**BKM v Republic (Criminal Appeal 64 of 2018)**
**[2023] KEHC 23271 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23271 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITUI**

**CRIMINAL APPEAL 64 OF 2018**

**RK LIMO, J**

**OCTOBER 4, 2023**

**BETWEEN**

**BKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. BKM , the appellant herein, was charged with the offence of incest Contrary to section 20(1) of *Sexual Offence Act* No. 3 of 2006 vide Kitui Chief Magistrate's Court Sexual Offence Case No. 6 of 2016.

2. The particulars are that on the night of 28/1/2016 at unknown time within Kitui County he intentionally and unlawfully committed an act which caused penetration with KKW (name withheld) a child aged 4 years by inserting his penis into her vagina who to his knowledge was his daughter.

3. He also faced an alternative charge of committing an indecent act with a child but the alternative count is not relevant to this appeal as he was found guilty and convicted of the main charge after trial.

4. The following is a summary of the evidence adduced at the trial.

5. KK (PW1) the complainant gave an unsworn statement after a *voire dire* exercise. She testified on two occasions. In the first instance on 22nd February 2018 and subsequently on 21st March 2018. During the complainant's first time in court, the prosecution submitted that the complainant had been influenced on what to tell the court and sought more time. In the 2nd time, on 21st March 2018, the complainant told the court that her father, the Appellant used to sleep with her and that he did bad things to her on her private parts. She also stated that she told her grandmother that her stomach was aching but she did not do anything about it. She also stated that the Appellant took her to school and that she told her teacher that she was not feeling well following which she was taken to hospital and thereafter to the Police Station.

6. FM (PW2), a teacher at (Particulars withheld) Primary School and the teacher to the complainant stated that the Appellant used to drop her daughter (PW1) at the school on his bike and that on 29th January 2016, he dropped her as usual at the school gate but this time, the minor (PW1) was crying. The witness stated that she took PW1 aside and asked her why she was crying to which the minor (PW1) responded that her mother had gone to Nairobi and that the Appellant had been sleeping with her and defiling her. The witness proceeded to state that she examined PW1 and found that her private parts was sore and also had pus. She testified that the minor was examined by another teacher who confirmed that the injuries were not normal and the matter was escalated to the school's head teacher.

7. AM (PW3) the head teacher (Particulars withheld) Primary School stated that he was informed of the incident by one of his teachers who had examined the complainant following the report. He stated that he called the appellant as well as the area sub-chief and in their presence, PW1 stated that the appellant had defiled her. He stated that he accompanied the area assistant chief, PW1, one parent and the appellant to the police station where the incident was reported.

8. Kennedy Kioko (PW4) a Clinical Officer at Matinyani Health Centre testified that he was previously based at Kauwi Sub-District Hospital where he attended the Complainant (PW1). He testified that the minor reported that her father had reportedly defiled her when her mother was away in Nairobi.

9. The Clinical Officer stated on physical examination that he noted that the minor had vagina discharge with the hymen broken. He also noted that the girl had bacterial infection which in his opinion was evidence of a sexual transmitted disease. He stated that he assessed the age of the minor as 4 years old. he tendered the Age assessment report as P Ex 1, treatment card as P Ex 2 and P3 Form as P Ex 4. he also stated that he filled the PRC Form which he tendered as P Ex 5.

10. He further testified that he examined the appellant and in his view though his private parts were normal, he noted that the appellant suffered the same Sexually Transmitted Diseases as noted on the minor, He tendered P3 Form in respect to the appeal as P Ex 6. The P3 tendered in respect to the appellant however indicated no Sexually Transmitted Diseases.

