



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**KKT v Republic (Criminal Appeal E044 of 2019)
[2023] KEHC 4011 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E044 OF 2019
SM MOHOCHI, J
MAY 4, 2023**

BETWEEN

KKT APPELLANT

AND

REPUBLIC RESPONDENT

*((Appeal against the sentence in CMCC SO No.37 of 2018 - Eldoret, Republic
v KKT, delivered by Hon. E. Kigen, S.R.M. delivered on 08.03.2019.))*

JUDGMENT

Introduction

1. This appeal was preferred on 15th of March 2019 having been convicted and sentenced to ten (10) years imprisonment for the offence of attempted “incest.”
2. On the 2nd of September 2021 the Appellant sought leave to amend his petition under a certificate of urgency and the same leave was granted by the Court on 16th September 2021 with 14 days’ window to do so.
3. On the 5th of October 2021 the applicant filed is amended petition of appeal on the following ground: -
 1. That, the learned magistrate, erred in law and in fact, in failing to comply with section 200 of the *Criminal Procedure Code* cap 63
 2. That, the learned magistrate, erred in law and in fact, in failing to fix that no medical evidence of the required standard existed to convict the appellant for the offence of incest.
 3. That, the learned magistrate, erred in law and in fact, in failing to find that there was failure to comply with section 210 and 211 of the *Criminal Procedure Code* caps 75.



4. That, the learned magistrate, erred in law and in fact, in failing to find the age of the victim was not proved, in order to constitute the offence of incest as charged.
5. That, the learned magistrate, erred in law and in fact, in failing to find the offence of incest was not proven beyond reasonable doubt.
4. While the Appellant had on the 13th of January 2023 without the leave of the Court, filed fresh amended grounds of appeal under Section 352 (5) of the [Criminal Procedure Code](#).
 1. That he pleaded not guilty at the trial.
 2. That the charges against him was a fabrication and a fiction.
 3. That there is new compelling evidence and he prays the same be considered for hearing and determination as per the provisions of Article 50 (6) b, of the the [Constitution](#) of Kenya 2010 and any other enabling provision of the law.
 4. That the evidence standard, during the trial was not true, and consideration for withdrawal is legitimately deserved since the appellant has served a sentence and punishment for the offence that he did not commit.
 5. He sought reliance on the complainant's affidavit that was mysteriously filed on the 13th December 2022 without the leave of the court.
 6. That the appellant prays for the court directives in this new compelling evidence during the hearing of this appeal.
5. It is significant, that on the 13th December 2022 without the leave of the Court, an affidavit purportedly sworn by the Complainant in Eldoret Chief Magistrate's Court, Criminal Case Number 37 of 2018, was filed in Court it remains a mystery as to who exactly filed the affidavit as while the Appellant appears privy to this filing.
6. This affidavit sought to introduce the "Fresh and Compelling" evidence that the appeal appears to have gravitated towards
7. This matter came up for hearing on the 26th of January 2023, during the service week, the Appellant asked the Court, to consider the testimony of the complainant; that he has a disabled child who depends on him and sought that he be released to go and take care of the child; that he was sentenced without benefiting from the provisions of Section 333 of the [Criminal Procedure Code](#) and that the Court allows his appeal,
8. On the part of the State, Prosecution Counsel Mr. Mugun, relied fully on its written submissions and prayed for a judgment date.
9. The Appellant in submission, consolidated his grounds of appeal, from ground 1 to ground 5, and submitted jointly that, he pleaded not guilty, his case was fabricated and fixed against him, and that there are contradictions in the law
10. That there is new and compelling evidence requiring a full interpretation in order to prevent any violation of the law and sought reliance on Article 50 (6) b of the [Constitution](#), which provides that, a person who is convicted of a crime, may petition the High Court for a new trial, if new and compelling evidence, has become available.
11. It was his view that in the instant case, the new and compelling evidence has become available after the complainant in the trial Court, willingly filed and swore the affidavit that discloses how she fixed the



