



**JLK v Director of Public Prosecution (Criminal Appeal E053 of 2023)  
[2024] KEHC 13911 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13911 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E053 OF 2023  
S MBUNGI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**JLK ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Being an appeal from the conviction and sentence delivered on 22nd March 2023  
by Honorable G. Ollimo SRM at Butere in Sexual Offence No. E040 of 2021)*

**JUDGMENT**

**Introduction**

1. The appellant was charged incest contrary to section 20(1) of the [sexual offences Act](#) No. 3 of 2006. The particulars were that on 5<sup>th</sup> day of June 2021 at about 1300hrs in Butere sub-county within Kakamega county, the Appellant intentionally caused his penis to penetrate the vagina of P.K(name withheld) a female child aged 13 years who was to his knowledge his daughter.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) of 2006. The particulars were that on 5<sup>th</sup> day of June 2021 at about 1300hrs in Butere sub-county within Kakamega county, the Appellant intentionally touched the vagina of P.K(name withheld) a child aged 13 years with his penis.
3. During trial the prosecution called four witnesses who testified in support of their case. The appellant was placed on his defence and gave unsworn evidence statement. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of incest and proceeded to sentence him to serve life imprisonment.



## **Facts at Trial.**

4. PW1 P.K, gave an unsworn evidence, stating that the appellant used to live with her and her mother and she addresses the appellant as father. She recalled that on the 05.06.2021, she had gone to fetch firewood in the company of her friends in a forest. She stated that the appellant followed them, held her by the hand and told her friends that he wanted to send her. She recalled that the appellant person led her to another part of the forest, made her trip and fall on the ground, removed her inner pants and also removed his long trousers and he lay on her and inserted his penis into her vagina.
5. PW1 stated that the appellant then instructed her to dress up and proceed with her chores. She stated that upon arriving home, she met the appellant who caned her and chased her away. She went to her grandmother's home and returned home the next day in the morning with her mother.
6. She later reported to her class teacher about the occurrence and the class teacher summoned her mother to school.
7. PW2 KNA a teacher at PW1's school testified that on 17.06.2021, PW1 reported to her class teacher that her father defiled her whereupon the class teacher called him and PW1 recounted her ordeal to both of them. He further told court that he later summoned PW1's mother who confirmed the allegations and further stated to them that she was afraid of reporting to the police. He further told court that he advised PW1's mother to report to the chief and to escort PW1 to hospital.
8. PW3 No. 107282 PC Regina Range recalled that she received the complainant and her mother at the station on 18.06.2021. It was alleged that on 05.06.2021 the complaint was defiled by her father. She told court that she conducted investigations and upon conclusion, she charged the appellant. It was her further testimony that she established that complaint was born on 03.12.2008 as evidenced by her birth certificate (Pexh.1).
9. PW4 Aggrey Ambetsa attached at Manyala sub county hospital filled the P3 form with respect to the complaint who visited their facility with a history of defilement. On examination, it was noted that PW1 had foul smelling discharge, the hymen was not present and lab investigations revealed epithelial cells in the high vaginal swab. He thus made a diagnosis of defilement due to absence of hymen.

## **Defence Case**

10. The appellant was placed on his defence and gave an unsworn statement. He maintained that he was innocent and merely framed and that he caned PW1 because he was exercising his obligation to discipline PW1 as a parent. He stated that at the time of arrest, he was at Shiatsala Shopping Centre and was surprised when the charges were read to him in court.
11. The trial court considered the evidence adduced and found the Appellant guilty of the offence of incest. The Appellant was allowed to mitigate and was thereafter sentenced to serve life imprisonment.
12. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on 12.07.24. The grounds raised were: -
  - i. That the learned trial magistrate erred in law and fact by failing to observe and consider that the appellant was not subjected to medical corresponding investigations as underlined under section 36 of the S.O.A No. 3 of 2006
  - ii. That the finding of the learned trial magistrate was against the weight of the available evidence on record.



- iii. That the learned trial magistrate erred in law and fact in finding the offence of incest established and proved without considering that the evidence was weak, inconclusive and inadequate medical evidence adduced.
  - iv. That the learned trial magistrate erred in law and facts in finding the charge of incest established and proved without observing that penile penetration was not mentioned in the medical findings of clinical officer.
  - v. That the learned trial magistrate erred in law and facts in failing to consider other options of the sentence.
  - vi. That , more grounds to be adduced after receipt and perusal of the trial court proceedings and judgement.
13. The applicant prayed that the appeal be allowed, conviction be quashed and sentence of life be set aside and he be set at liberty.
14. The merits of this appeal were canvassed by way of written submissions.

