



REPUBLIC OF KENYA



KENYA LAW
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**CMM v Republic (Criminal Appeal E021 of 2022)
[2023] KEHC 19689 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E021 OF 2022**

**GL NZIOKA, J
JULY 10, 2023**

BETWEEN

CMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in Criminal Case S/O No. E93 of 2021 at Senior Principal Magistrate’s Court at Engineer delivered by Daffline Aboke Sure, Senior Resident Magistrate on 31st May, 2022)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case S/O no E093 of 2021, with the offence of incest contrary to section 20 of *Sexual Offences Act* (herein “the Act”) and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each charge are as per the charge sheet.
2. The appellant pleaded not guilty to both charges and the case proceeded to full hearing. He was subsequently convicted on the main count and sentenced to life imprisonment. The particulars of the main count states that, on the 5th day of December 2021, in Nyandarua Centarl Sub-County within Nyandarua County, he intentionally “touched” the vagina of “MWM” aged 8 years with his penis who was to his knowledge his daughter.
3. The prosecution case was supported by the evidence of four witness led by the evidence of “MWM” (herein “the complainant”) who testified that, the appellant is her father. That they were staying in the same house just the two of them as the mother had gone away long before the incident herein.
4. That the house comprised of a single room and they used to sleep on the same bed. That on a date she could not recall, the appellant held her, removed her clothes; stockings, panty and skirt and then



removed his trouser and boxer and lay in between her legs. That he put his “Kasusu” into hers and she felt pain. That once he was done he left her to sleep.

5. The complainant stated that she could not sleep immediately after the incident. However, when she woke up in the morning to go to school; she felt pain in her “Kasusu”, was bleeding and she kept going to the toilet but all the same went through the school program. That when she went to collect the keys from the appellant’s place of work, she informed him that she was experiencing pain in her private parts he promised to take her to hospital the following day.
6. The appellant took her to hospital and when she told the examining doctor she was having pains in her private parts, the doctor sought to know what happened to her and she told the doctor what the appellant had done to her.
7. PW3 Ruth Wanjiru Ndirangu, a Social worker at J.M Kariuki Hospital where the complaint was examined testified that, she interrogated the complainant when she said she had pains in her private parts and learnt she was staying with the father as her mother had gone away. However, she did not disclose what had happened to her.
8. That she sent the complainant to the matron whom the complainant informed that the appellant had defiled her. As a result, the police officers were called in, arrested the appellant and charged him after the medical examination revealed that the complainant had been defiled.
9. At the conclusion of the prosecution case, the appellant was placed on his defence and vide an unsworn statement he told the court that, the complainant went home on 6thDecember 2021, at 7Pm and informed him that she was feeling pains in between her legs. That he inquired as to what had happened and she said nothing but was bleeding.
10. That he took her to hospital the following day but since was required to pay Kenya shillings four hundred (Kshs 400) and he only had Kenya shillings two hundred shillings (Kshs 200), he took the complainant to a Government hospital, J. M Kariuki and was in attendance when his child told the doctor her problem. He was then told to go outside. That he stayed out for a while and was arrested, handcuffed, taken to the police station and charged.
11. At the conclusion of the case, the court held that the prosecution had proved its case on the main count beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment.
12. However, he is aggrieved by the decision of the trial court and appeals against it on the following grounds; -
 - a. That the appellant pleaded not guilty
 - b. That, the learned trial magistrate erred in law and fact when she convicted the appellant in the prosecution case where age was not proved.
 - c. That the learned trial magistrate erred in law and fact when she convicted the appellant in the prosecution case where the penetration case was not proved.
 - d. That the learned trial magistrate erred in law and fact by applying the wrong standards of proof in the criminal case which was a standard of probability instead of reasonable doubt.
 - e. That the learned trial magistrate erred in law and fact in convicting the appellant but did not considered the appellant’s defence.
 - f. That, I pray to be supplied with the original typed copy of the trial court’s proceedings and its judgment to enable me prepare my submissions on appeal in time.



