



**JTK v Republic (Criminal Appeal E046 of 2022)
[2023] KEHC 27441 (KLR) (2 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 27441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E046 OF 2022
GL NZIOKA, J
AUGUST 2, 2023**

BETWEEN

JTK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon. E. Boke, Principal Magistrate (PM), delivered on, 26th November, 2012, vide Criminal Case No. 3100 of 2011, at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha, charged vide Criminal Case No. 3100 of 2011, with the offence of; incest contrary to; section 20(1) of the Sexual Offence Act No. 3 of 2006 (herein "the Act"), in count (1) and an alternate count of committing an indecent act with a child contrary to. section 11 (1) of the Act.
2. He was also charged in two counts with the offence of; sexual assault contrary to section 5(1)(a)(i)(2) of the Act, and two alternate counts of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each are as per the charge sheet.
3. He pleaded not guilty and the case proceeded to full hearing with the prosecution calling a total of six (6) witnesses. The prosecution case in brief is that, (PW1) RG, 12 years old (PW2) TWT 10 years old, and (PW4) MW 6 years old (hereinafter "the complainants") were staying with their mother (PW3) MWW, and the appellant, their step-father in a one bedroomed house.
4. That on 5th October 2011, the appellant beat (PW3) MWW and fearing for her life, she went to live with her sister in Narok leaving the appellant with the complainants.



5. That, on or about the 11th and/or 12th October 2011, the complainants, went to sleep on the sofa set while the appellant was on the bed. That, the appellant went to the sofa set and touched (PW2) TWT but he realized that she was still awake and he went back to the bed.
6. That the appellant still went to the sofa set and removed (PW1) RG's innerwear and defiled her. She testified that she felt pain.
7. That the appellant also removed (PW2) TWT's innerwear and defiled her. She too testified that she felt pain and that the appellant ordered her to go back to sleep.
8. That in the morning, (PW1) RG and (PW2) TWT went to school and left (PW4) MW at home with the appellant. Similarly, the appellant placed (PW4) MW on a seat, removed her pant and inserted his finger in her private parts. He then told her to wash her clothes since they had blood stains.
9. However, (PW1) RG and (PW2) TWT returned home from school in the evening and found (PW4) MW crying and had blood in her vagina. (PW2) TWT went and informed Mama Ann who informed Mama Mutugi.
10. That, Mama Mutugi reported the matter to the police station and returned with police officers who arrested the appellant and took the complainants to the police station. Later, the complainants were taken to Naivasha District Hospital where they were treated and subsequently P3 forms filled. At conclusion of investigations, the appellant was charged with the offences herein.
11. At the close of the prosecution case, the trial court ruled that, the appellant had a case to answer and placed him on his defence. He testified vide an unsworn statement and denied committing the offence. He stated that, on the 13th October 2011, he woke up at 5:00 am and reported to the garage where he was working at 5:45am and did welding and fabrication, that he worked up to about 8:30pm when he closed the garage and went home.
12. That while at home, a police officer armed with a gun went and ordered him out of the house and took him to the police station where he was locked in the cells. That, he was later taken to Naivasha District Hospital where he met the complainants and wanted to accompany them in the doctor's room but Dr. Njogu told him to wait.
13. That after a while the doctor informed him that the children were okay. However, he was placed in a motor vehicle and taken back to the Haraka Police Station and was subsequently taken to court and charged with the offences. He accused a pastor who had an affair with his wife for destabilising his family.
14. At the conclusion of the hearing, the trial court delivered a judgment dated; 26th November 2012 and held that the prosecution had proved the case beyond reasonable doubt the main counts, convicted the appellant accordingly and sentenced him to serve life imprisonment in count 1, and fifteen (15) years imprisonment count 2 and count 3 respectively.
15. However, the appellant is aggrieved by both conviction and sentence and appeals against the same based on the following as verbatim reproduced:
 - a. That, the learned trial magistrate erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the appellant was not informed of his right to have an advocate assigned to him considering the gravity of the charges he was facing.



- c. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not prove the ingredients of the offence beyond reasonable doubt.
 - d. That I pray to be furnished with a copy of the lower court's proceedings and its judgment.
 - e. That, further grounds shall be adduced at hearing of this appeal.
 - f. That, I wish to be present during the hearing and determination of this appeal.
16. However, the respondent opposed the appeal vide grounds of opposition that states: -
- a. That the sentence imposed on the appellant was provided by law in line with the circumstances of the offence and the three counts, defiling his own child aged 12 years and sexually assaulted two other children aged 10 years and 6 years respectively.
 - b. That the appellant is an adult and did not seek to appoint an advocate during the trial. He had an opportunity to cross-examine all witnesses.
 - c. That all the ingredients of the offence which includes age, identification and penetration were sufficiently proved beyond reasonable doubt. The prosecution witnesses' testimony corroborated.
 - d. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.
17. The appeal was disposed of vide filing of submissions. The appellant in submissions filed on 2nd March 2023 argued that the prosecution was required to prove the elements of the offence of incest being; age, penetration, and the relationship between the victim and the accused. However, the prosecution failed to prove penetration to the required to the standard set out in the case of; Mark Oiruri Mose vs Republic (2013) eKLR.
18. He submitted that, the complainants being minors their evidence should have been taken with caution and corroborated. That, (PW1) RG, could not state the date, time or month she was defiled.
19. Further, it was not possible for the complainants not to bleed after being defiled neither was it possible for (PW1) RG and (PW2) TWT to go school normally after being defiled. He relied on the case of; Ben Maina Mwangi vs Republic where the court took into consideration the age of the complainant and of the appellant, and stated that it was expected that the complainant was in excruciating pain and she could not avoid straining or bleeding if the appellant attempted to penetrate her genitalia.
20. Furthermore, the medical evidence did not corroborate the offence of defilement and sexual assault and was only speculative. That, the examination of the complainants revealed that they did not have any injuries in their genitalia, neither was there any discharge, pus cell or spermatozoa, and that the complainants' hymen was not freshly broken.
21. He relied case of Arthur Mshila Manga vs Republic (2016) eKLR where the Court of Appeal found that the medical evidence in the case did not establish defilement as there was no blood stains or discharge, nor were there any injuries on the head, abdomen, thorax, legs or hands, and that the urine, HIV and pregnancy tests were all negative despite the fact that the hymen was absent and vagina open.
22. Finally, the appellant submitted that, in sentencing him to serve life imprisonment, the trial magistrate misinterpreted the provision of section 20 (1) of the Act by finding that it provides for a mandatory sentence where the victim is a minor. That, a proper reading of the section gives the trial magistrate discretion to impose any sentence above ten (10) years where the victim is an adult and can be enhanced



