



REPUBLIC OF KENYA



**JGE v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 22354 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E012 OF 2022
SM GITHINJI, J
SEPTEMBER 20, 2023**

BETWEEN

JGE APPELLANT

AND

REPUBLIC RESPONDENT

(From the Original conviction and sentence in SO No. E026 of 2022 at Mpeketoni PM's Court Judgement delivered by Hon P.E.Nabwana – Rm on 6th April, 2022)

JUDGMENT

1. JGE was charged with two main counts and one alternative count in the lower court. The first count is of defilement, contrary to section 8 (1) (2) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the 31st day of May, 2021 at around 19.00 hours at [particulars withheld], Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JN, a child aged 8 years.
3. The second count is of incest contrary to section 20 (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars hereof being that on the 31st day of May, 2021 at around 19.00 hours at [particulars withheld], Lamu West Sub County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JN a child he knew to be his daughter.
5. The alternative charge is of committing an Indecent Act with a child, contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
6. The particulars of this offence are that on the 31st day of May, 2021 at around 19:00hours at [particulars withheld], Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully touched the vagina of JN a child aged 8 years, with his penis.



7. The prosecution case is that MN (Pw-5) and the appellant herein were married and had 6 children together. However, they later disagreed and separated. Both were living at [particulars withheld]. On 31/5/2021, the victim (Pw-2) who is one of their children, who at the time was aged 8 years having been born on 13/2/2012 as per her birth notification No. 45xxx1, went to visit her father, the appellant herein. The appellant was living in a house within his mother's farm, but the mother at the time was absent. The appellant welcomed his daughter and led her to M's place of which was a traditional beer drinking den. When they got there he bought her alcohol and a cigarette. After that they went to another place where he bought her soup. It's after taking soup that he led her to the house. He locked the door and removed her pant. He as well removed his trousers before he placed her on the bed. He defiled her, by penetrating her genital organ namely Vagina with his genital organ namely penis. Pw-2 felt pain and cried. He urged her not to shout. Pw-3, the complainant's brother who by the time was aged 14 years had heard the complainant crying in their father's house of which was locked. He informed the mother (Pw-5) about it. The mother proceeded to the scene with some neighbours for fear of violence. Upon arrival they heard the appellant telling the victim, "if you feel pain let me know." They called upon the appellant to open the door but he declined. Pw-3 sent for Pw-4 for assistance.
8. Pw-4 who was their neighobur was called. By that time, it was already dark. When he got to the scene the mother (Pw 5) told him what the problem was. He called the appellant by his pet name "kajamaa" but he did not respond. Pw-4 decided to call the area chief, MH. She got to the scene. Other neighbours had also gotten to the scene. The area chief sent for a NPR by the name of JK (Pw-6). When Pw-6 arrived, he found the house locked and there was no response inside. He threatened to break the door and nothing happened. He made a hole in the window using a stick and peeped inside through it. He saw two people inside covered in a blanket. They were Kajamaa and his daughter, the victim in this matter. He broke in and found the two in the bedroom. The victim stated she was told by the father to sleep in the house as she will not be able to get home. He defiled her. The appellant was very violent. He abused them and resisted arrest. With help of members of the public he was handcuffed. Pw-6 reported the matter at Mpeketoni Police Station.
9. Pw-7 and some other officers rushed to the scene. They found the appellant already handcuffed. Complainant was present, her mother and some members of the public. Investigations commenced and the victim was referred to Mpeketoni Sub-County Hospital. Pw-1 examined her in the said hospital.
10. He noted that she was under age, there were no blood spots seen, her pants were wet probably due to sperms, hymen was broken, however no bruises nor lacerations were noted. There was also no discharge from the vagina. HVS test revealed presence of sperms. The medical officer concluded that there was evidence of penetration. Medical notes were made and P3 form filled. Both were produced as exhibits.
11. The trial court found that the appellant had a case to answer and accordingly placed him on his defence. He gave sworn testimony and called no witness.
12. His defence is that on 31/5/2021 at about 15 minutes to 21:00hours he was removed from his house by strangers. He was inside the house with his daughter, the victim in this case. He was asked what he was doing with his daughter and wondered why the question as the daughter had just visited. The daughter was interrogated and stated they were relaxing in the house. The appellant was handcuffed. Police were called who re-arrested him and took him to the police station. He was later charged with the strange offences.
13. The trial court evaluated the evidence and found that the offence of incest was proved by the prosecution beyond reasonable doubt. He was accordingly convicted of the same, and considering the



- circumstances under which it was committed and its effect on the victim, he was sentenced to serve life imprisonment.
14. The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that; -
 1. The trial process was unfair.
 2. The prosecution case was marred with massive contradictions.
 3. Complainant's evidence was coerced.
 4. The medical evidence adduced is unreliable.
 15. The appeal was canvassed by way of written submissions.
 16. As the first appellant court I have re-evaluated the evidence on record, the judgment of the lower court and sentence meted, grounds of appeal and considered the submissions filed by both parties.
 17. Section 2 (1) of the *Sexual Offences Act* defines the offence of incest by male persons as follows; -

“ Any male person who commits an indecent act or an act which causes penetration with a female 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.”
 18. Provided that, if it is alleged in the information or charge and proved that the female person is under 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.
 19. From the foregoing provision, it's vivid that the ingredients for the offence of incest were as held in the case of *MGK v Republic* [2020] eKLR of which was relied upon by the respondent. These are; -
 1. The perpetrator and the victim must be related within the categories expounded under section 20 (1) of the *Sexual Offences Act*.
 2. The perpetrator must have committed an indecent act as defined under section 2 (1) of the *Sexual Offences Act* or committed an act which causes penetration with the victim.
 3. Where the charge sheet particulars disclose that the victim was a minor, for purposes of sentencing, the age must be established to that effect.
 4. The perpetrator must be sufficiently recognized or identified as such.
 20. Looking at the evidence on record, there is no dispute that the appellant herein is the father of the victim. The evidence of the victim, the mother (Pw-5) and the defence by the appellant ascertains that fact. The first ingredient is therefore established by the prosecution beyond reasonable doubt.
 21. On the second one, the victim stated she was penetrated by the appellant in her genital organ, with a genital organ. They had undressed and she felt pain. The evidence of Pw-1 that HVS test revealed presence of spermatozoa buttresses the fact. The victim and the appellant were found sharing a bed during arrest and examination was done soon thereafter. Though the broken hymen may not have been fresh given the evidence that no blood spots were noted, there were no lacerations and bruises; the available evidence suggest strongly that there was slight penetrations of which would suffice for the offence.



22. The victim stated she was 8 years old. A birth notification No. 45xxx1 was produced showing she was born on 13/2/2012. There is no doubt that on 31/5/2021 she was aged 9 years old. She was a minor.
23. The appellant herein was found with the girl in the house in bed. When he was called out to open the door he did not and it had to be broken into for the victim to be rescued and him be arrested. He does not deny the circumstances of the arrest but simply states the victim was resting with the father. The circumstances show he is the real culprit.
24. Having weighed the foregoing, I am convinced beyond reasonable doubt that the appellant was rightly committed of the offence of incest.
25. He was sentenced to life imprisonment. Considering the circumstances under which the offence was committed, where the father prior to the incest had bought her beer and cigarette, thus a minor school girl into harmful substances at such an early age, only to eventually end up penetrating her; and also considering the effect such had to the victim, the life imprisonment sentence is well deserved. I see no need of disturbing the same in favour of the appellant.
26. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2023

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S.M.GITHINJI

JUDGE

In the Presence of: -

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

