



**PCN v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 20294 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E043 OF 2022**

**A. ONG'INJO, J
JULY 13, 2023**

BETWEEN

PCN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Hon. S.A. Ogot Senior Resident Magistrate at Msambweni Law Courts Sexual Offence Case No. 28 of 2020 on 27th April 2022)

JUDGMENT

1. The Appellant PCN was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 in Msambweni Senior Principal Magistrate's Court.
2. Particulars of the charge were that PCN on the 13th day of January 2020 at around 06.00hrs at Msambweni Sub-County within Kwale County, intentionally and unlawfully caused his penis to penetrate the vagina of RNM a female juvenile (child) who to his knowledge was his daughter aged 15 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The trial Magistrate considered the evidence of the complainant, the 2 arresting police officers, the investigating officer and the medical officer as well as the appellant's evidence and concluded that the appellant was guilty and he was convicted and sentenced to serve 40 years imprisonment.
5. Aggrieved by the conviction and sentence, the appellant preferred the appeal herein on the following amended grounds filed on 18th January 2023: -



- i. That the learned trial court erred in law and facts by omitting to conduct voire dire examination on the minor victim.
 - ii. That the learned trial Magistrate erred in law and facts by failing to comply with Section 200 of the *Criminal Procedure Code* when he allowed the amendment of the charge sheet.
 - iii. That the testimony of the Complainant was inconsistent with the rest of crucial evidence.
 - iv. That the trial Magistrate failed to note that there was a likelihood of witness coaching.
 - v. That the trial court erred in law by failing to call for the evidence of the alleged informer whom allegedly leaked the information of the incident to the police.
 - vi. That the trial court erred in law and fact by failing to see that medical evidence tabled by the prosecution did not sit in consonance with the allegations made against the appellant with regard to the date of the incident.
 - vii. That the trial court erred in law and fact by dismissing the appellant's defence off hand.
 - viii. That the trial court erred in law and fact by imposing on the appellant a sentence that did not take into account his mitigation submissions.
6. The Appellant prayed that the appeal be allowed.
 7. The prosecution's case was that the Complainant used to stay with the appellant who is her father after her mother died.
 8. The Complainant testified that one day in January 2020 she was in the kitchen cooking when the appellant went and told her he wanted to sleep with her and she said she was still cooking. That the appellant went to the main house and demanded to have sex with her and when she said she was still cooking, he held her hand, took her to the house, removed her clothes and slept with her. That after that she went back and continued cooking. She said it was at 8.00pm and there was no one at home. She said her brother K was not at home. That MC had gone for a walk and M had gone herding.
 9. PW 1 said that on another occasion, the appellant told her he wanted to go and do for her shopping for school in Ukunda. They reached Ukunda late and that they slept in a big house and the appellant again defiled her. That when they returned home and she reported to her grandmother the paternal grandmother said the appellant could not have defiled her and she did not take any action. PW 1 said that there were 2 people who went home and asked if she had slept with her father and she admitted. She said that her brother was called and informed about the issue and PW 1 said she could not disclose that she had been defiled because she was scared that she would be beaten. PW 1 said the 2 people who visited their home took her away to Msambweni Police Station and to Msambweni Hospital, and later to a rescue centre. The complainant said she had no differences with the father, the appellant.
 10. The appellant extensively cross examined the complainant. PW 1 said she could not remember the date she was defiled at home but it was in January 2020 as she was waiting to join form 1. She said the appellant came with an admission letter to Secondary School and that when they were going to Ukunda they were in a vehicle occupied by 5 passengers including herself, the appellant and one D whose house was in the plot where the appellant also had his house in Ukunda.
 11. PW 1 said she did not sleep at D house, she said the appellant took her to sleep at his house at night and he defiled her again. She said she did not know the appellant's house in Ukunda until he took her there. The Complainant said she did not know the 2 people who went to their home were police officers and



