



REPUBLIC OF KENYA



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

**JGM v Republic (Criminal Appeal E001 of 2021)
[2023] KEHC 19427 (KLR) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E001 OF 2021**

A MSHILA, J

JUNE 23, 2023

BETWEEN

JGM APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence by Hon. H. M. Nganga (SRM) in
Gatundu Criminal Case No. 22 of 2019 delivered on 19th November 2020)*

JUDGMENT

1. The appellant was charged with two counts, the first being the offence of Incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 and the second count for the offence of Assault causing bodily harm contrary to Section 251 of the Penal Code. The particulars of the charge were that on the night of 12 and 13th July 2019 at [Particulars withheld] Village in Gatundu North sub-county within Kiambu County, the appellant caused his penis to penetrate the genitalia of MN, a minor who was his daughter.
2. He was also charged with an alternative charge of Indecent Assault contrary to Section 11(1) of the *Sexual Offences Act*. On this Count, the particulars of the charge were that on the night of 15th and 16th July 2019 at [Particulars withheld] Village in Gatundu North sub-County within Kiambu County unlawfully assaulted MN thereby occasioning her actual bodily harm.
3. The appellant pleaded not guilty to the charges and the case went on to full trial. The prosecution called 5 witnesses. At the close of the prosecution case, the trial court found the accused had a case to answer and he was placed on his defence. The appellant elected to give an unsworn statement and called no witnesses. By the judgment of 19th November 2020, the appellant was convicted and sentenced to 20 years imprisonment.



4. Being aggrieved by the conviction and sentence, he filed the current appeal. The grounds of the appeal as per the petition of appeal filed on 18th January 2023 are that:-
 - a. The trial magistrate erred in law and in fact in convicting the appellant based on fabricated allegations by the Complainant whereby the trial court ought to consider there was a mentioned person “Mukurino” who defiled the victim.
 - b. The trial court lost direction in evidence and failed to consider information on the charge sheet rendered it a defective charge since the age of the complainant was not indicated this omission did not prove the appellant guilty as required in law.
 - c. The trial magistrate erred in law and in fact while convicting the appellant in reliance with the evidence of PW2, PW3, PW4, and PW5 without putting into consideration the credibility of the evidence.
 - d. The trial magistrate erred in law and in fact while rejecting the appellant’s defence while the same was not displaced by the prosecution as per Section 212 of the Criminal Procedure Code.
5. The appellant urged the court to allow the appeal in its entirety and set aside the conviction and sentence.
6. The appeal was canvassed by way of written submissions. The appellant filed a set of submissions on 18th January 2023 and 8th March 2023. While the Respondents filed submissions on 23rd January 2023. Hereunder is a summary of the parties respective submissions:

Appellant’s Submissions

7. The appellant submitted that the prosecution failed to prove penetration beyond reasonable doubt. The prosecution also failed to prove that the appellant defiled his own daughter. The evidence of PW1 was contradictory as she first stated she was assaulted during the day and later told the court she was assaulted during the night. The appellant submits the prosecution failed to produce the quoted Mukorino whom the Victim intimated had defiled her before the appellant. According to the Appellant, the Victim accused him of assault and not rape. The charges against the appellant were actuated by malice from the wife and villagers due to the dispute between him and his wife and his failure to take care of the children.
8. The appellant urged the court to find the prosecution failed to bring credible witnesses and evidence to support its case. The prosecution failed to call crucial witnesses.
9. The appellant submits the charge was defective as it failed to capture the age of the victim, the age of the minor was also not proved during trial.
10. The court erred in dismissing the alibi evidence of the appellant which indicates the victim was injured while swinging on a mango tree.
11. In conclusion the appellant urged the court to allow the appeal and set aside the conviction and sentence.

Respondent’s Submissions

12. The Respondent submits the evidence by the PW1 demonstrates the accused was the father of the victim which the appellant did not controvert. PW1 explained to the court how the incident happened. The evidence of PW1 was corroborated by the evidence of PW5 Dr. Kimani who examined the victim and revealed a cut on the head and an injury on the hand which was swollen while the genitalia



examination revealed the hymen was broken and there was redness around the vagina. His conclusion was the Victim was defiled due to the broken hymen.

13. The Respondent submits PW1 in explaining the occurrence of the events had informed the court that the appellant removed her clothes and his clothes and did “tabia mbaya” to her where he inserted his “kasusu to her kasusu”.
14. Counsel urged the court to dismiss the appeal as the grounds of the appeal do not shake the credibility of the evidence adduced by the prosecution. In conclusion, the counsel submitted the conviction is just and the sentence meted out is legal and urged the court to uphold the findings of the trial court.
15. Before addressing the merits of the appeal this court will first analyse the trial courts evidence.

