



**MMA v Republic (Criminal Appeal 065 of 2022)
[2023] KEHC 23829 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 065 OF 2022
SC CHIRCHIR, J
OCTOBER 12, 2023**

BETWEEN

MMA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with incest contrary to section 20(1) of the sexual offences act No.3 of 2006 (The Act).
2. The particulars are that on 29th day of September 2018 at (particular withheld) village (particulars withheld) sub -county within (particular being a male person caused his penis to penetrate the vagina of RS a girl aged 14 years, who was to his knowledge, his daughter.
3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act.
4. He was convicted of the main charge and sentenced to 15 years in prison. He was aggrieved by the outcome and proffered this appeal.

Grounds of Appeal

5. The Appellant has set out several grounds of Appeal which are hereby paraphrased and summarized as follows:
 - a. That the Appellant was not accorded a fair trial as enshrined in Article 50(2) of the constitution.
 - b. That the trial court erred in dismissing his defence.
 - c. That the evidence of the complainant was incredible and should not have been relied on.



- d. That a vital witness was not called to testify
 - e. That there was no positive identification of the perpetrator
 - f. That the age of the complainant was not proved
 - g. That the charges against him were framed.
 - h. That, the prosecution's case was not proved beyond reasonable doubt
6. The appeal was canvassed by way of written submissions.

Appellant's Submission

- 7. It is the appellant's submission that he was framed by PW2 and that this was confirmed through the testimony of PW4. He further submits that the age of the complainant was not proved. He however admits that the complainant is his child.
- 8. It is further contended that penetration was not proved as the medical documents availed did not prove penetration.
- 9. On the DNA test results, the Appellant submits that he was denied the chance to cross-examine the maker of the report as the said maker was not called to testify.
- 10. Relying on the case of AML vs. Republic (2012) e KLR he contends that rape or defilement is not proved by DNA test but by evidence.
- 11. The appellant further submits that several witnesses failed to testify. It is finally submitted that the court erred in dismissing his defence of alibi, yet the said evidence was not contested by the prosecution.

Respondent's Submission

- 12. It is the respondent's submission that all the ingredients of the offence of incest was proved. On penetration the respondent submits that the paternity of the complainant's baby was sufficient proof of penetration having taken place.
- 13. On the age of the complainant, the respondent argues that it was ascertainable from the Appellant's own testimony.
- 14. On identification, it is submitted that according to the complainant, it was only her and her father who were in the house at the time.

Summary of the Evidence

- 15. PW1 was the complainant. She told the court that she was 14 years old; that on 29/9/2018, she was alone with her father in the house "but nothing happened". She further stated that she was already pregnant at the time; that it was her friend Awii who made her pregnant. On being questioned about the statement she had recorded with the police; the complainant told the court that she had lied to the police. At that point the witness was stood down at the request of the prosecution.
- 16. Upon being recalled, she insisted that she had lied to the police and that it is her Aunt (PW2) who coached her to implicate her father.
- 17. PW2 was the community health volunteer. She told the court that on 10.12.2019 she received information from one EA that the complainant had been impregnated by her father. She waited for the complainant to come home from school and when she did, the witness personally questioned her about the allegation. The complainant disclosed to her about the defilement and the pregnancy.



18. PW2 reported the incident to the complainant's school and to the local public Administration office. She also took the complainant to the hospital and then to the police station. She told the court that she had no personal differences with the appellant.
19. In cross-examination, she told the court that the Appellant was her relative, that the complainant was 5 months' pregnant when she got involved in the case. She further stated that the Appellant and the complainant were the only ones living in the house at the time. She denied ever putting pressure on the complainant to file the complaint or implicate her father.
20. PW3 was the investigation's officer. He told the court that on 29.9.2018 the complainant and PW2 went to the kwisero police station and filed a report of being defiled by the father. The girl was pregnant at the time. He further told the court that he later escorted the appellant, the complainant, and her child for the DNA test. The test affirmed that the appellant was the father of the complainant's baby. He produced the DNA report. (The court then makes a note stating that the appellant has not objected to the production of the report despite being notified of his right to demand for the maker to come to court)
21. On cross-examination, he told the court that he recorded PW1's statement and that he did not witness any threats directed at PW1 by PW2.
22. PW4 was the Clinical officer at Elbungah health centre. He testified that he received the complainant on 14/1/2019, aged 14 years. The complainant gave a history of defilement by her father; She was taken to the health centre by a community worker. Laboratory tests showed that she was pregnant and had uterine tract infection.
23. At cross-examination, he told the court that the complainant was 3 months pregnant at the time.
24. The Appellant was placed on his defence and he opted to give an unsworn statement. He told the court that he was the father of the complainant; that the complainant's mother died in 2010 and complainant was then aged 3 years. He told the court that PW2 was his brother's wife. That on 8/1/2019, the complainant told him that PW2 had told her to frame him. That there was nothing he could do about the accusation. That he had nothing to do with the complainant's pregnancy. He however agreed that he submitted his samples for the DNA Test.

Determination

25. This is a first appeal and the court is duty -bound to review the evidence, re-evaluate it and arrive at its own independent decision. (see David Njuguna Wairimu vs. R (2010) eKLR.
26. I have considered the grounds of appeal, the rival submissions and witness accounts as well as the documents produced. In my view, the following issues arise for determination:
 1. Whether the offence of incest was proved beyond reasonable doubt.
 2. Whether vital witnesses were not called.
 3. Whether the defendant's defence was unfairly dismissed.Whether the offence of Incest was established beyond reasonable doubt
27. Incest by males is covered by Section 20 (1) of the [sexual offences Act](#) (The Act). The section provides as follows:
Incest by male persons



- (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.

