**ES v Republic (Criminal Appeal E007 of 2021)**
**[2022] KEHC 2547 (KLR) (8 February 2022) (Judgment)**

*ES v Republic [2022] eKLR*

Neutral citation: [2022] KEHC 2547 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BOMET**

**CRIMINAL APPEAL E007 OF 2021**

**RL KORIR, J**

**FEBRUARY 8, 2022**

**BETWEEN**

**ES ....................................................................................................... APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(From Original Conviction and Sentence by Hon. J. Omwange (SRM) in Sotik SRM's Court Criminal Case S.O. Number. 53 of 2019 dated 4/2/2021)***

**JUDGMENT**

1. The Appellant, ES was charged of the offence of Incest contrary to section 20(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on the 22nd day of October 2019 at [particulars withheld] in Sotik sub-county within Bomet County, intentionally caused his penis to penetrate the vagina of BC who was to his knowledge, his daughter aged 10 years old.
2. He also faced an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the 22nd day of October 2019 at [particulars withheld] in Sotik sub-county within Bomet County, intentionally touched the vagina of BC, a child aged 10 years old with his penis.
3. The substance of the charges were read to the Appellant in the language he understood. His response was, "Not true" to both the main and alternative charges. A plea of not guilty was entered and the matter proceeded to full trial.
4. The prosecution called six (6) witnesses including the victim herself. At the close of the prosecution's case, the court found that the Appellant had a case to answer and put him on his defense. Section 211 of the *Criminal Procedure Code* was read and explained to the Appellant in the language he understood.

He opted to give sworn evidence and called no witnesses. By Judgment delivered on January 4, 2021, the Appellant was convicted on the alternative charge and sentenced to thirty (30) years imprisonment.

5. Being dissatisfied with the conviction and the sentence, the Appellant lodged an Appeal on February 16, 2021 raising 5 grounds reproduced verbatim as follows:-

   a) That he pleaded not guilty to the charges and maintains the same.

   b) That the learned trial magistrate erred in both law and fact by convicting the appellant by uncorroboratory evidence from the prosecution witness which was not watertight and can't prove a case beyond reasonable doubt (sic!).

   c) That the learned trial magistrate erred in both law and in fact by not considering that the case emanated from a family conflict.

   d) That the learned trial magistrate erred in both law and fact by failing to analyze that the charges were framed, manipulated and fabricated.

   e) That it is his humble prayer as an appellant to be present during the hearing and determination of the appeal.

6. The Appellant later filed an amended Memorandum of Appeal on November 17, 2021 and listed the following grounds:-

   (a) That the learned trial magistrate erred in law and in fact by not considering or rather addressing (sic!) that this matter came out as a result of complainant's mother wanting the appellant to sell land which the appellant refused.

   (b) That the learned trial magistrate erred in law and in fact in that the doctor did complete the P3 Form due to absence of PRC Form.

   (c) That the learned trial magistrate erred in law and in fact, the prosecution failed to availed its vital witnesses to adduced evidence (sic!) ie a village elder, nyumba kumi chairman, C, LM and WT.

   (d) That the learned trial magistrate erred in law and fact whereby Section 210 and 211 of the *Criminal Procedure Code* was not complied (sic!).

   (e) That the learned trial magistrate erred in law in that section 43 of the Sexual Offences Act was not observed correctly.

7. The Appeal was canvassed through written submissions. The Appellants undated submissions were filed on November 17, 2021 while the Respondents submissin dated November 25, 2021 were filed on the same date.

**The Appellant's Submissions**

8. The Appellant submitted that the charges brought against him arose out of a family dispute in which his second wife (PW2) wanted him to sell a piece of land for school fees for her children. He submitted that the victim, his daughter, had been coached to give evidence against him and that the prosecution did not consider the circumstances of the case. Additionally, he submitted that the medical evidence ought not to have been relied upon because the doctor who examined the victim never filled the Post-Rape Care (PRC) Form.

9. The Appellant further submitted that the Prosecution failed to produce material witnesses. He cited the case of *Bukenya & Others vs Uganda* (1972) EA 549 at page 550 of the EACA. Secondly,

he submitted that the Prosecution case had many irregularities. Lastly, he submitted that the trial magistrate never complied with the requirements of section 210, 211 and section 43 of the *Criminal Procedure Code* with respect to poorly framed charges which was prejudicial to him. It was his final submission that because the trial court found that there was no penetration, the conviction should be quashed and the sentence set aside.

