



REPUBLIC OF KENYA



**BHE v Republic (Criminal Appeal 50 of 2019)  
[2023] KEHC 21684 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL 50 OF 2019  
SM GITHINJI, J  
AUGUST 1, 2023**

**BETWEEN**

**BHE ..... APPELLANT**

**AND**

**REPUBLIC ..... REPUBLIC**

*(Being an appeal from the Judgment of the PM's Court in S.O Case No.12 of 2018  
by Hon EM Kadima – SRM delivered on 13th March, 2019 at Garsen Law Courts)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. BHE was charged in the lower court with a main count of Incest contrary to section 20 (1) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence being that on the 24<sup>th</sup> day of June, 2018 at around 00:30hours in Ngao location within Tana River County, the appellant intentionally touched the vagina of AH with his penis, who to his knowledge is his daughter, a child aged seven years.
3. In the alternative he 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 particulars of this offence being that on the 24<sup>th</sup> day of June, 2018 at around 00.30 hours in Ngao location within Tana River County, the appellant intentionally touched the vagina of AH, a child aged seven years with his penis.



5. The prosecution case is that the appellant herein was married to Pw-2, one BKK. They had three children and had been married for a period of 7 years. They were living at [Particulars Withheld] in Tana River. On 24/6/2018 at about 9.00pm. PW 2 went to asleep. The appellant was with his brother B at the Verandah. She left them chatting as she went to sleep. She was sharing her bedroom with Pw-1 (the victim) though Pw-1 had her own separate bed. Pw-1 according to her birth certificate which was produced at Pexhibit -4, was born on 6/7/2011. On 24/6/2018, the alleged date of the offence she was aged 6 years old. Her 7<sup>th</sup> year Birthday would have been on 6/7/2018.
6. At the dead of the material night when everyone had slept, the complainant evidence shows that the appellant woke up, removed her from the bed in which she was sharing with A, and took her on a mat at the verandah. He removed her panty and drew out his penis. He then placed his penis in her vagina. Pw-2 woke soon thereafter. She wanted to go outside to answer a call of nature. She got her phone which had a torch to luminate her way out. It's then she noted the appellant and the complainant were not in the room. She went to the verandah and found them. The complainant was lying naked as her pant had been removed and placed on the mat. Her dressed had been pulled upward. She was covered with a sheet. Pw-2 quarreled the appellant. The scenario implied he had sex with her. Pw-3 a neighbour heard the commotion in the appellant's house. He went there to find out what was happening. When he knocked on the door the two argued on whether to open it and not. They however opened. He entered therein and made them sit down. He then asked what the quarrel was about. Pw-2 said the child could tell. Pw-1 was at the verandah. Pw-3 asked her what was the problem. She hesitated at first but then stated that the Dad had done to her bad manners (Dadi amenifanya tabia mbaya). She stood and Pw-3 noted her pant was at her ankles. Pw-3 then asked the appellant what he was doing. The appellant said he was fitting the girl with the panty. Pw-3 was shocked. He called Pw-4 who is a cousin to the appellant. Pw-4 went to the house of the appellant. The complainant was there standing on the mat and the pant was on one leg. Pw-4 asked Pw-2 what was happening and Pw-2 told him to ask the complainant. Pw-4 asked the complainant about it and the complainant stated that the father had done to her obscene things (Baba amenifanya mambo machafu). He asked her how she got there, and she answered that the appellant took her there from the bed. He asked the appellant about it. The appellant said he had done nothing as he was only trying to fit the complainant with a new panty. Pw-4 asked him, "at 1.00am?". They all went to the hospital at Ngao. The complainant was examined. They proceeded to Tarasaa Police Station and when they got at the gate, the appellant escaped. They however made the report and recorded statements.
7. The complainant was examined by Pw-5 and her P-3 form filled. The clinical officer observed that the hymen was broken and one finger could easily penetrate. She had no visible cut or discharge. High Vaginal swab revealed presence of epithelial cells and pus. HIV and pregnancy tests were negative. The girl was traumatized.
8. Pw-6 investigated the case. The appellant was arrested two days after he had escaped. The area Assistant Chief and the Youths Chairman told the officer about his arrest. He had been arrested by members of the public. The police went and picked him up. He was taken to Tarasaa Police Station and charged with the offence of incest.
9. The appellant's defence is that after his mother died, he started quarrelling with his wife. On 14/4/2018 they were mourning his mother's death and though his wife's present was needed, she was noticeably absent. When he asked her about it she quarreled. She accused the appellant of being more concerned about his brothers and not her, and also of having other lovers. She vowed to fix him. A friend called K found them quarrelling. When he asked what it was about, she responded rudely. The parents however entered and calmed them.