- g. That I pray to be present during the hearing of this appeal.
13. Upon service of the appeal, the respondent opposed it on the grounds of opposition dated 8th December, 2022 which states that:
- a. That, the age of the complainant was sufficiently proved as provided under section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. The complainant (PW1) was proved to be 8 years (Ex 3- Birth Certificate).
 - b. That, penetration was proved under section 8(1) and 8(2) through the evidence of PW1, and PW2, who examined the complainant and produced PEX1 (p3 form) and PE2 (PRC form).
 - c. That, the trial court considered the accused defence and subsequently dismissed it as an afterthought.
 - d. That, the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *Criminal Procedure Code*.
 - e. That, the sentence imposed by the trial court was proper and in line with the sexual offence acted. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant.
 - f. That, the honourable court be pleased to dismiss the appeal and uphold both conviction and sentence.
14. The appeal was canvassed through filing of submissions. The appellant submitted that, the court in the case of *DMK v Republic* [2022] eKLR laid down the ingredients of the offence of incest as proof that the offender is a relative of the victim; proof of penetration or indecent act; identification of the perpetrator; and age of the victim.
15. He argued that the trial court contravened the provisions of Article 50 (2) (j) of *the Constitution* of Kenya, 2010 and section 77 of the *Evidence Act* by allowing PW2 to produce the age assessment report, the PRC form and the treatments notes, yet she was not the maker of the same. Further, the prosecution did not give reasons why the makers could not be called denying him an opportunity to cross-examine them.
16. Further, that the prosecution failed to supply him with the age assessment report before the hearing date denying him an opportunity to prepare his defence as provided for in Article 50 (2) (c) of *the Constitution*. He relied on the case of *Francis Omuroni v Uganda* 2 of 2000, where the court stated that medical evidence was paramount in determining the age of a victim and asked the court to strike the age assessment report.
17. He submitted that the learned trial Magistrate erred in finding that the prosecution had proved penetration, yet the evidence by the complainant on penetration differed with the evidence in the medical documents. That, the complainant testified that she was taken to hospital the next day after the offence and was bleeding yet the PRC form indicated that her hymen although torn was healed and there was no discharge or blood seen in her genitalia.
18. Further, that the prosecution failed to conduct a DNA test to prove that he was the complainant's father as alleged, and that the learned trial Magistrate failed to address the issue of relationship in her judgment.



19. Furthermore, he was not properly identified by the complainant as the offence occurred at night in a dark room and therefore the conditions for identification were not favourable as set out in the case of *Republic v Turnbull* (1971) QR 227.
20. The appellant argued that the learned trial Magistrate failed to inform him of his right to legal representation as provided for in Article 50 (2) (g) and (h) of *the Constitution* of Kenya, 2010 and Article 14(3)(d) of the *International Covenant on Civil and Political Rights* (ICCPR) despite the fact that he was from a poor background, was uneducated and the offences he was charged with were serious and attracted a sentence of life imprisonment.
21. Further, the sentence by the trial court was illegal since the learned trial Magistrate failed to indicate whether all the ingredients of the charge were conclusively proved.
22. Lastly, that the minimum mandatory sentences were declared unconstitutional by the Court of Appeal in the case(s) of *Mwangi v Republic* (Criminal Appeal no 84 of 2015) KECA 1106 (7th October 2022) (judgment) and *Okello v Republic* (criminal Appeal no 189 of 2016) KECA 1034 (KLR) (23rd September 2022) (judgment); and by the High Court in the case of *Philip Mueke Maingi & 5 others v Director of Public Prosecution & the Attorney General* Cr. Pet. no E017 of 2021. He urged the court to set aside the minimum mandatory sentence by the trial court and substitute it with a lesser sentence and cited the case of *Abamad Abolfathi Mobammed & another v Republic* [2018] eKLR.
23. However, the respondent on its part submitted that the prosecution proved its case beyond reasonable doubt. That, penetration was proved through the evidence of PW1 which was corroborated by the evidence of the Medical Officer who produced the medical report and the PRC form.
24. Further, the prosecution produced the age assessment report of the complainant that indicated she was eight (8) years at the time of the offence and therefore the age of the complainant was proved to the required standard.
25. Furthermore, the appellant was properly identified by the complainant who pointed him out in court and said that, they were the only the two of them in the house at the time of the offence.
26. Lastly that the trial court considered the evidence of the appellant against that of the prosecution and found that his defence was a mere denial and that the prosecution had proved its case beyond reasonable doubt. That, the learned trial Magistrate considered his mitigation and correctly convicted him.
27. At the conclusion of arguments on the appeal, I note that, the role of the first appellate court, as stated by the Court of Appeal in the case of; *Okeno v Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, recognising that it did not benefit from the demeanour of the witnesses.
28. The Court of Appeal observed as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] E.A. 570). 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; 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”

29. Having considered the appeal in the light of the evidence before the trial court, I note that the conviction herein is on the main count. In that regard, section 20 (1) of the Act states that: -

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 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.

30. Pursuant to the aforesaid and settled case law, as held in the case of; *SMW v Republic* (Criminal Appeal 48 of 2014) [2023] KECA 512 (KLR) (12 May 2023) (Judgment), the ingredients for the offence of incest are:

- a. Proof that the offender is a relative of the victim;
- b. Proof of penetration or indecent act,
- c. Proof of the age of the victim; and
- d. Identification of the perpetrator.

31. As regards the first issue, section 22 of the Act provides that: -

- “(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 ...”