**The Respondent's Submissions**

10. The Respondent submitted that the victim was a minor aged 10 years old as demonstrated by Prosecution Exhibit No. 1 that she was born on the 6th day of November 2009. They submitted that the victim was indeed a daughter to the Appellant and the same fact was confirmed by the Appellant. Lastly, it was their submission that though the evidence of penetration was insufficient from the medical report, the Court ought to invoke the provisions of section 124 and convict the Appellant for the said offence.

**Issues for Determination**

11. From the Record of the trial court, the grounds of appeal and the parties' respective submissions, the following issues arise for determination:-

    i. Whether the conviction for the offence of indecent act was safe.

    ii. Whether the sentence meted was legal and justitious.

**i.Whether the conviction of offence of Incest was safe.**

12. In considering this appeal, I am conscious of my duty as a first appellate court to subject the evidence to a fresh evaluation. In *David Njuguna Wairimu vs Republic* [2010] eKLR, the Court of Appeal explained this duty thus:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

13. The offence of committing an Indecent Act with a child is provided for under Section 11 (1) of the *Sexual Offences Act* No 3 of 2006 as follows:-

> " 11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

The Act further describes what an indecent act is under section 2. It states:-

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or display of any pornographic material to any person against his or her will."

14. The offence of incest on the other hand is founded on the provisions of section 20 of the *Sexual Offences Act* as follows:-

> " 20(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 cases penetration or the indecent act was obtained with the consent of a female persons."

15. It follows then that for this offence to be proven, there must be proof of penetration or an indecent act as defined by law; and; that the Accused must be related to the victim as defined under section 22 of the Act.

16. The evidence originally presented by the Respondent in the trial court against the Appellant was in respect of the Appellant defiling his 10 year old daughter. Firstly, PW1 the victim testified that she was 10 years old and was going to class 4. She produced her clinic card PMFI-1 which indicated that she was born on November 6, 2009.

    Her age is therefore not in contention. Her evidence was corroborated by PW2 her mother and it remained uncontroverted by the Appellant who was the victim's father.

17. In her testimony, PW1 testified that her father called her to the bathroom when her mother had left to go the Posho Mill and while in the bathroom, he removed her pant (PMFI-2, an orange stripped pant) which she identified before the trial court. She further testified that her father touched her buttocks. When it became too difficult for her to proceed with her testimony, the Prosecutor requested that she be stood down to allow her to recollect her thoughts, which Application the court allowed.

18. PW1 later testified as follows, " My father held and touched me on the buttock and my female genital organ with his hand and male genital organ. As he was doing it, C came and found us with my father penetrating me by inserting his male genital organ into my female genital organ." PW1's testimony disclosed that her father inappropriately touched her private parts. The Appellant in his cross examination never controverted this evidence. He only inquired from the victim about the people who came to pick her from the house.

19. Where the victim is a child of tender years such as the one in the present Appeal, the court is expected to satisfy itself that the child was telling the truth and that they have sufficient intelligence for their evidence to be taken. This is done through conducting a voire dire. A voire dire is normally referred to as a trial within a trial and it is meant to assess the capacity of the minor to give evidence particulary from a minor. In the present Appeal, I note that a voire dire was conducted and the trial magistrate concluded that the child understood the nature of the oath and the importance of telling the truth.

20. The victim's testimony was that her father (the Appellant) touched her buttocks and her private parts. While this evidence alone is enough to convict the Appellant owing to the provisions of section 124 of

the *Evidence Act*, it was important for the trial magistrate to have recorded his reasons for believing that the victim was telling the truth. In this case there is nothing on record to show why the trial magistrate belived PW1. It was therefore necessary that her evidence be corroborated by the medical evidence.

21. Medical evidence was adduced by Kibet Kirui the clinical officer ( PW5). He produced the Treatment notes and P3 Form. He testified that he observed that the hymen was broken,there was whitish discharge on the vaginal wall, there were no lacerations on both labia, no pervaginal bleeding, and no venereal disease noted.

22. The clinical officer further testified that the discharge on the pant was not semen but mucus-like discharge and that he expected bruises on the genitals of the victim but there were none. He concluded that from the absence of the hymen that there had been penetration before and that such penetration was not fresh. He stated that the examination was conducted after three days and so the medical evidence did not conclusively demonstrate that there was penetration.