10. On 28/4/2018 appellant went back to Marereni. On 23/6/2018 he was called home to address domestic problems which had escalated. When he got home he quarreled with his wife. There was no food to eat and when he said he will visit his friends she also said she will leave to visit hers too. He was later reluctantly served with food. In the evening he escorted his brother. When he returned the door was open. He asked her why it was open and she said she will teach him a lesson. Pw-3 was attracted by the quarrel and he also called Pw-4. They were told to ask complainant what the problem was and she said “amenifanya tabia mbaya.....”. (He has done bad manners to me). The Appellant could not believe it. He suggested they go to the hospital. There the complainant said the mother had told her to say the father had done to her bad manners. The appellant asked his wife about it and Pw-3 started to hit him on the head. They went to the police station. At the gate he attacked the appellant once more. Others present joined him. The appellant decided to escape. He was accommodated by an old woman. He slept there. When he left he was arrested and taken to the police station.
11. The trial court evaluated the evidence and found that the offence in the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years imprisonment.
12. Dissatisfied with the said conviction he appealed to this Court on the grounds that; -
  1. The prosecution did not prove their case beyond reasonable doubt.
  2. The age of the complainant was not proved.
  3. The massive contradictions in the prosecution case were not evaluated.
  4. The defence was not properly weighed.
13. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
14. I have considered the charges preferred, evidence adduced by the prosecution side, defence, judgment and sentence meted, the grounds of appeal and submissions.
15. The appellant in the main count was charged under section 20 (1) of the [Sexual Offences Act](#). The section provides; -

“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 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.”
16. Given the foregoing provisions, the prosecution was obliged in this case to establish beyond reasonable doubt that; -
  1. The appellant is the father to the complainant.
  2. In terms of Indecent act, unlawfully and intentionally committed an act which caused contact between any part of his body with the genital organs, breasts or buttocks of the complainant, without penetration;



Or he exposed or displayed any phonographic material to the complainant against her will.

17. On the second limb, on penetration, to establish beyond reasonable doubt that the appellant herein partially or completely inserted his genital organs to the genital organs of the complainant. The complainant herself in her evidence indicated that the appellant drew out his penis, removed her inner wear and then inserted his penis into her vagina. The words she used when she reported to her mother, Pw-3 and Pw-4 are to the said effect. The circumstances in which the mother found her and the appellant, and which was later witnessed by Pw-3 and Pw-4 who got to the scene soon thereafter, suggests firmly that the complainant told the truth. The appellant was questioned separately by Pw-3 and Pw-4 and the response he gave is one, that he was trying to fit the complainant with a pant. Such cannot be true. A father cannot wake up his daughter aged almost 7 years at the dead of the night, take her to a separate place secretly for the purposes of fitting a new pant on her. This is a thin lie. The complainant's evidence is corroborated by the evidence of the medical officer who observed her, mostly in that epithelial cells were noted, which suggests there was penetration. The fact that the appellant accompanied the team to the hospital and thereafter as they went to report at the police station escaped and went underground for two days shows he was guilty conscious. If he escaped because he was being attacked, he would have raised alarm for police to rush to his rescue or escape into the police station which was just nearby. In relation to the offence the prosecution have been able to establish beyond reasonable doubt that; -

1. The appellant is a father to the complainant and knew of that fact.
2. He penetrated her genital organ with his genital organ.
3. The complainant was then aged 6 years old.

18. The foregoing facts gives rise to the offence of incest of which the prosecution established beyond reasonable doubt. Given the age of the girl, the appellant was liable to imprisonment for life. The trial court was lenient enough to have sentenced him to 15 years imprisonment. I have no ground to lower it further.

19. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1<sup>ST</sup> DAY OF AUGUST, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -.**

1. The Appellant in Person
2. Ms Mutua holding brief for Ms Mkongo for the Prosecution

