



REPUBLIC OF KENYA



**DMM v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 20704 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E020 OF 2022**

LW GITARI, J

JULY 11, 2023

BETWEEN

DMM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, DMM, was charged with two (2) counts of incest contrary to Section 20(1) of the *Sexual Offences Act* in Chuka Criminal Case S.O.A. No. 48 of 2019. On Count I, the particulars of the offence were that on 18th October, 2019 at [particulars withheld] Village in Maara sub-county within Tharaka Nithi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.N., a child aged 6 years.
2. On Count II, the particulars were that on 18th October, 2019 at [particulars withheld] village in Maara Sub-County within Tharaka County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.G., a child aged 4 years.
3. In the alternative, the Appellant faced two counts of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 the brief particulars being that he intentionally caused an act of indecency by touching the buttocks and vagina of one E.N., a child aged 6 years and that he intentionally caused an act of indecency by touching the buttocks and vagina of one P.G., a child aged 4 years.
4. The Appellant was tried and after a full trial he was found guilty on the two counts of incest, convicted and sentenced to life imprisonment on each count.

The brief facts of the case are that the two complainants are the biological daughters of the appellant and were students at Mbuteni Primary School in PP1 and PP2. They were living with the appellant after their mother deserted her matrimonial home to an unknown place. As the appellant was living



with the two daughters, on the 18/10/2019, the complainant defiled E.N. who was by then aged six (6) years inserting his penis in anus and her vagina genital organs, in turns. The appellant then defiled her daughter P.G. who was by then aged four years. The appellant inserted his penis in her vagina. He then warned PW1 not to tell anybody what he had done or he would kill her. The following day PW1 & PW2 went to school as usual and they reported to the teacher that the appellant had defiled them during the night. The teacher took the two to the Police Station where the matter was reported. They were referred to hospital. They were escorted to Magutuni Hospital by the Area Assistant Chief, Catherine Muthoni Elias (PW4). Upon examination by the doctor, he confirmed that the children had been defiled. The doctor filed the P3 forms. According to doctor Edward Njiru Munyi who examined the complainants, E.N. (PW1) had a hymenal tear that is anal tear and the hymen was torn. He concluded that there was penetration. The child complained of urine incontinent and was treated for urinary tract infection. There was trauma to the urethral splinter and hence she could not retain urine. He produced the P3 form, PRC Form and treatment notes as exhibits 1-3.

With regard to P.G she complained of defilement on continuous occasions. She had a Hymenal tear that is, anal tear. The hymen was torn. She complained of frequent urination and there was impression of urethral splinter. He produced the P3 form, PRC Form and treatment notes as exhibits 4, 5 and 6. The appellant was arrested and charged with this offence.

The appellant was arrested by the Area Manager and the Assistant Chief. He was handed over to the Police and was charged with this offence.

5. The Appellant was dissatisfied with the conviction and sentence and has raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in both points of law and facts by imposing a mandatory sentence as the said sentence does not take into account the dignity of the individual as mandated under Article 27 of the *Constitution*.
 - ii. That the learned trial magistrate still erred in both matters of law and fact by convicting the Appellant without considering that incest involves a family member and perhaps the legislature was of view that the same family member who is convicted might be required to cater for his children.
 - iii. That the learned trial magistrate still erred in both matters of law and fact without considering the complainants were of tender ages hence there was need for strict compliance with the requirements of the provisions of Section 124 of the *Evidence Act* which is quite clear whether the complainants were penetrated.
 - iv. That the learned trial magistrate erred in both points of law and facts by failing to consider the conduct of the complainant's mother where the evidence was much influenced by their mother hence arriving at a wrong penalty.
 - v. That the learned trial magistrate erred in both points of law and fact by convicting the Appellant without proper analyzing and re-evaluation of the entire prosecution evidence whereas the penile penetration was not proved beyond reasonable doubts.
 - vi. That the learned trial magistrate erred in both points of law and fact by failing to realize that the whole prosecution case was riddled with material contradictions which were enough to displace the prosecution narrative.
6. The Appellant thus prays for a re-trial of his case.



7. The appeal was canvassed by way of written submissions. The Appellant filed his written submissions on 17th March, 2023 whereas the Respondent filed its written submissions on 23rd November, 2022. Below is a summary of the same.

The Appellant's Submissions

8. The Appellant submitted that the trial court did not explain to him the magnitude of the charges he was facing. That he was not able to plan well on how to defend himself during cross-examination in the prosecution case. For this reason, he prayed for a retrial.
9. Further, he submitted that the evidence adduced by the prosecution was not proved beyond reasonable doubts and that the sentence meted upon him is harsh and excessive owing to the fact that the mandatory sentences were rendered unconstitutional.
10. The Appellant thus prayed that his appeal be allowed, his sentence be set aside, and he be set at liberty.