23. From the foregoing, this Court agrees with the trial court in finding that the evidence proving penetration was not conclusive. It showed that PW1 had been penetrated earlier and there was nothing in the medical evidence to link the Appellant to the said penetration.

24. Having already established that penetration could not be proven, it remains for this Court to establish whether the evidence of the victim proved the alternative charge of committing an indecent act with a child.

25. PW1 initially testified on December 2, 2019 that her father ( the Appellant) called her to go to the bathroom and removed her pant and touched her buttocks. According to the record, the prosecutor made an application to stand down " the witness who is clearly traumatized to enable her recall her evidenc." The court allowed the application. The court however did not record its own observations regarding (PW1). On being recalled on January 23, 2020 to contimue her testimony, PW1 testified that her father " held and touched me on the buttock and my genital organ with his hand and male genital organ as he was doing it C came and found us with my father penetrating me by inserting his male genital organ into my female genital organ."

26. There is nothing on the record to show whether the vivid wording of the testimony above were the words of PW1 or the interpretation by the trial court. At face value, it appears that PW1 was now more articulate in her testimony when describing what her father did to her. The aspect of penetration however was not supported by medical evidence of PW5 who found no evidence of recent penetration. I find therefore that the evidence while falling short of proving penetration, clearly proved an indecent act with a child. The victim's evidence is corroborated by the circumstantial evidence from PW1 and PW2. Both testified that when PW2 returned, it was C, PW1's younger sister who informed PW2 that she had seen her father and sister engaging in sex. PW2 then beat PW1. PW1 also testified that she was afraid to tell her mother what had happened because her father had told her not to tell anyone. Taken together, the evidence prove an indecent act beyond reasonable doubt.

27. It was not in dispute that the Appellant was the father of the victim. PW1 and PW2 testified that the Appellant was the father of the victim. Besides, the Appellant did confirm this relationship in his testimony when he stated that the victim's mother was his second wife and that they had a family dispute relating to land. He also maintained the same in his submissions in this appeal. The relationship made the act incestous.

28. I will now discuss the remaining grounds of appeal raised by the Appellant in respect of the issue of material witnesses, the PRC form and non compliance with the *Criminal Procedure Code*.

29. Firstly, the Appellant stated that the Respondent failed to call material witnesses and went ahead to list them as outlined in paragraph 6(c) above. Indeed, I do agree that the prosecution is under a duty to call material witnesses to a case. Where they fail to do so, the court may presume that such witnesses would have given evidence that was unfavourable to them. (See *Oloro and Daltanyi vs Reginam* [1956] 23 23 EACA 49).

30. However while bearing this in mind, the court is also expected to evaluate the witnesses that the prosecution called and those whom they failed to call in order to make a determination on whether the evidence of those called to testify was enough to sustain a conviction. It is only in doing so that it can be able to decide whether to draw an adverse inference or not.

31. In esence, this Court ought to consider the quality of evidence adduced by the existing witnesses and make a finding on whether it was necessary to call other witnesses. This was determined by the Court of Appeal in *Michael Kinuthia Muturi vs R* CRA 51 of 2002 (NRI) where it stated thus:-

> "Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."

32. The Appellant argued that C, his younger daughter aged 7 years old and the one alleged to have found him in the act should have been called to testify. He also wanted the Nyumba-Kumi chairman Mr WT to testify alongside L M who was the neighbour and Mutemi another village elder. In my opinion, the testimony given by PW3, Mr Peter Sawe Kiplang'at the assistant chief was sufficient to demonstrate how the authorities came to the knowledge of the matter. Additionally, PW4, RK the village elder, gave the relevant testimony regarding the arrest of the Appellant. His counterpart Mr T would have given a similar testimony since they both arrested the Appellant. The last witness is L who would have only stated what she was told. None of them would have given further or peculiar evidence. It must be remembered that the prosecution is not required to call a specific number of witnesses. They must determine on their discretion the number of witnesses and the type of evidence that they wish to adduce for each case (see *Issa Jomo Sewedi vs R* [2016] eKLR).

33. In the present Appeal, I am of the view that the witnesses brought before the trial court were sufficient and there was no need to call the other witnesses as claimed by the Appellant. In addition, it is my finding that the failure to call the other witnesses does not lead me to make an adverse inference against the prosecution and does not prejudice the Appellant in any way.