- third born in the framing of the false allegations against him, that he wanted to her and that during that incident the Appellant touched her private parts of her body.
12. He sought reliance on the affidavit purportedly sworn by the Complainant, and argued, that under Article 50 (4) of the Constitution, evidence obtained in a manner that violates rights shall be excluded if the admission of that evidence would otherwise render the trial unfair or would otherwise be detrimental to the administration of Justice.
 13. The Appellant argues that his fundamental rights had been violated since according to him he has been framed and he was not accorded a fair trial as is provided under Article 50 (2) of the Constitution of Kenya.
 14. It was his view and submission that, the new and compelling evidence had paralyzed his intentional aim of challenging this case, and since this is the first appeal he urged the Court, to take judicial notice to proceed and prevent any violation of his fundamental rights and freedoms.
 15. The Respondent opposed the appeal and it is their understanding that the appeal can be consolidated to two (2) main issues: -
 - a. whether the case is proven beyond reasonable doubt? And
 - b. whether the sentence imposed was harsh and excessive?
 16. The duty of this first Appellate Court in Criminal Cases was restated in the case of Charles Mwita – v- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In Okeno v R [1972] E.A. 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”.
 17. 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 courts 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] E.A. 424.”
 18. 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 prosecution called a total of 5 Witnesses in support of their case, the Appellant was found guilty by the trial Court convicted and sentenced to imprisonment of ten (10) years.
 19. PW1, the complainant MJ, testified how the Appellant her brother a third born in the family of twelve (12) siblings, her being the last born. That on the night of 5th February 2018, having visited her brother from Nairobi arriving a day earlier while sleeping on the floor she was awoken at around 11 p.m. when the Appellant started caressing and touching her, ordering her to keep quiet, as he was her medicine, she rushed out seeking help from the neighborhood.
 20. She testified how the Appellant followed her to the neighbor’s house, shook the window and door trying to break it and the neighbor came and the Appellant was arrested and taken to the chief, she



- went back home the following day, and went to the Turbo Police Station to report that the Appellant was touching her on the wrong part of the body by force claiming he was the cure of her epilepsy.
21. She described that she was in a night dress and he inserted his hand through the night dress to her private areas and thighs, and breasts, and he threatened to beat her if she refused, but she managed to escape to the neighbor's house, she asserted that she had no reason to lie against the Appellant.
 22. Upon cross-examination she admitted that it is true that the Appellant welcomed her as his sister and that his wife had escaped and she asserted that it is true that he caressed her, that she did not have any convulsions, and further stated that the Appellant had put on a condom during the incident. She denied that she had colluded with the neighbors. She admitted that she did not scream but rather she just escaped, but she had threatened to scream and that the door had just been fastened by a single bent nail which came out and that the Appellant stole her phone, and that the Appellant had wanted to break the neighbor's house using an axe and a panga.
 23. PW2, MWW, testified how the Appellant who was his neighbor residing two meters from his house, on the material day on the 5th February 2018 at 11:30 p.m. he heard his door being knocked and when he opened PW1, entered the house by force and locked the door herself and she told him she was not going back to her house since the Appellant wanted to rape her.
 24. Shortly the Appellant went back to his house shouting and clicking having failed in convincing the Complainant to go back. PW2 feared for his life and went to call nyumba kumi and on his way back, he encountered the Appellant walking towards the shopping center, on opening his door to his house, the Appellant came and tried to slap PW1 and became furious. It was the witness testimony that they handed him to the chief and later to the police at Jua Kali and Turbo, where he recorded his statement.
 25. It was PW2 testimony, that they lived well with the Appellant and that on Sunday the Appellant called PW1 on his phone and requested her to come and help look after the minor child since his wife had left and said PW1 arrived on Sunday night.
 26. On cross-examination the witness said he was asleep and described the Appellant as saying nitaua hii kitu, he was categorical that the Appellant threatened to kill PW1 and he heard with his own ears what the Appellant told PW1
 27. PW3, Cleophas Kembo, testified, that the Appellant lived in a rental house within the center and on the 5th February at 2018 at about 11:30 p.m. while he was asleep he heard his door being knocked and upon opening, he found PW2 and another person and on inquiring she stated that Chengochet, the Appellant, wanted to rape PW1 and him being a nyumba kumi member, called other neighbors and they met the Appellant and asked him, what the problem was, and he responded that they should stop harassing him.
 28. The witness stated that PW1 came and hid behind his back as she tried to talk and the Appellant threatened her and asked her to stop. That PW1 was of unsound mind.
 29. That the Appellant demanded that, they should leave his compound, while the members of the public were threatening to lynch him. PW3 called the assistant chief and they later escorted the appellant to Jua Kali Police Station.
 30. The witness testified of escorting PW1 to the Turbo Police Station since she was new in the area, he further stated that, he does not have any grudge with the Appellant, although he has handled small disputes between the Appellant and his neighbors back at the village. It was his evidence that the Appellant was intoxicated on that day.



