



REPUBLIC OF KENYA



KENYA LAW
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**KFG v Republic (Criminal Appeal E013 of 2021)
[2023] KEHC 23893 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E013 OF 2021
SM GITHINJI, J
OCTOBER 17, 2023**

BETWEEN

KFG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against sentence ONLY in Sexual Offences Case No.89 of 2018 at Kilifi by Hon S.D.Sitati – Resident Magistrate delivered on the 28th day of January, 2020)

JUDGMENT

1. The Appellant herein was charged in the first count with the offence of incest, contrary to section 20 (1) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of this offence are that on the diverse dates between 2nd July, 2017 and 31st October, 2018 at Ganze Sub-County, within Kilifi County, the appellant intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of KKF, a child aged 12 years who to his knowledge is his daughter.
3. In the alternative to the said offence, the appellant faced a charge 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 hereof being that on the diverse dates between 2nd July, 2017 and 31st October, 2018 at Ganze Sub-County within Kilifi County, the appellant intentionally touched the genital organ namely vagina of K.K.F a child aged 12 years, with his genital organ namely penis.
5. There is a preferred second count of threatening to kill, contrary to section 223 of the penal code. The particulars of which are that on the diverse dates between 2nd July, 2017 and 31st October, 2018 at Ganze Sub-County within Kilifi County, the appellant without lawful excuse threatened to kill KKF, a child aged 12 years.



6. That last count, is of grievous harm, contrary to section 234 of the penal code; of which particulars are that on the 31st day of October, 2018 at Ganze Sub-County within Kilifi County, the appellant unlawfully did grievous harm to KKF, a child aged 12 years.
7. The prosecution case is that the appellant herein is the father to the complainant who by the time of the alleged offences was aged 12 years old. She had no birth certificate but her age was assessed on 2/11/2018 at Kilifi District Hospital and an opinion made by doctor Mwachai to the effect that she was approximately 12 years old. She was a pupil at [Particulars Withheld] Primary School in class one. She was not certain whether the appellant was her biological father or an adoptive or stepfather but knew him for long as her father. They were living as a family with him, the mother and other siblings at Bamba.
8. The offences allegedly took place on diverse dates between 2nd July, 2017 and 31st October, 2018. The complainant's mother had delivered and had visited a neighbouring home. The first incident happened while the complainant was asleep together with other siblings in their room; the appellant went to their room at night. He caressed her, touching her on her private parts. She told the mother about it in the morning.
9. The second incident happened while the appellant was in his room. He called upon the complainant who was playing outside to go and pick the phone. When she went he held her hand and dragged her into the bed. He unclothed her. She was lying facing upward. He removed his trouser. He penetrated her private part with his. She felt pain and cried. The mother returned home at 1.00Pm and she reported to her. She questioned the appellant about it and he denied.
10. The father defiled her four more other times. He used to send other siblings outside to play when their mother was away. He could remain with the complainant and defile her.
11. On the last time he beat her up when she resisted his evil move and intention. She tried to shout and he held on her neck and mouth. He pressed on her neck and threatened to kill her if she reported to the mother. He had sex with her. She later reported to her mother.
12. The mother reported the matter to Kenga Charo Ziro. The said Kenga Charo Ziro reported the incident to the area chief, one Samson Mwashe. The area chief called Pw-3 who is a volunteer Children's Officer and asked him to investigate the report. On 4/11/2018 Pw-3 went to the complainant's home. The appellant and his wife were not there. The complainant was called and she narrated what had been done to her by the appellant. Pw-3 having established what had taken place reported back to the area chief who alerted the police about it. On 1/11/2018 two police officers were dispatched to go and arrest the suspect. They went with Pw-3 to the complainant's home. The appellant was there and when he saw them he escaped into the bush. They picked the complainant and took her to Bamba Police Station. She was then taken to Bamba Sub-County hospital for examination and treatment. Later, in presence of the mother, the complainant was taken to Kilifi County Hospital. She was examined there on 2/11/2018. According to Pw-2, she had a swelling on the clit, bruises behind the neck, ears and several bruises on the back.
13. Her genitalia had a white discharge, hymen was broken and there was reddish swelling on labia minora. Save for sexual organ injuries, the other injuries observed were assessed as grievous harm. The P-3 form and PRC form were filled to the said effect. The doctor was of the opinion that the child had forced penetrative sex, and according to her, five times.
14. The matter was investigated by Pw-4. On 2/11/2017 the appellant was arrested while hiding at a local witchdoctor's house where he was seeking help to beat arrest, but the witchdoctor unhappy with his conduct reported his presence to the police who arrested him.