28. Section 22 of the Act, sets out sexual relationships that would be considered incestuous and it includes a sexual relationship between father and daughter .
29. Thus, on the basis of the aforementioned definitions, the ingredients of the charge of incest are:
- a. Proof of relationship between the perpetrator and the victim
 - b. Proof of penetration or indecent act
 - c. Identification of the perpetrator
 - d. Proof of age of the victim
30. On identification, the Appellant alleges that he was not properly identified. However, it was the evidence of PW2 that the complainant and the Appellant were the only ones who used to live in the house. This piece of evidence was not contested during cross- examination. The Appellant also told the court during his evidence in chief that the complainant was his daughter. The complainant identified the father in court. This was therefore a case of identification by recognition.
31. On the proof of relationship, this again was not a contested issue. Both the complainant and the Appellant readily admitted to their blood relationship. Thus pursuant to section 22 of the Act, the act of sexual intercourse between the two was incestuous.
32. On the age of the victim, the appellant contends that the age of the complainant was not proved. At this juncture, it is important to point out that the question of age is only relevant in determining whether the victim was a child, as this determination has effect on the sentence to be passed, if an accused person is found guilty.
33. The Appellant’s contention in this regard is without merit as the age of the complainant came out from the Appellant’s own testimony. He told the court that the complainant’s mother died in the year 2010, and the complainant was then 3 years old. This means that the complainant must have been born in 2007 and was therefore about 11 years old at the time of the incident in September 2018. Further, the complainant himself told the court that she was 14 years old. This fact was not contested during cross-examination or controverted by the appellant. Finally, the trial Magistrate did record that in her own assessment, the complainant was yet to attain 18 years.
34. In the case of Francis Omuroni Vs. Uganda Criminal Appeal No. 2 of 2000 cited with approval in the case of Kefa Marita Nyang’au vs Republic (2018) e KLR the court had this to say: “ On proof of age in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could potentially determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parent or guardian and by observation and common sense.” (Emphasis added)



35. Unlike cases of defilement, all the prosecution needed to do in this case was prove that the victim was below 18 years of age. I am satisfied that the appellant's own testimony, and the trial court's own observation was adequate proof that the complainant was below 18 years of age at the time.
36. On penetration, the incident is alleged to have taken place in September 2018 and the complainant was examined on 14/1/2019. She was found to be pregnant. A DNA test was carried out, based on samples presented in September 2019 (Pexb.3). The test results showed that the Appellant was both the father of the complainant and the complainant's child, baby BK.

The appellant admitted that he subjected himself to the DNA test.

37. In the case of WLN Vs. Republic (2021) eKLR the court held: "...of great evidentiary importance however is that in criminal cases, defilement or rape, DNA result that proves a person to be the biological father of a child conceived through defilement is proof of penetration by the person found to be biological father of the child."
38. In this case, the DNA results showed that the appellant was the father of the child (the complainant) and his grandchild, baby BK. There is no better proof of his culpability. I do find that penetration was indeed proved. The results of the paternity test also overrule the Appellant's claim of lack of identification as the perpetrator. The test result identifies him as the perpetrator of the crime.
39. Thus, it is my finding that all the ingredients of the charge of defilement was proved.

Whether vital witnesses were not called:

40. The Appellant has complained that some witnesses were not called . He has cited the complainant's grandmother to whom the complainant had told her that she fell on a stone , a neighbor by the name Elisepha , who purportedly told PW2 what had been going on , among others. The law on the number of witnesses to prove a fact is that the prosecution is only required to call such number of witnesses as to prove their case. (see section 143 of the [Evidence Act](#)). The prosecution tendered sufficient number of witnesses to prove penetration , the relationship of the complainant and the Appellant, while age of the complainant was proved as aforesaid. The Respondent was able to prove its case without the need for these extra witnesses that the Appellant has referred to. The Appellant's complain in this regard is without merit.

Whether the Appellant's defence was unfairly dismissed

41. The appellant has submitted that his defence of alibi was unfairly dismissed. However, the trial court record does not show a defence of alibi having been raised. The Appellant simply told the court that the complainant's pregnancy had nothing to do with him. He further told the court that PW2 was framing him. The defence of alibi is therefore being brought out for the first time in this appeal. Further it is lacking in substance as it does not lay out the defence of alibi. Thus, even if this court was to consider it at this stage, which it cannot, there is no evidence that has been submitted upon which the court could decide.
42. On the alleged framing by PW2, the Appellant did not demonstrate to the court, the basis of this allegation. He did not tell the court of any feud that existed between the two. PW2 told the court that he had no difference with the Appellant. This testimony was not controverted by the Appellant or contested through cross- examination. The Appellant's defence is not plausible, and cannot stand in the face of scientific evidence in the form of DNA in any event.



43. Although lack of fair trial was cited as a ground of Appeal , the Appellant did not argue this point. There are many aspects of an unfair trial and it was upon the Appellant to pinpoint in what specific way this right was violated. I would take the Appellant's failure to to argue this ground to mean that he abandoned it..
44. It is my finding that the Respondent proved the offence of defilement beyond reasonable doubt and the Appellant was properly convicted.
45. I take note of the fact that there was not appeal against the sentence and therefore I will not delve into it.
46. In the end, I find that this Appeal has not merit. It is hereby dismissed.

DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 12TH DAY OF OCTOBER 2023.

S. CHIRCHIR,

JUDGE.

In the presence of:

E. Zalo- Court Assistant

Appellant- present in person

No appearance by the Respondent.