34. The Appellant also raised the fact that there was no PRC form filled by the clinical officer. I however find that this ground is neither here nor there since there was no injustice occassioned to him as a result. On the contrary, I find that it helped his case because the absence of such material evidence worked to the detriment of the Respondent who's duty was to prove the allegations brought against the Appellant.

35. Lastly, I will address the ground raised by the Appellant with respect to section 210 and 211 of the *Criminal Procedure Code* which provide:

> 210. Acquittal of accused person when no case to answer
>
> > "If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the

prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

211. Defence

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

36. The trial Record demonstrates that the learned magistrate made a ruling that a *prima facie* case had been established against the Appellant. He was then put on his defence. The Record indicates as follows: "Directions under section 211 *Criminal Procedure Code*." What comes after is the Appellant is recorded as having stated that he would give sworn evidence and call no witnesses. This right is fundamental to an accused person and can be the basis of an unfair trial process where there is no compliance. The Court must record and proceed in the manner that an accused person elects. The Court of Appeal in *Martin Makhakha vs Republic* [2019] eKLR explained that: -

" 19. The rights under section 211 of the *CPC* are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected."

37. The Appellant stated that the substance of the charge and particulars were never read to him. I am doubtful that this was indeed the case owing to the fact that he even elected to give sworn evidence. One wonders how he would have known which options were available to him if indeed the court failed to explain the same to him. He relies on the fact that the Record does not record word for word the directions given under section 211. In this regard, I refer to the Court of Appeal case of *Kossam Ukiru vs Republic* [2014] eKLR, where it was stated that the failure by the trial court to record the exact words of the section 211 of the Criminal Procedure Code did not in any way prejudice the Appellant.

38. Similarly in another Court of Appeal case *DO vs Republic* [2020] eKLR the Court of Appeal differently constituted stated that:-

> " As regards the appellant's contention that he was not informed of his rights under Sec. 211 of the CPC, we find that nothing much turns on this. The record shows that the appellant made a sworn statement and although the record does not state that the appellant was informed of the 3 options in defending himself, he clearly opted to make a sworn statement of defence."

39. The above settles the issue of non-compliance with section 210 and 211. As regards section 43 of the *Sexual Offences Act*, the Appellant stated that the omission of the term 'unlawful' should have led the trial court to give him the benefit of doubt. I however dismiss this ground on the basis that it neither affects the substance of the charge nor prejudices the Appellant in any way. In the end, it is my conclusion that the alternative charge wsa proved to the required legal standard. I uphold the conviction.

**ii.Whether the sentence meted was legal and Justitious.**

40. The trial court sentenced the Appellant to 30 years in jail. The learned magistrate noted that the offence attracted a sentence of not less than 10 years and where the victim was a minor, the same could attract a life sentence. He also considered the Appellant's mitigation but noted that it was a matter of grave concern where the victim was a child of tender age who expected to be protected and not defiled by her own father.

41. Sentencing serves several purposes. In the case of *R Vs Scott* (2005) NS WCCA 152, Howie J Grove and Barn JJ explained the principle of sentencing thus:-

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...... one of the purposes of punishment is to ensure that an offender is adequately punished.... a further purpose of punishment is to denounce the conduct of the offender."

42. There is no sexual offence that is there or less serious than the other. All sexual offences rob the victims of their right to consent and where it involves a minor, their innocence. It is more detestable when such actions are perpetrated by a person related to a victim, a person in a position of trust, and especially where the victim is a child of tender age as in the present Appeal. It is expected that one of the paramount duties of a parent is to protect their child. In a situation where the parent turns into the assailant, it behoves the justice system to ensure that such behaviour is adequately punished.

43. In considering the sentence in this appeal, I am guided by the Court of Appeal case of *M K vs Republic* [2015] eKLR which explained that the provision under section 20(1) was not a minimum mandatory sentence of life imprisonment and that it merely allowed the trial court to exercise its discretion in meting out a maximum term of life imprisonment. See *Bernard Kimani Gacheru vs Republic* [2002] eKLR.

44. In the final analysis, it is my finding that the appeal against conviction lacks merit and I uphold the conviction. I set aside the 30 year sentence and substitute therefor a sentence of 20 years imprisonment which shall run from the date of first arrest being October 22, 2019.

45. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 8TH DAY OF FEBRUARY, 2022**

**R. LAGAT-KORIR**

**JUDGE**