



REPUBLIC OF KENYA



**MIH v Republic (Criminal Appeal E096 of 2022)  
[2023] KEHC 19737 (KLR) (Crim) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E096 OF 2022**

**K KIMONDO, J**

**JULY 6, 2023**

**BETWEEN**

**MIH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment in S. O. Case No. 289 of 2020 at the Chief Magistrates Court Makadara by M. Kivuti, Senior Resident Magistrate, dated 20th May 2022)*

**JUDGMENT**

1. The appellant was adjudged guilty of incest of a minor contrary to section 20 (1) of the [Sexual Offences Act](#) (hereafter the Act). He was sentenced to imprisonment for twenty years.
2. The particulars were that on the October 19, 2020 at [Particulars Withheld] within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of NAM. [particulars withheld] who was to his knowledge his niece aged 9 years”.
3. The appellant has preferred an appeal. There are seven grounds but which can be condensed into three. Firstly, that the conviction was based on inconclusive investigations, contradictory and insufficient evidence. Secondly, that he did not get a fair trial; and, thirdly, that the learned trial magistrate disregarded the defence proffered by the appellant.
4. At the hearing of the appeal, his learned counsel, Ms F. Mburu, relied wholly on her written submissions dated April 13, 2023. Those submissions are two-pronged: Firstly, that the Republic did not prove beyond a reasonable doubt that the appellant committed the offence. Secondly, that the appellant was denied fair administrative action or a fair trial. Learned counsel cited among other cases, [Joseph Ndungu Kagiri v Republic](#) [2016] eKLR and [Eliud Nyauma Omwayo & others v Kenyatta](#)



- University [2014] eKLR for the proposition that the administrative actions of public officers, state organs and other administrative bodies are subject to the dictates of Article 47 of the Constitution.
5. The appeal is contested by the State. Learned State Counsel, Ms. Oduor, also relied wholly on the Grounds of Opposition dated January 20, 2023 and a set of submissions dated June 14, 2023. In a synopsis, she contended that all the ingredients of the offence were proved beyond reasonable doubt. I was beseeched to dismiss the appeal.
  6. This is a first appeal to the High Court. I have examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] E. A. 32, Felix Kanda v Republic, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.
  7. I will begin with a preliminary matter. At the time of the incident, the complainant was aged 9 years. This fact was proved by the birth certificate (exhibit 4) produced by her mother (PW2) showing she was born on April 4, 2011. At the time she testified in court, she was about 10 years of age and in class 2.
  8. The trial Court conducted a detailed voire dire examination, the learned trial magistrate formed the opinion that the child was “confident, maintains eye contact and understands the solemnity of an oath”. The minor thus gave sworn evidence. I am satisfied that the trial court complied fully with the procedure of taking the evidence of the minor. See Republic v Peter Kiriga Kiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445.
  9. I will now turn to identification. The complainant’s and the appellant’s family all lived in the same compound. Their houses were directly opposite each other. According to the complainant, as she left to answer a call of nature, the appellant grabbed her, covered her mouth, eyes and ears with a hijab and defiled her.
  10. Although the incident occurred at night, I am satisfied that the complainant knew the appellant very well. In cross examination, she said that she saw him clearly before he blocked her mouth and eyes. I thus find that the appellant was positively identified. This was in fact evidence of recognition. Wamunga v Republic [1989] KLR 424.
  11. It is a truism that the legal and evidential burden rested squarely on the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant.
  12. PW1, testified that after the appellant grabbed her and covered her head with the hijab he led her behind her aunt’s house where clothes had been hung. He restrained her hands, removed her pair of tights, got on top of her and “inserted the organ he uses to pass urine into the organ she uses to pass urine”. She could not scream because the appellant covered her mouth. She said that her sister saw the appellant grabbing her. She testified that the appellant, who is dumb, wrote on a piece of paper and passed it on to her; instructing her to go pick a ball and to take it to her aunt.
  13. Her mother (PW2) was alerted of the incident by Sima, a daughter of the accused, who rushed into her house and told her that her mother wanted to see her. The latter disclosed to her that PW1 was defiled by the appellant. She took the complainant to the hospital the same evening. In cross examination, she denied that she had any grudges with the appellant.
  14. The appellant was arrested at the locus in quo the following morning by PW4, PC Milka Nyambura. No useful evidence was recovered at the scene.
  15. According to the clinical officer, Dorcas Kerubo (PW3), who testified on behalf of her colleague, Jaran Kado, the examination was conducted on the day of the incident. She said the outer genitalia was



normal. However, there was “a whitish mucous discharge”. The vagina was hyperemic with fresh tears at 6 o'clock and 9 o'clock positions. This was also captured in the PRC form (exhibit 2). From the swab taken, no spermatozoa were detected. It is material that the appellant did not object to production of exhibit 3 after it was explained to him in sign language.