11. When placed on his defence. BKM (DW1) gave a sworn statement. He stated that he took the complainant to school on 29th January 2016 and thereafter left for work. That he then left work and attended a meeting at the complainant's school where he was elected a member of the school's committee. That after that, he left the school and decided to go and wait for the complainant at the market but on his way he met his brother and asked him to wait for the complainant. He then stated that he was called by the Sub-Chief who asked him to go to the complainant's school and when he arrived, he was informed by the Head Teacher (PW3) that the complainant had reported that the he had defiled her. The appellant also stated that he was being framed by a teacher at the school over a grudge that arose after pool match which he reportedly won against the teacher.

12. KM , (DW2) the appellant's DW1's mother told the court that the complainant used to sleep at her house as her mother was away. She also attributed the complainant limping to her shoes which she stated were not fitting well. She also stated that the complainant had been pinched on the thigh at the school.

13. SK(DW3) the mother to the Complainant told the court that she did not know anything about the case or why the appellant, her husband was in custody.

14. The trial court evaluated the evidence tendered by both the prosecution and the defence and found that the Prosecution had made out its case and proved all the elements of the charge. The trial court found that the defence allegation about the differences with a teacher had no bearing in the case because she

was justone of the witness from the school who testified on the observations made on the minor when she reported to school. It further found that the evidence of the complainant was well corroborated by PW2, PW3. It found the appellant was found guilty, convicted and sentenced him to serve life imprisonment.

15. The appellant felt aggrieved and filed this appeal raising the following grounds namely: -

    i. The learned Chief Magistrate erred in both law and facts when she casually dismissed the Appellant's defence of frame-up without considering its weight despite the fact that the Appellant called watertight evidence to establish the frame up done by the complainant's teachers.

    ii. The learned Chief Magistrate erred and misdirected herself on the law and the facts when she convicted the appellant on charges of incest without sufficient evidence establishing the commission of incest as required in law.

    iii. The learned Chief Magistrate erred and misdirected herself on the law and the facts when she relied on contradictory evidence to convict the appellant.

    iv. The Learned Chief Magistrate erred and misdirected herself on the law and the facts when she applied selective bits of the evidence in convicting the appellant while disregarding the exonerating evidence.

16. In his written submissions, the appellant submits that he was framed by the Complainant's teacher (PW2). He further takes issue with the medical evidence tendered saying that the minor was examined two days after the alleged defilement. He contends that the age of the minor was also not proved. He insists that the minor was coached to frame him wondering why other children who were schooling with the minor were not availed to testify. he contends that the prosecution's case was not proved beyond doubt.

17. Finally, he submits that the sentence was too harsh and that, time spent in custody was not considered and suggests that a sentence of 25 years would have been appropriate.

18. The State has opposed this appeal and supports the conviction and sentence meted out contending that the appellant expressed no remorse upon conviction.

19. The Respondent submits that the prosecution was able to prove the element of relationship between the appellant and the minor contending that there was no dispute that the appellant was the father to the complainant.

20. On the age, the prosecution has placed reliance on the evidence by the complainant on the same as well as an age assessment report produced and marked as PEXH 1.

21. On penetration, the state relies on the evidence by the complainant that the appellant defiled her as well as PW2's testimony which it has been submitted was corroborated by medical evidence adduced by PW4 who examined the complainant and made the conclusion that she had been defiled.

22. On identification, the prosecution submits that the complainant was able to identify the Appellant and place him at the scene of crime.

23. It has also been submitted that PW1's testimony did not require corroboration and reliance has been placed on the Court of Appeal decision in *J.W.A v Republic* (2014) eKLR and the case of *Mohamed v Republic* (2006) KLR where it was held that corroboration of testimonies of children of tender years was not necessary in sexual offences particularly where a court was satisfied that the child was truthful.

24. It submits that the defence raised on the existence of a grudge between the appellant and the complainant's teacher who testified as PW2 was not supported by any evidence adding that the trial court addressed the issue well in its judgement. The State submits that the Complainant's evidence was supported by a medical officer who did not know the appellant adding that apart from PW2, there were other witnesses who gave corroborative evidence supporting the Prosecution's Case.