Trial Courts Evidence

16. After conducting a ‘voir dire’ test, the court established that the victim PW1 possessed sufficient intelligence and understood the duty to speak the truth and the consequences of lying. She then gave sworn evidence.
17. PW1 MN testified she was 12 years old and schooling at [Particulars withheld] primary school in Grade 3. She lived with her younger Siblings. She told the court she lived with the accused and referred to him as that one while pointing at him. She informed the court that her mother fled home when her dad came home drunk and he woke her up to bathe her head after cutting her. According to her, she could not remember the day of the week or month when the incident happened but she recalled her dad cut her head at night. She told the court her other siblings had gone to look for their mother who had disappeared. She told their neighbour Wa-ibo who advised her to tell the teacher. At school she reported the incident to her teacher who called the deputy and she was taken to the hospital.
18. She further narrated to the trial court that her father used to do ‘tabia mbaya’ to her. She could not recall how many people were in the house when the incident happened. PW1 explained that the appellant removed his and her clothes and he did tabia mbaya to her, “alinilalia na dudu inatumika kususu to where I use to susu.” She informed the court after the incident she bathed and wore clothes.
19. In cross-examination she told the court they lived with four (4) other people. After the incident she told Waimbo, who told her to tell the teacher that her father was bad. She restated the appellant found her asleep and hit her with a slasher.
20. PW2 Simon Waweru the area assistant chief Igegania Sub-County C Gatundu North testified on 28th January 2020. He told the court he arrested the accused person after receiving a call on 24th August 2019 at 8.00 am from the Children Officer Gatundu North seeking assistance to help in arresting the Accused for neglecting his children. He confirmed the accused is the person he arrested. He informed the court he was not aware of the issue of defilement.
21. PW3 JMM testified he is the Head teacher of [Particulars withheld] primary school where the accused and her sibling school. On 16th July 2019 at around 1.30 pm, PW1 was brought to school by the MCA, she went to class and when the class teacher inquired about her whereabouts the girl started crying. PW1 informed the teacher she was defiled by her father. PW1 was taken to hospital by Mr. Irungu, in the company of a female. PW3 testified the accused was the father to PW1 as he brought her to school on some occasions.
22. PW4 CPL Sabina Yome testified she was at Kamawangi Police Station prior to her deployment in Makongeni police station when a girl in the company of the children officer came to report an incident of defilement by her father. She recorded all the statements and he issued PW1 with a P3 form. The



injuries sustained were confirmed by the Doctor through the P3 Form. She later charged the accused after he was arrested by the area chief.

23. In cross-examination, she informed the court she could not see how PW1 would have framed him.
24. PW5 Doctor George Kimani testified he has been a doctor since 1995 and was stationed at Igegan Hospital for 6 years. He filled out the P3 form after examining PW1 who had a history of defilement on 12th July 2019. PW1 had an injury of the head and hand which was swollen. On conducting a genitalia examination, the hymen was broken and there was redness around the vagina but the spermatozoa did not show. He concluded there was evidence of defilement. He produced the P3 form, treatment cards from Igegan Hospital, the lab request form and the Post Rape Care which were marked as exhibits 1 - 4 respectively. In cross-examination, he told the court the child was brought to the hospital by a guardian and a children's officer.
25. The Accused (DW1) was placed on his defence on 15th October 2020 he testified that when he returned home from work he found PW1 sleeping and he asked her why she was asleep and she said she was having a headache and pain in the hand as she was swinging on a Mango tree, he applied salt on the head and medicine on the hand, they slept and in the morning gave her money for school. He informed the court that when he returned from work, the wife was not around and had left the children to loiter around in the village.
26. In its judgment, the trial court found that the relationship between the accused and the victim was not disputed by the accused as PW1 elaborated to the court that the accused was her father. On the issue of identification, the trial court held the complainant positively identified the accused person. The credibility and the truthfulness of her testimony go to the root of the prosecution case as per Section 124 of the *Evidence Act*. The trial court went ahead to find that at the time of the incident, the wife and mother to PW1 were not living with them and there was no evidence adduced to indicate she framed the accused.
27. The trial court found the prosecution had proved its case beyond reasonable as the evidence of PW1 on penetration was corroborated by the evidence of PW5, and proceeded to convict and sentence the accused.

Issues for Determination

28. Having perused the trial court record and reading the respective written submissions, this court has framed the following issues for determination;
 - i. Whether the Charge Sheet was defective;
 - ii. Whether the prosecution proved the age of the minor, identification, penetration and incest beyond reasonable doubt;
 - iii. Whether the trial court disregarded the appellants defence;
 - iv. Whether the sentence imposed was lawful.