### **Appellant's submissions**

15. The appellant submitted that the life sentence was harsh and excessive citing the case of Ndegwa vs Republic(1985) KLR and that the same has been declared unconstitutional by the Court of Appeal at Mombasa in Criminal Appeal No. E011 of 2022(2023)eKLR.
16. Secondly, the appellant submitted that the prosecution failed to prove its case, averring that the trial magistrate misapprehended the evidence of PW1 without corroboration of evidence from independent witnesses.
17. On whether the evidence of penetration was proven beyond reasonable doubt, the appellant submitted in the negative; averring that the absence of the hymen was not conclusive to suffice to axiomatically presume penetration.
18. The appellant further averred that the age of the complainant who was said to be thirteen years old was not proved as the prosecution only produced a birth certificate and no one from the registrar of birth and death was ever summoned to testify.
19. The appellant submitted that the evidence tendered on record concerning the matter in [\*sexual offences act\*](#) was insufficient, inadequate and inconsistent with material contradictions that weakened and destroyed the inference of the appellant guilt hence misguided.
20. Lastly, the appellant submitted that the prosecution failed to summon vital witnesses to testify including the complainant's friends who were in her company and that the trial magistrate shifted the burden of proof to the appellant hence prejudiced.

### **Respondent's submissions**

21. The respondent submitted that essential elements of incest were proved as per Section 20(1) by the trial court. The respondent submitted that the appellant's relation to the victim was proved as per Section 22 of the [\*Sexual Offences Act\*](#) as PW1 stated that she addressed the appellant as 'dad'.
22. On the ingredient of penetration, the respondent submitted that it was proved through medical evidence as PW4 testified that the hymen was broken and had a foul smelling discharge, and epithelial cells were present in the high vaginal swab.



23. The respondent further submitted that the perpetrator(appellant) was properly identified by the victim in court and she stated that the appellant is her father and they lived together.
24. The respondent submitted that the ingredient of proof of age was also well proven by the production of the birth certificate from which the age of the victim could be adduced to be 13 years; citing the Court of Appeal case of Edwin Nyambogo Onsongo vs Republic (2016) eKLR.
25. Lastly, the respondent submitted that the life sentence meted to the appellant met the legal threshold as per Section 20(1) of the *Sexual Offences Act* No. 3 of 2006.
26. The respondent urged that the appeal herein lacks merit, and should be dismissed in its entirety and the conviction and sentence upheld.

### **Analysis and Determination.**

27. This being first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

“The duty of the first appellate court is to analyze 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 that 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.”

28. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court’s judgment.
29. The issue for determination is whether the trial court was right in finding the appellant guilty for the offense of incest and whether the sentence was appropriate.
30. The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

“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 that the female person is under the age of eighteen years, the appellant 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.”

31. For the prosecution to establish an offence of incest the following ingredients should be proved:
  - i. That the offender is a relative of the victim
  - ii. Proof of penetration or an indecent act
  - iii. Proper identification of the perpetrator
  - iv. Proof of the age of the victim



32. From the evidence tendered in the lower court there is no dispute that the appellant was married to the mother of the complainant though he was not the biological father.
33. Section 22(1) of the *Sexual Offences Act* covers such arrangements. It states:
- “(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not”
34. The appellant is a half father of the complainant; therefore, the first ingredient was proved.
35. A birth certificate was produced during the trial showing that the complainant’s Date of Birth was 03.12.2008 so at the time of the alleged commission of the offence, the complainant was then 13 years old. The age factor was proved.
36. Production of a birth certificate is one way of proving the age of a person. The Court of Appeal in *Edwin Nyambogo Onsongo Vs. Republic* (2016) ECLR stated as follows in respect of proving the age of a victim in cases of defilement: “... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable...”
37. On the issue of penetration, it is not in doubt that the complainant was not a virgin for the medical examination done by PW4, who also filled the P3 form noted that the hymen was not present. However, the witness did not give an indication of when the hymen could have been broken and what could have broken it. He only said that he reached the conclusion that this was a case of defilement because the hymen was not present. The witness did not indicate whether there was signs of recent sexual activity in the complainant’s vagina given that the complainant was allegedly defiled on 05.06.2021 and examination was done on 17.06.2021. Also, he did not tell the court whether it was possible to detect whether one had sexual activity 12 days after the alleged act.
38. In the case of *Andrew Runya Munga Vs Rep* (2021) eCLR the court held that:
- “...The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and collaborated by the medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration...”
39. On the issue of the identity of the perpetrator, obviously if it was the appellant the complainant would not have a problem in saying it is the appellant for he is her step father with whom she was staying with, and the act was allegedly committed during the day.
40. So the question to answer is, Was it the appellant who defiled the complainant? The complainant in her evidence insists that it is the appellant and the appellant denies. Who is telling the truth given the fact that there was no eye witness who said they found the appellant in the act?
41. This court is alive to the fact that evidence of a single witness can attract a conviction so long as the court is satisfied the witness is telling the truth.