The Respondent's Submissions

11. It is the Respondent's submission that the grounds of appeal can be reduced to the following issues;
- i. Whether the prosecution proved their case beyond reasonable doubt to warrant conviction.
 - ii. Whether there were inconsistencies in the evidence of the prosecution witnesses.
 - iii. Whether the sentence meted out against the Appellant is amenable to reduction and/or variation
12. The Respondent thus submitted that the prosecution did prove its case beyond reasonable doubts. Further that the prosecution was not tainted by inconsistencies and contradictions. Finally, that the mandatory life sentence was suitable in the circumstances. The Respondent thus urged this Court to find that the appeal lacks merit and to dismiss the same.

Issues for Determination

13. I have considered the grounds of appeal as well as the respective submissions by the parties. The main issues that arise for determination by this Court are:
- i. Whether the prosecution proved its case to the required standard of beyond any reasonable doubt;
 - ii. Whether the sentence meted against the Appellant was harsh and/or excessive in the circumstance of this case

Analysis

14. This is a first appeal. As a first appellate court, this Court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. It is this Court's duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in the case of *Okeno v. Republic* [1972] EA 32.
15. From the above authority, I shall proceed to analyse the case against the Appellant as presented in the trial court by the nine (9) prosecution's witnesses.



16. PW1 was E.N., a girl aged 6 years and the first complainant herein. She gave unsworn evidence after the trial magistrate ruled that she does not understand the oath. She identified the Appellant as her father. PW1 testified that the Appellant sexually assaulted her and her little sister (PW2) while they were living with him. She went into detail by stating that the Appellant left his bed and came to her bed, removed her inner wear (panty), then opened his zip and removed the kabibi from there. That the Appellant slept on top of her while facing down while she was facing up. She cried. It was her testimony that the Appellant put his kabibi in her private part as she pointed to her vagina. She further stated that the Appellant threatened to kill her if she told anyone about it. It was also her evidence that the appellant penetrated her from behind, that is her anus while she faced down with her legs spread apart, she reported to her teacher who took them to the police station to report the matter. She was then taken to hospital. She identified the appellant as her father who defiled her.
17. PW2 was P.G., a girl aged 4 ½ years at the time of the incident and the second complainant herein. PW2 corroborated PW1's testimony that the Appellant, who is their father, sexually assaulted her and her elder sister (PW1) while they were living with him and that the Appellant threatened to kill her if she told anyone about it. She gave unsworn evidence after the learned trial magistrate ruled that she had challenges and could not understand the meaning of the oath.
18. PW3 was John Mugendi, the area manager. It was his testimony that he went to the complainants' school and found them talking to their teacher. That the teacher informed him that the complainants had been defiled by their father. That the complainants also confirmed to him that their father had sexually assaulted them. PW3 called the assistant Chief and they went and arrested the accused then handed him over to the police.
19. PW4 was Catherine Muthoni, the area assistant chief. It was her testimony that she was called by PW3 to the complainants' school where it had been reported that PW1 and PW2 had been sexually assaulted by their father. They then began searching for the Appellant who they found in Ngobo. They arrested him and took him to the police station. PW4 then took the complainants to hospital where they were treated. PW4 then took the complainants to the Appellants' brother.
20. PW5 was Dr. Edward Njiru Munyi, a medical officer at Magutuni Hospital. He testified on behalf of one Dr. Tutayo who had been transferred. It was his testimony that PW1 and PW2 were brought to hospital by PW4 with a complaint of sexual assault. That the medical examination of PW1 showed anal tear and her hymen was broken. PW5 confirmed that this was evidence of penetration and stated that PW1 suffered trauma to the urethral splinter which caused her not to be able to hold urine. He then produced PW1's P3 form, P.R.C. form, and treatment notes as P.Exhibits 1, 2, and 3 respectively.
21. As for PW2, it was the testimony of PW5 that her medical report showed hymenal tear which confirmed penetration. That there was no evidence that there was anal penetration but just like PW1, PW2 had impressions of trauma to the urethral splinter. PW5 then produced PW2's P3 form, P.R.C. form, and treatment notes as P.Exhibits 4, 5, and 6 respectively.
22. PW6 was Milton Maragu, the head teacher in the complainants' school. He stated that he knew the Appellant as the father of the complainants. He stated that on 17th October two teachers PP1 and PP2, Ida and Mrs. Mwaniki went and told them that the complainants had told them that their father had sexually assaulted them. PW6 stated that he facilitated the arrest of the Appellant.
23. PW7 was Aida Karende, a teacher in the complainants' school. She informed the court that PW8 had told her that some of her students had been complaining that their father had done "tabia mbaya" to them, which means that he had sexually assaulted them. They went to the complainants who confirmed the complaint to PW7. They then reported to the head teacher (PW6).