31. Upon cross-examination, PW3 stated that he was woken up at around 11:45 p.m. and that he did not witness the incident.
32. He stated that, the Appellant had a habit of touching small children and it has been reported to him severally but he did not charge him for lack of evidence and that there is a minor who has been coming to the appellant's house but the mother has not yet reported to the station.
33. The witness stated that PW1 told him that the Appellant wanted to rape her. That he could not strip the Appellant to check marks on his body and that they met the chief on the way as they had already called him and that he does his work within the law as a nyumba kumi member.
34. PW3, stated that the Appellant does not have an identity card and uses somebody else's identity card, and that he had a history of the Appellant and he denied threatening the Appellant stating that he has helped the Appellant from being lynched by members of the public.
35. PW4, Jane Lemakoko, Senior Clinical Officer attached to the Turbo Sub-County Hospital testified how she examined PW1 on the 6th of February 2018 and treated her, and that PW1 had complained of attempted rape by a person she knew who was her brother she described the time as 11:20 p.m. when she was asleep and that the witness proceeded to fill in a P3 form the P3 form was marked as PEXH 1 and the treatment card was marked as PEXH2.
36. Upon cross-examination, PW4, stated that PW1 had sought for treatment and she alleged that, there was an attempted defilement, and that the witness did not find any injuries on examination.
37. PW5 Police Constable, Henry Wawire recalled on the 6th February 2018 at 9:50 a.m. while at the station conducting normal duties, the Appellant was brought by members of the public including PW1 on allegations that he attempted to have sexual intimacy with PW1 who is her sister, at Target Trading Centre on the 5th February 2018 at 23:30 hours.
38. He immediately commenced Investigations by interrogating PW1 who described how she travelled on the 4th of February 2018 from Nairobi to visit the Appellant and arrived at his home at 8.00pm and she slept and the following day the Appellant woke up at 5 a.m. and prepared her daughter to go to school and they spent the day well up to the evening hours when PW1 sought to know from the Appellant why it was only her in the family with epilepsy?, the Appellant had responded that , some family members had the disease and he promised to assist her get treatment.
39. That PW1 went to sleep on the floor with the Appellant's daughter, while the Appellant slept on his bed, and at 23:30 hours PW1 was awoken to find the Appellant naked, touching her private parts and she pushed him away and fled to the neighbors. That, he issued the P3 form that was filled by the expert.
40. Section 358 of the Criminal Procedure Code (Cap.75) allows an Appellate Court to admit fresh evidence in the interests of justice. Courts have severally dealt with this issue. I will only cite the case of *Samuel Kangu Kamau – v- Republic* (2015) eKLR where the Court of Appeal stated as follows: –

“It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal”
41. I associate myself with the Case of *Martin Musembi Mutyeleli v Republic* [2022] eKLR Dulu J. when dealing with an application for leave to file fresh evidence on appeal, held that: -

“The appellant has neither demonstrated, that the purported additional evidence is new, nor that he could not avail it or act on it at the trial. The fact that a witness contradicts his or her



own witness statement recorded by the police is not sufficient reason to justify introduction of additional evidence on appeal”.