16. PW3 then produced the P3 Form (exhibit 1) which she had prepared on October 22, 2020. She had done so relying largely on the PRC Form. She reached the conclusion that the complainant had been penetrated. She explained that one of the causes of hyperemia on a vagina is penetration.
17. I have also considered the defence by the appellant. He gave sworn testimony. In a nut shell, he claimed that he is a “straight forward person and he could not rape a girl nor do anything contrary to the Quran”. He stated that he returned from work, joined his whole family on the material night and that it was inconceivable that there were no witnesses to the offence. He also said that the medical evidence was not conclusive.
18. One of the grounds in the appeal is that the defence was not considered. That is not true. The learned trial magistrate at pages 4 and 5 of the typed judgment analysed that defence. However, the learned trial magistrate concluded that PW1’s evidence was reliable and was backed up by medical evidence; and, that it is the appellant who penetrated her. I concur in that finding for the reasons that now follow.
19. I find the evidence of PW1 to be consistent with that of the clinical officer (PW3) and the report by Medicins San Frontiers (exhibit 3) and Post Rape Care Form (exhibit 2). I am thus satisfied that full penetration was proved. I am well guided by section 2 of the Act which defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
20. I agree with the leaned counsel for the appellant that there were some inconsistencies in the evidence. For instance, PW1 stated that it is her mother who found her and the appellant. In another part of her evidence she states that her sister, Sima, saw her being grabbed by the appellant. But I have kept in mind that she was a young child of nine; and, that penetration was corroborated by clear medical evidence. It is not lost on me either that the complainant was taken to hospital and examined the same night.
21. I have thus reached the conclusion that the discrepancies in the evidence of PW1 and PW2 were immaterial. Furthermore, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.
22. Furthermore, I have seen no reason to doubt the complainant. I am alive that under the proviso to section 124 of the *Evidence Act*, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful.
23. The next key issue is the degree of relationship with the appellant. The complainant’s mother and the appellant are brothers. He is thus the uncle to the complainant. Needless to say, the complainant was his niece.
24. Section 20 (1) of the *Act* 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 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. Underlining added]

24. I thus find that the appellant was properly convicted for the offence of incest. But before I leave the matter, I am minded to deal with the other ground raised in this appeal that the appellant's right to fair administrative action or the right to a fair trial were abused.
25. The appellant is a person living with disability. He is dumb and communicates through sign language. Paraphrased, was the appellant given both procedural and reasonable accommodation at all the stages of investigation and the trial?
27. Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act* on the other hand decree that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. But it is important to keep in mind that unlike a civil action, the appellant was being investigated for criminal conduct. He was arrested on October 20, 2020 and informed of the complaint. He was presented to court on October 27, 2020 for plea and was granted bail in the sum of Kshs 300,000.
28. It is not clear from the record why he was not presented to court earlier. Article 49 (1) (f) of *the Constitution* provides that an arrested person shall be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or, if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day. A cursory look at the calendar shows he was arrested mid-week. I cannot make a conclusive finding by the very nature of the matter before me. But if he was unlawfully held, his remedy for such violation would not be an acquittal but an action for damages. I say that obiter.
29. Regarding the quality of investigations, they remained wanting. PW4 said that he did not recover any useful evidence at the scene the following morning. Her evidence largely was based on what she heard from some witnesses, some of whom were not called to the stand. That is why the appellant's counsel attacks her evidence as hearsay. Nevertheless, I find that there was credible and sufficient evidence from PW1, PW2 and PW3.
30. It is not again clear whether the appellant underwent medical examination or whether his samples taken. Either way, the high swab on the complainant did not reveal any spermatozoa. In the end, the investigations may not have been up to scratch, but I am unable to say that they occasioned a failure of justice.
31. Article 50 (2) (c) (g) (h) (j) and (p) of *the Constitution* provides that every accused person has the right to have adequate time and facilities to prepare a defence; to choose, and be represented by an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access that evidence; and, to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.
32. The record shows that the court provided a sign language interpreter throughout the trial. The appellant was thus able to participate at the trial, examine all witnesses, and make his sworn defence. The nature of the charge did not entitle him to pro bono counsel from the State. I note that the court directed that he be supplied with witness statements in advance. I found earlier that it is not true that his defence was disregarded. I also find, in all the circumstances of this case, that the defence was counterfeit.



33. I have also seen a letter on the file from the complainant received by the trial court on July 1, 2021 in which PW1 indicated she wanted to withdraw the complaint. That matter was to be mentioned on July 15, 2021 but it seems not to have been dealt with. I am well aware that the appellant was facing a felony; and, that the withdrawal would not be in the interests of the child.
34. In the end I am unable to say that there was violation of Article 50 of *the Constitution*. For all of those reasons, the appeal against conviction is dismissed.
35. I will now turn to the sentence. Section 354 (3) of Criminal Procedure Code empowers this court to review the sentence. Under the proviso to section 20 (1) of the *Sexual Offences Act*, the appellant was liable to imprisonment for life. When a penal provision is prefaced by the words “liable to” the sentence following is not a minimum sentence. Furthermore, the Court of Appeal has given fresh guidance on minimum sentences under the Act in *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:
- In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.
36. I have considered the appellant’s mitigation. He is a father of four and is living with disability. He is a first offender and was remorseful. I will accordingly set aside the sentence of twenty years. I substitute it with a sentence of 5 (five) years in jail. The sentence shall run from May 20, 2022, the date of his original conviction and sentence. Furthermore, and in accordance with section 333 (2) of the *Criminal Procedure Code*, the period spent in remand custody from the date of his arrest on October 20, 2020 shall be deducted from the sentence.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of-***

The appellant.

Ms.....for the appellant instructed by Felicia Mburu Advocate on behalf of Article 48 Initiative.

Ms.....for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