42. Section 143 of the *Evidence Act* provides that “No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”
43. The court is also alive to the fact that evidence of children of tender age needs to be corroborated. But the court can still convict if satisfied that the child told the truth. Section 124 of the *Evidence Act* states:
- “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”
44. Did PW1 tell the truth? PW1 P.K, gave an unsworn evidence, stating where she goes to school, and that the appellant used to live with her and her mother and she addresses the appellant as father. She recalled that on the 05.06.2021, she had gone to fetch firewood in the company of her friends Oduori and Zainabu in a forest. She recalled that the appellant followed them, held her by the hand and told her friends that he wanted to send her. She recalled that the appellant person led her to another part of the forest, made her trip and fall on the ground, removed her inner pants and also removed his long trousers and he lay on her and inserted his penis into her vagina. PW1 stated that the appellant then instructed her to dress up and proceed with her chores. She stated that upon arriving home, she met the appellant who caned her and chased her away. She went to her grandmother’s home and returned home the next day in the morning with her mother. She later reported to her class teacher about the occurrence and the class teacher summoned her mother to school.
45. From the above PW1’s testimony, in order to test her truthfulness, the following questions arise:
- i. Why did she not tell her mother or grandmother that the appellant had defiled her yet she told her grandmother that the appellant had spanked her?
  - ii. Why did it take her that long (12 days or so) to tell her teacher PW2?
  - iii. Could it be that she was angry with her father because he spanked her and chased her on the alleged fateful night and that is why she told the teacher?
  - iv. Was there evidence that the father had warned her not to tell anyone and threatened to harm her in case she told anyone? (from the evidence on record she did not say so)
46. From the record, the trial court did not ask itself these questions. If it had asked itself, perhaps it would have arrived to a different finding given that PW1 gave unsworn evidence which has less or no probative value.
47. The law relating to unsworn statements was well expressed by Emukule, J in the case of *Mercy Kajuju & 4 Others v Republic* [2009] eKLR as follows:
- “I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence....”
48. In *Amber May v The Republic* [1999] K.L.R. 38, it was held that unsworn statement has no probative value notwithstanding the provisions of Section 211(1) of the Criminal Procedure Code. On Appeal



against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal held, *inter alia* that:

That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

49. It is clear from the trial court record that the trial magistrate undertook a *voire dire* examination of the complainant, and formed the opinion that she did not appreciate the nature or solemnity of an oath and she therefore allowed her to testify without being sworn.
50. The evidence of a child under the age of 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a *voire dire* examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. In the present case the child was thirteen years old.
51. In *Oloo v R* (2009) KLR, the Court of Appeal held that:

“In our view, corroboration of evidence of a child of tender years is only necessary where such a gives child unsworn evidence. (See *Johnson Muiruri v Republic* (1983) KLR) In law, evidence of a child given on oath after *voire dire* examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”.
52. The investigating officer did not visit the scene to see the nature of the scene and establish whether there was a possibility of the ground having been disturbed, footprints etc.
53. The complainant said she was in the company of her friends Oduori and Zainabu who saw the appellant hold her hand and take her away. These two were not called as witnesses. Their evidence would have given credence to PW1’s assertion that the appellant was the perpetrator of the said offence. The failure to call them can make one infer that their evidence would be adverse.
54. The Court of Appeal in *Julius Kalewa Mutunga v Republic* stated as follows: -

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
55. In *Bukenya & Others v Uganda* in which the former East African Court of Appeal laid down the following principles: -
  - a. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
  - b. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
  - c. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.
56. From the above, it is clear it was unsafe to convict the appellant on the strength of PW1’s unsworn evidence which was not corroborated thus making it unbelievable.



57. The appellant gave unsworn evidence in his defence where he maintained his innocence and said that he was disciplining the child as a parent when he spanked her.
58. His unsworn evidence cannot be regarded as not evidence for it is anchored on the law in section 211 of the Criminal Procedure Code (Cap 75, Laws of Kenya).
59. In the case of *May v The Republic* [1981] KLR. 129, the Court of Appeal held:
- “No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)”
60. In a nutshell, I find the appeal succeeds and I quash the conviction and sentence. The appellant is hereby set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Appellant – present online.

Court prosecutor - Mr. Mbonzo present online

Court Assistant – Elizabeth Ang’onga