32. The prosecution led evidence to the effect that the complainant is the appellant’s daughter. She clearly testified to that effect and the same was confirmed by the appellant when he stated in his defence that; “I woke up as usual and prepared my child for school”. He went to state; “I returned at 6.00pm and I did not find my child” and testified further; “I was present when my child told the doctor her problem”. As such the subsequent argument herein of the need of for DNA to prove the relationship between the complainant and the appellant is neither here or there.

33. As regards the issue of penetration, section 2 of the Act states that; “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”. In the instant matter, PW2 Dr Catherine Kivuta produced a P3 form filed on 9th December 2021, by Mr Gitonga, which showed that the complainant’s hymen was torn and healed, and that the age of the injury was estimated to be a week old. She further produced a PRC form and treatment notes which revealed similar finding as indicated in the P3 form, save that the latter indicated the offender was the victim’s father.

34. However, the appellant fault the evidence on the ground that the medical documents were produced by a person who was not the author and without his consent. I note from the court record that, the only document the appellant conceded to being produced by the witness on behalf of the author is the P3 form. The court signed off the evidence after that evidence.



35. However, without inquiring from the appellant whether he was objecting or conceding to the production of the PRC form and treatment notes, the trial court allowed the same in evidence. Of great concern is the fact that, the witness did not even indicate who the authors of these documents were, and whether she knew them and/or their signatures. Taking into account the fact that the appellant was not duty bound to prove the case against himself, the production of the impugned documents was improper and inadmissible.
36. It is unfortunately that the failure to observe the rules of admissibility of documents was occasioned by the court in that the prosecution did not even apply to have the witness produce the subject document and the court seem to have done so *suo moto*. Be that as it were, I find that the evidence in the P3 form sufficient to prove the complainant was defiled.
37. As regards the age of the child. The same was alluded to by PW 2 Dr Kivuta in her evidence in chief where she stated that; “I have the age assessment. It shows the patient is 7 years old”. Several question arise: Who carried out the age assessment? Why was the author of that critical document not called to testify.? How was the document produced without the appellant being asked as to whether he was conceding to its production or otherwise, in that the author was not in court? Even more no basis was laid as why this document was not produced by the author.
38. The importance of ascertaining the age of the child can not be underestimated. It is to assist the court in determining the appropriate sentence upon conviction of the accused person. In this regard, under section 20(1) of the Act, it is paramount to prove whether the victim of crime was either under or above 18 years at the time of the offence. It also suffices to note that, in this matter, the charge sheet states the complainant was 8 years old while the age assessment report states she was 7 years old, yet that discrepancy was not addressed. I find that the evidence on age was not properly admitted.
39. As regards the last ingredient, I find the child testified that she was staying with the father alone. That the mother had long left the two. She stated that, after the mother left she was sleeping on the same bed with the father, the appellant herein. That she did not have her own bed. Further the house was single room as also confirmed by PW 4 no 253102 PC Kaitumo who visited the house.
40. The complaint was insistent that it is the appellant who defiled her. She maintained that although it was at night, she knew it was the appellant as she saw him “every night”, that the room was “not too dark “and she could see him.
41. In cross-examination the complainant responded to what seems to have been either one or two question by answering, “you came home with a cigarette. No one entered the house except you”. I note that, against this evidence the appellant simply addressed in his evidence how he took the complainant to the hospital and what transpired before he was arrested. Therefore, the appellant has not recanted or rebutted the complainant’s evidence at all.
42. It is also noteworthy that, several witnesses and documentary evidence reveal that the complainant maintained that, she was defiled by her father, the appellant. Therefore, the appellant evidence is a mere denial and not tenable.
43. Be that as it may, one thing seems to have eluded the prosecution and the court. The particulars of the charge in the main count states that, the appellant “touched” the complainant’s vagina with his penis. The provisions of section 20(1) of the Act requires proof of penetration not mere “touching”. The act of touching proves the alternative offence of committing an indecent act with a child
44. Pursuant to the aforesaid, and the fact that the age of the child was not properly proved, the conviction on the main count cannot be sustained. I hereby quash the same and substitute with conviction on the



alternative count. I also set aside the sentence of life imprisonment and substitute with the sentence of ten (10) years imprisonment.

45. Taking it account the seriousness of the offence and the fact that the victim of crime did not occasion the miscarriage of justice that led to lack of adequate evidence to prove the offence on the main count and the fact that she will live with the psychological effect of the crime all her life, I order that the sentence imposed shall run from the date of the appellant was arraigned in court but not subject to remission. Further the victim should not be returned to the custody of the appellant upon release, until she attains the age of 18 years, when she is able to make her own informed decision.

46. Those then are the orders of the court

DATED, DELIVERED AND SIGNED ON THIS 10TH DAY OF JULY, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, virtually in court

Mr Atika for the respondent

Ms Ogutu; Court Assistant