- they didn't give their names. She said that she was told to go to Kibaoni police post on 17/04/2020 in the company of her brother but her brother – PW 2 was engaged and she went alone.
12. PW 1 said that she was interviewed about the appellant and Kioko and she told them about the appellant. The complainant said she was living in a rescue centre with her brothers. She said she was not coached to testify about the appellant. She also said that she did not scream when she was defiled as no one was at home and she was scared. She also said the appellant warned her not to say anything and she was scared that she could be beaten. The complainant said that it was not true that she wanted to have him failed so that her school fees could be paid and that people inherit his property.
 13. PW 2 the brother of the complainant said he was not aware the appellant had defiled the sister – PW 1.
 14. PW 3 P.C. Mathew Musyoki of Mivumoni Police Post under Msambweni Police Station testified that on 14th April 2020, he got information from a member of the public that there was a girl who was being molested sexually by her father within [Particulars Withheld] village. That in company of Sgt. Karisa the incharge for the police post, they went to the home and found the girl and spoke to her and she told them the appellant defiled her when he returned from work in Ukunda and on another day when she accompanied her to Ukunda to do her form 1 shopping and they spent at Ukunda.
 15. PW 3 said that when they were speaking to the complainant, she was scared and they did not talk much as the grandmother was at home. He said they were pretending that they wanted to sponsor her to school as the family was against her reporting the sexual abuse. PW 3 said that after the interview, they summoned the complainant to the police post on 17/4/2020 and she was escorted to Msambweni Police Station where she was interviewed by female officers and escorted to Msambweni Hospital for examination. PW 3 said the information given by the informer was confirmed by the complainant and by the medical report.
 16. PW 3 said they did not tell the grandmother of the complainant what they wanted as she warned her against making a report to the police. PW 3 said he did not use the complainant to falsely charge the appellant as he did not know him before and he did not know the complainant. He said the complainant was kept in safe custody as she could not go back home. He said he interrogated the complainant about the appellant only and no one else. PW 3 said he did not collude with the informer to take away the appellants children and break up his family.
 17. PW 4 Sergeant Karisa – Incharge Mivumbini Police Post under Msambweni Police Station reiterated what PW 3 said in court as he accompanied him to the appellant's home where they interrogated the complainant together. He said they took the complainant to hospital where she was examined, treated and the PRC & P3 forms duly filled as per EXP1, P2 & P3 which were produced by PW 5. PW 4 also produced certificate for PW 1's birth.
 18. PW 4 said the appellant had threatened the complainant and the informer did not want his details to be disclosed. PW 4 said there was no eye witness to the offence and a neighbor could not confirm if the appellant defiled his own child. PW 4 said the complainant had reported to her grandmother the mother to appellant but she did not take action. PW 4 said they did not coach or threaten the complainant to testify against the appellant. PW 4 also said he questioned the complainant about the appellant only and not about 2 suspects. He said the complainant had been threatened by the appellant and she feared for her life. He further said they are allowed to remove a child from a dangerous situation. PW 4 said it was upon investigations and confirmation the offence was committed that they arrested the appellant.



19. PW 5 Dr. Ibrahim Hassan Musuya from Msabweni Sub-County Hospital produced treatment notes, PRC and P3 forms as ExP 1, 2 & 3 on behalf of Dr. Rabma Salim Mwakango who examined the complainant and filled the P3 form. It was found that the Complainant's hymen was broken.
20. When placed on defence, the Appellant gave sworn statement and denied the charge of incest. He said that his wife died from cervical cancer after being at the Coast General Hospital for 6 months on 19th November 2019 and she sent the complainant to the aunty. That he also had 2 other children who needed to go to school and he left for Ukunda to look for money. That he returned home on 25/12/2019 and asked for the complainant's results. That the complainant's grandmother advised that she should be taken to Boarding School. That he collected an admission letter from [Particulars Withheld] Secondary School on 13/1/2020 when his boss gave him a lift on his way to the shamba. That when he arrived home he found the complainant had come from the aunty's place.
21. That the complainant was to report to school on 17/1/2020 and he send her to go to school and have some forms filled and medical checkup done at Kibaoni District. He said that his mother could not do shopping for the complainant and a woman known as D who was with him in his boss' car accepted to go and shop for her. That they arrived in Ukunda at 8.00pm and D and the complainant alighted and entered the boss' house as he offloaded things from the vehicle after which he went to sleep at his house. That the following morning, he met the complainant, D and her daughter at 9.00am and they took money and went shopping. That after shopping, complainant, D and her daughter returned to the boss' house, had lunch and D escorted the complainant to board a bus for home while he remained in Ukunda. He said that reporting date was extended from 17th to 24th. That he remained in Ukunda up to 23/1/2020 when he went back home and arrived at 2.00pm and took both children to school.
22. That on return to Ukunda, he got hold of the person who said that even if he educated the children he would still take them. That he reported to 2 elders and it was agreed they meet on 18/04/2020 to ascertain the allegations. That on 17/04/2020 he left Ukunda to go home for the meeting the following day and while he was at Mzee's home 3 people arrived on bodaboda and one of them was the one who said he had their child. That he pointed at the complainant and the other 2 who identified themselves as police officers who arrested him and he was taken to the cell without being informed of what the issue was.
23. He said he remained in the cells for 5 days and was taken to court on 21/04/2020. He said PW 1 had not been chased from school for fees and he was surprised to hear her say she had been promised payment of fees. He said that the complainant said she slept with another and that is why she said she had no issue with the appellant. Appellant said it is MM who wanted to take the child. He said he knew him in 2008. He said Mutunga sent someone to steal the child but he returned the child when he heard a report had been made. He said that he learnt the child was now in M custody. The appellant said he was not calling his boss, the village elder or Mama D as his witnesses.

Analysis and Determination

24. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“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 appellate 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.”

25. After considering the amended grounds of appeal filed on 16th January 2023, records of the trial court and submissions, issues for determination are as follows: -
- i. Whether failure to conduct *voire dire* examination was fatal to the prosecution’s case
 - ii. Whether the trial magistrate erred in law and fact by failing to comply with Section 200 of the [CPC](#) upon amendment of the charge sheet
 - iii. Whether the complainant’s testimony was consistent with the medical evidence
 - iv. Whether the appellant’s defence was considered.
 - v. Whether the appellant’s mitigation was considered in the sentence.