42. In this instance, the Appellant did not expressly admit filing on the 13th December 2022 of the affidavit purportedly sworn by the Complainant, MJ, but sought to argue that the affidavit constituted the “Fresh and Compelling” evidence.
43. The Appellant never demonstrated how the affidavit filed constituted “Fresh and Compelling” Evidence, however, the Court shall in the interests of justice admit the “Amended Grounds of Appeal” and the affidavit as filed on the 13th December 2022 for purposes of analysis and determination.
44. From the onset it is important to recall that this is not a petition for a new trial under Article 50 (6) b) of the Constitution but an appeal against conviction and sentence.
45. The affidavit 10 paragraph purportedly sworn by the Complainant, MJ, filed on 13 December 2022 sought to recant her entire evidence without providing any basis as follows (verbatim from para 3):-
 - i. That I am the biological younger sister to KKT who is the Appellant herein.
 - ii. That the accused was charged with the offence of defilement in 2019 and is still in custody to date.
 - iii. That the same Criminal Case 44/2019 has a hearing date for the 13/04/23.
 - iv. That the Complainant had suffering from EPILEPTIC since 2009 and she still under medication of drugs (doctors medical report attached). That the Complainant had suffer from EPILEPTIC for long time which in system disorder in which brain activity becomes abnormal, causing seizures or periods of unusual behavior.
 - v. That the above charges/an or offence against the Appellant person (defilement) is not true.
 - vi. That I wish to withdraw the case against the Appellant person, since I have realized that the same was not true. In the view of the provision of Section 176 of the Criminal Procedure Code Chapter 75 Laws of Kenya.
 - vii. That the facts deponed to hereinabove are true to the best of my knowledge, information and beliefs.
46. I have scrutinized the said affidavit and makes the following observations: -
 - i. The affidavit does not disclose the maker;
 - ii. The Deponent appears unaware of the charges that the Appellant was convicted for, being attempted “incest”, and erroneously refer to the offence of “defilement”.
 - iii. The Affidavit does not seek or introduce any new evidence apart from an attempt at recanting her entire testimony.
 - iv. The deponent (a complainant) seeks the withdrawal of charges long after conviction and sentence.
47. The Court has considered the probative value of this affidavit and finds the same to be of no probative value to the appeal. If the Appellant has come upon fresh evidence he may consider filing a petition for a fresh trial as is provided for under article 50 (6) b) of the Constitution.



48. The Complainant (PW1) testified before the trial magistrate on the 19th February 2018 two weeks after the alleged incident that occurred on the 5th February 2018 and that her evidence, memory and facts as narrated can be termed as being fresh, and she was cross examined and re-examined.
49. The Complainant (PW1) testified before the trial magistrate and gave a vivid description of the events on the night of the 5th February 2018 and in contrast with the Affidavit filed on the 13th December 2022 and the Court has considered the two contradictory testimonies and find credibility of the witness testimony in the trial Court is solid and believable and that the affidavit would constitute an attempt at unduly influencing the Court.
50. The Affidavit dated 13th December 2022, is of no probative value to this appeal.
51. The Court finds that medical evidence adduced in the trial Court was corroborative and that lack of proof of penetration did not displace the prosecution's case.
52. The Court finds that lack of proof of complainant's age was not fatal to the prosecution's case.
53. As to whether the sentence by the trial magistrate was manifestly excessive and harsh to warrant this Court's interference? the Appellant was convicted and sentenced to imprisonment for a term of ten (10) years under Section 20(2) of the *Sexual Offences Act* which provides for a sentence of not less than 10 years and as such the imprisonment sentence was set at the lowest scale and cannot thus be argued to be harsh or excessive.
54. This Court finds the Appeal to be lacking in merit and accordingly dismisses the same.
55. The conviction and sentence by the trial Court is hereby confirmed.
56. Right of appeal in 14 days.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 4TH MAY 2023

MOHOCHI S.M

JUDGE

In the Presence of: -

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