Analysis

29. This being a first appeal, the court is clothed with the jurisdiction to re-evaluate and re-analyze the evidence of the trial court and arrive at its own independent conclusion as was cited in the case of David Njuguna Wairimu v – Republic [2010] eKLR where the court of appeal stated:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

Whether the Charge Sheet was defective;

30. The appellant submits the charge sheet is defective as it fails to indicate the age of the complainant. This court has had occasion to peruse the Charge Sheet and finds no evidence that the omission made the particulars to be at variance with the Charge and further the evidence adduced at the trial proved the age of the minor.
31. Evidence on the age of the minor is very crucial and in this instance this court is satisfied that it was adduced and proved during trial. It is this courts’ considered view that the omission did render the Charge Sheet as defective.

Whether the prosecution proved the age of the minor, identification, penetration and incest beyond reasonable doubt;

32. On the age of the minor: The P3 form and PRC form, treatment notes from Kiambu and Igegania Hospital produced as exhibits indicate the victim was 12 years. The trial court in taking the evidence of the complainant conducted a voir dire as the complainant was a minor.
33. It is trite law that the prosecution ought to prove the age of the complainant in the absence of such the court may rely on secondary evidence to determine the age of the Complainant. The Court of Appeal in Edwin Nyambogo Onsongo Vs. Republic (2016) eKLR, the court stated

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

34. Also in Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, it was held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”



35. This court thus finds the age of the minor was proved by the medical report and the treatment notes which documentary expert evidence was unchallenged and it demonstrated that the victim was aged 12 years.
27. On the issue of identification; the appellant contends that there may have been another person a Mukorino that committed the offence. It is this court's considered view that there is direct evidence from the minor that points to the appellant being the assailant and that he defiled her. The evidence of the minor was that the appellant came home drunk and her siblings had left to pursue their mother who had disappeared. This court opines that the appellant had ample opportunity to commit the heinous act as he was at home alone with the minor, also the appellants' nonchalant attitude after hearing she had fallen from a mango tree and the act of shifting the blame on an elusive mukorino is found to be an attempt at covering up his actions. This court is satisfied that the appellant was positively identified.

Whether Penetration and Incest were proved.

36. Section 20 (1) of the *Sexual Offences Act* creates the offence of incest, it 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 provided 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.”

37. To prove incest, there must be penetration by a male person who is a relative. PW1 testified the Appellant was her father and they lived together. This position was not controverted by the appellant. The area assistant chief also confirmed the appellant was the father to the victim as they hailed from his area. It is therefore not disputed that the relationship is that of father and child.
38. On the act of penetration, the complainant candidly narrated to the court what her father did to her. She informed the court that her mother fled home when her dad came home drunk that he woke her up to bathe her head after slashing her. She could not remember the day of the week or month when the incident happened but she recalled her dad cut her head at night and that he had removed his and her clothes and he did her tabia mbaya, “alinilalia na dudu inatumika kususu to where I use to susu.” After the incident she bathed and wore clothes.
39. This court notes that the complainant candidly explained what transpired between her and the appellant who removed her clothes and his clothes and slept on her. The evidence of PW1 was corroborated by the Medical report and the PRC form and the by the evidence of PW5 that confirmed the hymen was broken.
40. This court is satisfied that the complainant positively identified the father as being the defiler; further the court is satisfied that the prosecution proved penetration and incest to the desired threshold.
41. This ground of appeal is found to have no merit and it is disallowed.



Whether the trial court disregarded the appellants defence;

42. The Appellant raised an alibi that the victim was injured while swinging from a mango tree and secondly that according to him there was also a Mukurino who was responsible for defiling the complainant. As for him, he was only liable for assaulting the complainant.
43. Having perused the appellant's unsworn statement of defence, this court concurs that it does not in any way dislodge or controvert the evidence of the prosecution witnesses (PW1) that places him at the scene on that material day. This court is satisfied that the trial court analyzed the appellants statement of defence and weighed it against the evidence tendered by the prosecution and gave good reasons for disregarding as it did not cast any doubt on the prosecution's case.
44. This ground of appeal is found lacking in merit and is disallowed.

Whether the sentence imposed was lawful.

45. Upon convicting the appellant, the learned trial magistrate imposed a sentence of 20 years and this court is satisfied that the sentence imposed was within the law and finds no good reason to interfere with the trial courts discretion on sentence.
46. In the upshot, the appeal filed herein is found to be devoid of merit.

Findings & Determination

47. For the forgoing reasons, this court makes the following findings and determinations;
 - i. The Charge is found to have been properly drawn and the omission does not render the charge as defective.
 - ii. The prosecution proved the offence of incest to the desired threshold.
 - iii. The trial magistrate gave sound reasons for rejecting the appellants defence.
 - iv. The appeal is found lacking in merit in its entirety and is hereby dismissed.
 - v. The conviction is found to be safe and the sentence, lawful and both are upheld.

Orders accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 23rd DAY OF JUNE, 2023.

A. MSHILA

JUDGE

In the presence of:

Appellant – present in person

Ngesah H/B for Mr. Gacharia for the Respondent