24. PW8 was Caroline Gakii, also one of the teacher at the complainants' school. It was her testimony that she had noticed that the complainant's frequently sought permission to go to the washrooms and that they would urinate on themselves even before getting there. She inquired from the complainants who informed her that their father, the Appellant herein, was sexually assaulting them by inserting his "kipipi" (penis) into their "mbele" (vagina) and that the Appellant had threatened to kill them if they told anyone. That she then called her colleague (PW7) and the complainants narrated the ordeal to her and they (PW7 and PW8) then reported the matter to the head teacher.
25. PW9 was Eric Kiprono, the investigating officer in this matter. It was his testimony that a report had been made that a father was sexually assaulting his two young daughters. That PW1 explained that their father removed his "pipi" and inserted it into the vaginal of PW2 and that he would then do the same to her and also sodomize her. He stated that he then filled their P3 Forms and took the complainants to hospital.
26. When put to his defence, the Appellant confirmed that PW1 and PW2 were his daughters but did not answer to any of the accusations leveled against him. He only stated that on a day he could not remember, he left the children at home and went to work. On returning back home at midnight and found the mother of the children drinking alcohol with other drunkards. He went and fetched water as the wife cooked. He then went to bed at 3.00 a.m. and his wife slept with the children. The next morning, he took the children to school and was later arrested at his work place.
27. Having analysed the evidence adduced before the trial court, I now moved to the issues for determinations in this appeal.

i. Whether the prosecution proved its case against the Appellant to the required standard of beyond any reasonable doubt

28. The law on the offence of incest is provided under Section 20 (1) of the [Sexual Offence Act](#) which states that:

“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.”

In view of this provision I feel obliged at this stage to look at the charge sheet to determine whether it was in line with the Section. The ingredients of the offence of incest under Section 20(1) of [Sexual Offences Act](#) are-

- i. Proof that the offender is a relative of the victim.
- ii. Identification of the perpetrator
- iii. Proof of the age of the victim.



In a charge of incest, the allegation is that the offence was committed against a relative of the offender. As such under Section 20 of the *Sexual Offences Act* a degree of consanguinity is contemplated. Section 22 of the *Act* provides:-

- “(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. [Rev. 2014] Sexual Offences No. 3 of 2006.
- (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).

It is my view in a charge of incest, the particulars of the charge must disclose the relationship between the victim and the perpetrator.

In this case, the charge sheet stated as follows:-

“Incest contrary to section 20(1) of the *Sexual Offences Act*. “



Particulars:

“D.M.M on the 18/10/2019 at [particulars withheld] village in Mara Sub-County within Tharaka Nithi County intentional and unlawfully caused your penis to penetrate the vagina of E.N. a child aged 6 years.”

The 2nd count was drafted in a similar way safe for the name and age of the victim. These particulars failed to disclose the relationship between the offender and the victim. Section 134 of the Criminal Procedure Code provides that the charge or information must contain a statement of specific offence which the accused is charged and enough information to demonstrate the nature of the offence charged. A charge of incest is defective if it fails in its particulars to disclose the relationship between victim and the offender. The particulars of the charge of incest should therefore read as follows- D.M.M on 18/10/2019 at [particulars withheld] village in Maara Sub-County within Tharaka Nithi County intentionally and unlawfully cause your penis to penetrate the vagina of E.N a child aged 6 years “who to your knowledge is your daughter” (emphasis mine.)

This gives the offender sufficient information to understand the nature of the charges and information the State should adhere to the rules under Section 137 of the Criminal Procedure Code. The particulars of the charge sheet as drawn disclose a charge of defilement and not incest.

In the persuasive decision in Criminal Appeal No.80/2017 at Kisii *GBM -v- Republic* (2018) eKLR the court held that –

“ At this point I wish to point out that under Section 20(1) of the Act, incest is proved by either penetration or indecent act hence penetration alone is not an essential ingredient of the offence. What distinguishes the offence of incest from defilement under Section 8(1) of the Act or committing an indecent act with a child under Section 11 of the Act is the relation between the accused and the child.”

The two essential elements are indecent act with knowledge that the person is a relative. For an offence of incest it is not enough to state that the offender committed an act which caused penetration. It must be qualified with the relationship of the victim to the offender and the knowledge of the offender that the victim is a close relative.