Whether failure to conduct *voire dire* examination was fatal to the prosecution’s case

26. Section 125 (1) of the [Evidence Act](#) states: -

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.

27. Section 19 (1) of the [Oaths and Statutory Declarations Act](#) provides: -

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

28. In the case of [Samuel Warui Karimi v Republic](#) [2016] eKLR it was held: -

“...*voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the [Evidence Act](#), the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.”

...

“This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given



by the child be recorded verbatim. The definition of a child of tender years provided under the Children’s Act has remained a guide in regard to criminal responsibility.”

29. The Appellant submitted that the trial magistrate was satisfied that the complainant was fit to be sworn in for purposes of giving her testimony even before examining her whether she was possessed with the requisite capability to testify on oath as the law requires. The court was duty bound under Section 19 of the *Oaths and Statutory Declarations Act* to establish whether the complainant being a child of tender age had the capacity of testifying on oath.
30. In *John Muiruri v Republic* (1983) KLR 445, Criminal Appeal No. 44 of 1982 Court of Appeal at Nairobi, Madan, Porter JJA and Chesoni Ag JA held: -

“Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion on a *voire dire* examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

...

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood”

31. In *Patrick Kathurima v Republic*, Criminal Appeal No. 137 of 2014, the Court of Appeal held: -

“We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of *Cap 15*. We are aware that Section 2 of the *Children’s Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, *Cap 15*. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

32. The Complainant was defiled when she was 15 years. She was testifying when she had turned 16 years. The appellant cross examined her extensively and she answered all the questions put to her. Her competence as a witness was not in question and moreover, she was not a child of tender years.

Whether the trial magistrate erred in law and fact by failing to comply with Section 200 of the CPC upon amendment of the charge sheet

33. On 21/07/2021 when PW 1 & PW 2 had testified, the charge was amended and reduced to one count and dates amended to read on diverse dates between 1st January 2020 and 13th January 2020. The Appellant said he pleaded not guilty to the amended charge but was never asked if he needed to cross examine the complainant afresh.
34. This court has perused the records for 21st July 2021 and noted that the appellant was asked whether he was ready to proceed in consideration of the amendment and he said that he was ready. The matter was therefore placed aside for proceeding at a later time and when PW3 testified, the appellant cross-



examined him extensively. The amendment of the charge sheet was consistent with the evidence that the complainant tendered in court and the prosecution not having closed its case had the right to amend the charge sheet.

Whether the complainant's testimony was consistent with the medical evidence

35. The appellant took issue with dates in the charge sheet questioning where the dates in the complainant's statement came from because she said she could not remember the dates. The prosecution amended the charge sheet to indicate the complainant was defiled on diverse dates between 1st to 13th January 2020 for reasons that the complainant could not remember the exact dates but she remembers that her father defiled her on two occasions, once at home at 2.00 pm and on another occasion when he took her to Ukunda in the guise of doing school shopping for her Form 1 admission. The appellant admitted that the complainant accompanied him to Ukunda and that they spent the night there. He also confirmed that there was a woman known as D who was also with them in the car and the complainant denied that she spent the night in that woman's house.
36. The complainant's evidence that she was defiled was corroborated by the medical evidence of PW5, Dr. Rabma Salim Mwakango who examined the complainant on 17.4.2020 and found that the complainant's hymen was broken. The complainant explained that she had sex with a family worker who blackmailed her but that is in addition to the appellant forcing her to having sex with him. That fact does not exonerate the commissions by the appellant.

Whether the appellant's defence was considered

37. The trial magistrate in her deliberation of the evidence on record analysed the prosecution's evidence and that of the appellant concurrently and extensively and weighing the evidence against each other believed the evidence of the minor and said denial by the appellant was a lie. The trial magistrate said the demeanour of the complainant was not of a person who is a liar and there was no reason why the complainant who is a daughter to the accused would implicate him. The trial magistrate also found that the police officers involved in the arrest and investigation of the matter were not known to the appellant prior to his arrest and that there was nothing to suggest that there was collusion to have the appellant charged and convicted.

Whether the appellant's mitigation was considered in the sentence

38. The appellant was arrested and arraigned in court on 21.4.2020 and his trial concluded on 27.4.2022 when he was sentenced to serve 40 years imprisonment from the time he was taken into custody in April 2020. In mitigation, he sought for a non-custodial sentence on account that he had dependants who relied on him and that the time he had spent in remand was sufficient sentence. He said he had learnt quite a bit in remand and that the court should consider time spent in remand.
39. The sentence is indeed harsh and excessive in the circumstances as it does not make a difference to the prescribed life sentence provided for under Section 20(1) of the *Sexual Offences Act* which had been outlawed as unconstitutional by the Court of Appeal decision in *Julius Kitsao Manyeso v Republic*, Criminal Appeal No. 20 of 2021 in the Court of Appeal at Malindi.
40. In consideration thereof, this court substitutes the 40 years imprisonment with 25 years imprisonment to take effect from 21.4.2020. The appeal on conviction dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
13TH DAY OF JULY 2023**

HON. LADY JUSTICE A. ONG'INJO



JUDGE

In the presence of: -

Bebora- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