15. The appellant gave unsworn evidence in his defence and called his wife as a witness. He alleged that on 1/11/2018 he and his wife left home and went to work at Benesi. He later left his wife at the place and went to repair Bahati wa Balazi's house. He was there up to 4.00Pm. They had left 7 children at home. On his return home he found many people at the place. His brother and other neighbours were present. Kadzo was asked what she had told Kadenge and she said she had told him she was living well with the appellant. At 1.00Pm Charo went with two police officers and took Kadzo Away. At 5.00Pm the appellant reported the incident to the village elder. At 6.00Pm the appellant returned home. At 8.45Pm he was arrested. He was asked for 10,000/= to secure his release and return of his daughter. He had no money. They reduced the amount to 5,000/=. He did not raise the amount. He was taken to the police station. He was beaten and told to accept the offence while at the police station. The complainant who was present, told him that Charo Kadenge took her to the police and she was beaten up to fix him.
16. The wife stated on 1/11/2018 they went to work with the appellant at different places. When she returned home she did not find Kadzo. The following day the appellant was summoned by the village elder. Charo Kadenge called her to go to the chief's office. She went and were taken to Bamba Police Station. The child was there and appellant had been arrested. She was told the appellant had defiled the daughter. She was shocked as she was not aware of it.
17. Josphat Charo had asked appellant for 10,000/= on 18/8/2018. He was given the amount on 19/8/2018 and it was to be refunded by 5th September, 2018. He failed to pay and said could pay on 30/10/2018 after selling 25 bags of charcoal. He fixed the appellant out of the said debt.
18. The trial court analyzed the entire evidence and found the three counts established by the prosecution beyond reasonable doubt. The appellant was convicted of the offences and sentenced to serve on the first count 15 years imprisonment, second count 3 years imprisonment and 3rd count 5 years imprisonment; sentences to run concurrently.
19. The appellant dissatisfied with the said sentences, appealed to this Court on the grounds that; -
 1. He is a first offender.
 2. He is an orphan for his parents passed away when he was 18 years old.
 3. The presentence report presented was favourable to a lenient sentence.
 4. He has been of good character in prison and has undertaken trainings that will be of use if released.
 5. Period spent in remand was not weighed.
 6. The court has discretion on sentencing.
20. The appeal was canvassed by way of written submissions and both parties filed their submissions.
21. I have noted that the amended grounds of appeal abandoned the appeal on conviction and only raised concerns in relation to the sentence. I therefore need not consider the weight of evidence as regard the conviction but only as far as it informs the meted sentences.
22. Section 20 (1) as regards the sentence for the offence of incest where the victim is a child, states the accused shall be liable to imprisonment for life. The undisputed facts of this case is that the complainant at the time of the alleged offences was aged 12 years. The appellant caused her grievous harm, committed an indecent act to her and defiled her for about 5 times.



23. He got 15 years imprisonment for incest, 3 years for committing an indecent act and 5 years for grievous harm. These sentences are to run concurrently. In my view the said sentences are very lenient given the minimum and maximum provided sentences for them in law. It was also a lenient consideration that they run concurrently which means the appellant herein will only serve 15 years imprisonment for all the offences.
24. The court, definitely, to arrive at such lenient sentences must have weighed the period spent in remand.
25. In this case there are aggravating circumstances which informed the years of custodial sentences. The offences have serious physical and psychological effects on the young victim. It targeted a vulnerable person, a child who is a daughter to the appellant. The trial court's sentences were consistent with sentencing policy guidelines and this Court has no cause to interfere with the same in favour of the appellant.
26. The appeal therefore lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF OCTOBER, 2022

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S.M.GITHINJI

JUDGE

In the Presence of; -

The Appellant in Person

Ms Mutua for the Prosecution

