] Estate Primary School. She advised her to take them to school and the following day she proceeded to the said school and talked to a teacher called Purity. She then took the children in question to Moiben Police Station where they recorded statements. From there, she took them to Moi Teaching and Referral Hospital for treatment and later to Shelter Children's Home.

37. That the children who were all aged below 12 years were later handed over to the mother. The children were treated at Moi Teaching and Referral Hospital. They were also issued with P3 Forms. PW6, a police officer attached to Moiben Police Station is the one who investigated this matter and concluded that there was enough evidence to charge the Appellant. He testified that on 3rd August 2016 the Assistant Chief Surgoet Sub-Location went to their said station with three children and reported that they had been defiled by their father. The report was duly recorded in the Occurrence Book and their statements taken. He issued them with P3 Forms. While on patrol on the same day, they received a call through which they were informed that the suspect had been arrested by members of the public who wanted to lynch him. They rushed to the scene and rescued the Appellant who was the said suspect.

38. PW7 told the Court that BJ was her pupil. On 2nd August 2016 at around 9.00am she was in class and when pupils went for break to play, she saw her walk in a funny way. She then called her and asked her what the problem was and she said that her father had done bad manners to her. She immediately called the Head Teacher Who directed her to escort the child to a nearby Hospital. She duly complied. She was examined and thereafter the doctor called someone from the Children Department. Thereafter, she went back to school with the child. After some time, some people from the Children Department came and together with the child, they went to Moiben Police Station where the matter was reported. The children's officers then left with B.C and her younger sister. She said that she had seen the Appellant once when he came to discuss the progress of the children.

39. PW8, a Medical Doctor based at Moi Teaching and Referral Hospital produced in evidence the P3 form in respect of the minors herein. She confirmed that the minors were all examined at the said facility by one Dr. Yatich and found to have been defiled.

40. In his sworn statement of defence, the Appellant told the court that he was a construction worker and that on 2nd August 2016 he went to work at a construction site where he was until 3.00pm. He later went home where he found that his children had not come back.

41. He was to pay school fees. He proceeded to their local centre where he was to see the said children's teacher but he did not find him. He then decided to leave but as he was leaving, two people came to where he was and ordered him to sit down. They later took him to their area chief where he was accused of committing the offences herein. Members of the public gathered at the scene and started baying for his blood but he was rescued by police officers. He said that he was arrested and charged because he married a second wife. He claimed that his wife was behind the charges herein.

**The Law.**

42. Section 20(1) of the *Sexual Offences Act* under which the counts were brought provides as follows: -

> " 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 appellant 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."

43. As it was held in the case of *H K K v Republic* [2017] eKLR, the offence of incest is created by the above Section of the law. The charge has four components, namely, the sex of the perpetrator and the victim, the relationship between the two, penetration and the age of the victim for purposes of sentencing.

44. On the issue of the Complainant's uncorroborated testimony, I am guided by the provisions of Section 124 of the *Evidence Act* which provides as follows: -

> " Corroboration required in Criminal Cases
>
> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the appellant shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

45. It is trite law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony, corroboration is unnecessary. As was held in *Johnson Muiruri vs. Republic*, (1983) KLR 445 as follows: -

> " Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."

46. In the present case, the trial magistrate conducted a voire dire examination on the minors and was convinced that PW1 & PW3 understood the meaning and significance of an oath, therefore

the Complainants gave sworn testimonies and were cross-examined by the Appellant. PW2 though intelligent was found to be too young to understand the nature of the oath and she testified without being sworn or affirmed but was equally cross-examined.

47. This Court therefore concludes that PW1 and PW3 testimony need not to have been corroborated, however be that as it may, from the record it can be seen that the Complainant had a good recollection of the events preceding the occurrence of the offence herein, therefore the appeal fails on these grounds.

48. With Regard to PW3 evidence the Court finds that the same was corroborated by PW8's evidence and documentary medical examination P3 form "PMFI2" therefore the appeal fails on this ground.

49. Penetration is defined under Section 2 of the *Sexual Offences Act* as "the partial or complete insertion of the genital organ of a person into the genital organs of another person". As an important ingredient of the offence, it must be proven beyond a reasonable doubt. This is either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by section 124 of the *Evidence Act* Cap 80.

50. In the case of *Bassita vs. Uganda* S.C. Criminal Appeal No 35 of 1995, the Supreme Court of Uganda had the following to say in respect of proving penetration: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

51. In this instance PW8 testified with regards to PW1, PW2 and PW3 evidence of penetration revealed in; old healed hymeneal tears at position 9.00 O'clock and redness of the labia minora. There was no vaginal discharge at the time of examination. H.I.V test was negative VDLR was not reactive. On urinalysis, there were no sperm cells pus cells seen, old hymeneal tears of position 11:00 0'clock, redness on the labia minora. The findings were suggestive for defilement.

52. It is noteworthy that PW8 testimony of medical history was that "the perpetrator was her father who had been defiling her and her sisters severally, the latest incident being on 1st October, 2017", furthermore the trial court in its determination held that victims were very young children who are not expected to be sexually active and the injuries found on their genitalia were indicative of penetration.

53. The Medical examination reports findings were consistent with defilement and that proof of penetration was established beyond reasonable doubt.

54. Sentencing is a discretion of the trial court. In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

55. This Court is alive to the prime objectives of the criminal law, which is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an appellant on proof of crime.

56. What sentence would meet the ends of justice depends on the peculiar facts and circumstances of each case and the Court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. Further, the Court ought to bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to consider the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

57. In this instance the trial court considered the nature of the offence, the circumstances which the offence was committed and what the Appellant told the Court in mitigation as factors before imposing the sentence and that this Court finds no fault in the exercise of discretion by the trial court.

58. The Court finds the appeal to be without merit and accordingly dismiss the same, the Appellant's conviction and sentence are hereby confirmed.

Right of Appeal 14 days.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 5TH APRIL 2023**

**.....**

**MOHOCHI S.M**

**JUDGE**

**05. 4. 2023**

**In the Presence of;**

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A