25. The Respondent supports the sentence imposed submitting that the minor went through traumatic experience. It submits that incest is a serious crime and a deterrent sentence was called for to protect the society citing that offences of such nature was prevalent in this area.

26. This Court has considered this appeal and the response made by the State. The State through the office of the Office of the Director of Public Prosecution through Learned Counsel Pauline Mwaniki has made extensive submissions to express strong opposition to this appeal.

27. The duty of this court being the first appellate is stated in the case of *Okeno v Republic* (1972) EA 32 at pg 36, the EA Court of Appeal said:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA 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. (*Ruwalla v Republic* (1957) EA 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, see *Peter v Sunday Post* (1958) EA 424."

28. This Court has considered this appeal and the evidence tendered at the trial keenly. This Court notes that the minor at first appeared not ready to testify but after intensive counselling sessions, she was able to testify and this is understandable given the age of the minor.

    The evidence tendered shows that the mother of the minor was away in Nairobi at the time and the minor stated that she slept with her father the appellant who did "bad things" to her. It was her evidence that she experienced some pain in her lower abdomen and reported to her grandmother who did not do anything about it. She stated clearly that, her father (the Complainant) took her to school using a bicycle and that it was while in school that she reported to her teacher who upon checking her, noted that her genitalia were sore and had pus. The Teacher (PW2) notified the Head Teacher (PW3) who took action and had the matter reported and action taken.

29. The issues for determination in these apeal are 3 fold and are;

    i. Whether the prosecution proved the offence of incest beyond reasonable doubt.

    ii. Proof of the age of the complainant

    iii. Whether the sentence was lawful and proportionate

30. Whether the ingredient of incest was proved. The prosecution was required to prove 3 ingredients of incest which are: -

    i. Penetration

ii. Relationship

iii. Age

31. To begin with the uncontested element of relationship. There is no doubt the appellant is the father to the minor (Complainant).

The appellant in his sworn statement of defence acknowledged that fact and the minor herself clearly stated it during trial.

32. The element of relationship was therefore well established.

33. On penetration, the evidence from PW1, the complainant was that the Appellant did 'bad things' to her when she was sleeping. The bad thing was found to be defilement (incest). The Medical evidence produced in court by PW4, Kennedy Kioko, a Clinician from Matinyani Health Centre clearly proved the element of penetration. On examining the complainant, he found that her hymen was missing and that the complainant showed signs of sexual assault. He stated that the complainant's private parts also had signs of a bacterial infection which was evidence of a sexually transmitted disease.

34. The evidence of the minor (PW1) was corroborated by PW2 and the medical evidence of PW4. There is absolutely no doubt that the pain the minor explained to her teacher (PW2) was as a result of sexual assault by her own father. The element of penetration was proved beyond doubt.

35. On the question of age, the prosecution was, in light of the nature of sexual offence (incest), was only required to prove that the victim was below 18 years. Section 20(i) of *Sexual Offence Act* stipulates as follows: -

> " 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."

36. The evidence tendered by PW4 (age assessment report P Ex 1) indicated that the minor was 4 years old. The appellant himself confirmed that when he testified, he stated that the minor was a small child in Nursery School. The element of age was established beyond doubt and so to all the ingredients of offence.

37. This Court finds that the finding on conviction was well grounded in light of the evidence highlighted above.

38. On sentence, the Respondent has illustrated the aggravated circumstances like the age of the victim, the effect on the offence on her life and the prevalence of the offences of such nature in the area. The trial Court took those aggravating circumstances into consideration when meting out the prescribed sentence under section 20 (1) of the *Sexual Offence Act*. I find no basis to interfere with the sentence meted out.

The appellant in my view expressed no remorse on what he had done his own child and for him to expect some leniency without remorsefulness given the seriousness of the offence, in my view means that he deserves the sentence meted out on him. This court in sum finds no merit in this appeal. The conviction and the sentence meted out are upheld.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 4TH DAY OF OCTOBER, 2023.**

**HON. JUSTICE R. LIMO-JUDGE**