The question is whether the defect should vitiate the conviction. The appellant did not challenge the charge sheet as drawn. It is trite that defects in framing of the charge or information do not automatically vitiate the proceedings Section 382 of the *Criminal Procedure Code* provides:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard



to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In *John Irungu-v- Republic* Court of Appeal, Mombasa, Criminal Appeal No.20/2016- the court held that failure to refer to the Section of the Act upon which a charge was based did not prejudice the accused because the particulars of the offence were clearly stated. This is to say where no prejudice is occasion on the accused the proceedings and the conviction shall not be vitiated. In this case, the appellant was charged with incest. The particulars of the victims was given safe for none disclosure of their full names to protect their names as they are minors. The victims also gave evidence and identified the appellant as their biological father. The appellant himself does not deny that the two minors are his daughters. I find that the appellant was not prejudiced by the defects on the particulars of the charge.

29. In this case, it is not in dispute that the Appellant is related to the Complainants by virtue of being their father. PW1 and PW2 confirmed this fact and the Appellant himself admitted that the complainants were his daughters. The prosecution proved that the appellant is a relative of the victims.
30. On the second element of penetration, it was the testimony of the medical officer (PW5) that the hymen of both PW1 and PW2 had been broken which she confirmed was proof of penetration. PW5 further confirmed that the tears on anal of PW1 were also proof of penetration. The testimony of PW5 corroborated the evidence of PW1 &2 that they were penetrated in their genital organs. They were minors and the evidence given by PW5 sufficiently proves the facts of penetration beyond any doubts.
31. As a ground in support of his appeal, the Appellant contends that there was no strict compliance with the provisions of Section 124 of the *Evidence Act*.
32. Section 124 of the *Evidence Act* provides as follows:

“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 accused 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 accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

33. A proper reading of the whole of Section 124 of the *Evidence Act*, shows that corroboration is still required on evidence by minors, but not mandatory in sexual offences as long as the witness is truthful and reasons are recorded. This was the holding of the Court of Appeal in the case of *Dennis Ogoro Obiri v Republic* [2014] eKLR where the court held as follows:

“The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence



of a child of tender years. In *Jacob Odhiambo Omumbo v Republic*, Cr. App. No 80 of 2008 (Kisumu), this Court made the same point as follows:

“Though P’s evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, as amended by Act No. 5 of 2003.”

Earlier in *Mohamed vs Republic* (2006) 2 KLR 138, this Court asserted:

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.” ”

34. In this case, the complainants were indeed minors. Being a case that concerns a sexual offence, it was acceptable for the trial court to convict the Appellant based on the uncorroborated evidence of the complainants. The trial court addressed the issue of credibility of the witnesses and held that the evidence of the minors was well corroborated by all the witnesses consequentially and without any gap.

35. It is absurd for the Appellant to suggest in ground No. 2 of his appeal that the trial court erred for convicting him without considering that incest involves a family member and perhaps the legislature was of the view that the same family member who is convicted might be required to cater for the children. The complainants are of very tender age and needed protection from harmful sexual activities. The Appellant ought to have been at the forefront of protecting his daughters and yet he is the one who endangered their lives and future. He cannot be ever trusted with the custody and care of the complainants. In deed the *Sexual Offences Act* provides the separation of the offender and the victims. Section 20(3) provides:

“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 (No. 8 of 2001) 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.”

36. On the alleged contradictions in the prosecution case, this court has a duty to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. The Appellant in this case has however failed to demonstrate what the alleged inconsistencies were. That notwithstanding, I find no contradictions in evidence adduced and even if there are any, they are not substantial to the extent of affecting the conviction. As such, this ground fails. It is also well settled that not all contradiction and inconsistencies will vitiate a conviction. Minor contradictions are ignored and overlooked. See *Wehangane -v- Uganda* quoted with approval by the Court of Appeal in *Erick Onyango Odeng -v- Republic* 2014 eKLR where it was stated that ‘grave contradictions’ unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradiction unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

37. Based on the above analysis, it is my finding that the prosecution did prove its case against the Appellant to the required standard of beyond any reasonable doubt.



ii On whether the sentence was harsh in the circumstances

38. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky* (1912) CCA 28TLR 263).”

39. In the case of *Wanjema v. R* [1971] E.A. 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

40. In the present case, the learned trial magistrate properly addressed herself on the evidence and the law and came to the right conclusion. There was credible and tangible evidence before court that proved the offence of incest. The sentence meted out against the appellant was lawful as it is the mandatory sentence provided for in law under the provisions of Section 20(1) of the [Sexual Offences Act](#). The conviction of the appellant was proper.

Conclusion

41. I find that the Appellant was properly convicted and sentenced.

I therefore order as follows:-

1. The appeal lacks merits.
2. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY 2023.

L. W. GITARI

JUDGE