to life imprisonment where the victim is below eighteen (18) years old. He relied on the case of; M.K vs Republic (2015) eKLR.

23. However, the respondents in submissions dated; 17th February 2023, argued that the sentences imposed by the trial court are provided for under the law and in line with the circumstances of the offence. That, in passing sentence under section 5 (1) (2) of the Act, the trial court noted it had discretion to enhance the sentence to life imprisonment.
24. Further, the appellant did not seek for the appointment of an advocate during the trial but he was given an opportunity to prepare for his trial, supplied with statements, cross-examined all witnesses and the trial conducted in a language he understood. Therefore, he was not prejudiced by the failure to appoint or have appointed for him an advocate.
25. Furthermore, the prosecution proved the elements of the offence being; the age of the victim, penetration and identity of the perpetrator. That, penetration was proved by the evidence of the complainants which was corroborated by the medical evidence that showed their hymen was broken.
26. Further, the age of the complainants was established through the production of their birth certificates. Furthermore, the appellant was properly identified by (PW3) Martha, who was the appellant's wife and complainants' step-father.
27. That the mother of the complainant testified that she left the complainants' in the appellant's care when she ran away to her sister's home. Additionally, the complainants' referred to the appellant as their father a fact he did not deny.
28. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
29. In that regard, the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, thus observed: -

“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”.
30. To revert back to the matter herein, the offence of incest is set out in section 20(1) of the Act which provides 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.

31. Further, section 22 (1) of the Act deals with relationship where incest may be inferred as: –
- “(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.”
32. The prosecution was duty bound to establish the relationship between the complainants and the appellant and it was established that the complainants was their step-father as he was married to their mother and the children referred him as their father which the appellant admitted. Therefore there is no doubt as to their relationship. Section 22 of the Act the law states that a step-father is considered a father.
33. On the issue of the age, it is settled law that, primary evidence in proof of the age of a person is the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. However secondary evidence can be deduced from the evidence of a parent or guardian, or physical observation of the child and/or common sense as held in; *Hillary Nyongesa vs Republic (Uganda)* HCCRA No. 123 of 2009. The age was proved by birth certificates produced as exhibits.
34. As regards penetration, section 2 of the Sexual Offence the Act defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
35. In the instant matter, Dr Joseph Maundu testified that, the hymen of all the three complainants were broken. Therefore, it was evident that penetration had been taken to break their hymen and/or virginity. The complainants stated that they were defiled by the appellant by use of both penis and fingers. The doctor also noted pus cells which he explained was as a result of wound created by recently broken hymen.
36. On identification, all the complainants stated that the appellant was the one who defiled them. The complainants were aged twelve (12), ten (10) and six (6) years and cannot have conspired to frame their step-father but even then the defilement and/or sexual assault was confirmed by the medical evidence
37. Further, it is on record that after the incident the complainants who had a cordial relationship with the appellant developed hatred towards him and that can only be explained by what happened to them.
38. Furthermore, the complainants were in the house with the appellant alone and so no one else could have committed the offence and if there was the appellant would have been the first one to know and report the matter.
39. The appellant introduced the issue of an alleged affair between the wife and the pastor but the evidence reveal that the complainants reported defilement to the pastor who took them to the police station.
40. I find that there was sufficient evidence to find the appellant guilty as charged on the main counts and I uphold the conviction.
41. As regard the sentence, I find that the offence of incest is provided for under section 20(1) of the subject Act which 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.”

42. On whether the sentence under section 20 (1) is mandatory in nature, the Court of Appeal in *M K v Republic* [2015] eKLR stated thus:

17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years’ imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of *Opoya -v- Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James -v- Young* 27 Ch. D. at p.655 where North J. said:

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits



an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in *Opoya -v-Uganda* (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of *Ogolla s/o Owuor*, (1954) EACA 270 wherein the predecessor of this court stated:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

23. We are of the considered view that the High Court misinterpreted the proviso to Section 20 (1) of the *Sexual Offences Act* and acted on wrong principles and overlooked the decision in *Opoya -v- Uganda* (1967) EA 752.”

43. In the given circumstances of this case and taking into account the appellant sexually abused children of tender years who looked upon him for protection as a father, the sentence of life imprisonment on count (1) is deserving and I shall not interfere with it.

44. The appellant was further convicted in two counts with the offence under section 5(1)(a)(i) as read with that follows: -

“(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person;

...

is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”



45. The appellant was sentenced to serve fifteen (15) years on count 2 and 3. I find the sentence lawful and was in fact ordered to run concurrently. I decline to set it aside.
46. The upshot is that the appeal is dismissed in its entirety.
47. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 2ND OF AUGUST 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Atika for the respondent

Ms. Ogutu: Court assistant

