JNM v Republic (Criminal Appeal E006 of 2025)
[2025] KEHC 14353 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14353 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E006 OF 2025

NIO ADAGI, J

OCTOBER 8, 2025

BETWEEN

JNM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment on conviction and sentence delivered on 10th July 2024 by Hon. P. Wechuli (PM) in Kithimani Magistrate Court Sexual Offence No. E026 of 2023)

JUDGMENT

Introduction

1. The Appellant was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between 5th May 2023 and 7th May 2023 at [Particulars withheld] village, Masinga Sub-County within Machakos County being the father of VM Intentionally and unlawfully caused his male genital organ (penis) to penetrate into the female organ (vagina) of VM (name withheld) a child aged 15 years who to his knowledge was his biological daughter.

2. During trial the prosecution called six witnesses who testified in support of its case. The Appellant was placed on his defence but he opted to remain silent. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of incest and convicted him under Section 215 of the criminal procedure code and he was sentenced to serve life imprisonment.

3. The Appellant being dissatisfied by the conviction and sentence filed this Petition of Appeal on 29th January 2025 raising five grounds of appeal. The grounds raised were that:

   i. The learned Trial Magistrate erred in law and fact by failing to consider that the evidence adduced of the doctor was not enough to base for conviction.

ii. That the learned trial magistrate erred in both law and fact that the first report of the complainant was doubtful according to the other witnesses' testimonies.

iii. The learned Trial Magistrate failed in law and fact in convicting him based on witnesses' evidence which was fully contradictory.

iv. That the learned Magistrate failed in law and fact to rely on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgement.

v. That the Learned Magistrate failed in law to give due consideration on the plausible defence.

4. The appeal was canvassed through written submissions. The Appellant's submissions are dated 18th June 2025 while the Respondent's submissions are dated 19th May 2025 filed by Ms. Agatha State Counsel.

Analysis and Determination

5. This being the first appeal, this court is expected to re-evaluate and re-analyze the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by the Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

6. Also, in Peter's vs Sunday Post (1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

7. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India Case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

8. Having considered the trial court's record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination:-

i. Whether the prosecution proved the case beyond reasonable doubt

ii. Whether the court failed to give due consideration to the Appellant's plausible defence and ended up in convicting and sentencing him to serve life imprisonment.

i. Whether the prosecution proved the case beyond reasonable doubt

9. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

10. In this case, the Appellant was charged and sentenced under Section 20 (1) of the *Sexual Offences Act* which provide as follows:

(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 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."

11. The ingredients for the offence of incest can be summarized as follows;

a. Proof of penetration or indecent act

b. proper identification of the perpetrator.

c. Proof that the offender is a relative of the victim

d. Proof of the age of the victim

Proof of Penetration

12. On the issue of penetration, the same is defined in Section 2 of the *Sexual Offences Act* as;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

13. PW1 stays at a home with Sisters. The mother left her and the Appellant took her to the home. In December of 2022 she went for holiday at Shosho's place. PW1 testified the Appellant found her at Shosho's place and held her. The Appellant held her mouth and "did bad manners". PW1 testified that "he removed his clothes and started doing bad manners. he inserted his organ in me. He did so three

times". PW1 also testified that she found herself pregnant. PW2 confirmed that when PW1 came back from the holiday she was pregnant and gave birth on 18/10/2023.

14. PW3 who produced the DNA Report PExt.5 stated that "there are 99.99% chances that John Ndambuki (the Appellant) is the father of Victoria (PW1's) child". PW6 produced the P3 Form and the Post Rape Care (PRC) Form which confirmed the hymen was not intact and the lab results confirmed PW1 was pregnant.

15. Section 2 of the *Sexual Offences Act* defines penetration as:

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person"

16. PW6 indicated the hymen was not intact and the lab results showed the victim was pregnant. The DNA report confirms the Appellant was the father of the child born by the victim PW1. PW1 testified she was defiled and became pregnant. By the very fact the pregnancy is proof of complete penetration.

17. The evidence of penetration was sufficiently proved based on the victim's testimony and the other witnesses such as the Government Analyst on the DNA profile being 99.99 % matching with the Appellant's child. I therefore find that there was indeed penetration.

Identification of the perpetrator

18. On the issue of identification, there is no doubt or dispute that the Appellant was the PW1's father. It is therefore no doubt that identification was by way of recognition and the DNA results being able to confirm that the Appellant was the father of the VM's child sums it all. The Court of Appeal in the case of Peter Musau Mwanzia Vs The Republic (2008) eKLR expressed itself as follows:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

Relationship between Perpetrator and the victim

19. PW1 refers to the Appellant as "my father". She testified that her mother left her and she was left with her father the Appellant. PW1 also notified the Trial Court that it was her father the Appellant who defiled her. PW2 confirmed the Appellant was the father of the victim and PW1 told her the Appellant defiled her.

20. The victim PW1 confirmed that the Appellant is her father. PW1 is the daughter of the Appellant which falls under the ambit of Section 20(1) of the *Sexual Offences Act*. From the evidence that was adduced during trial, it is clear that the Appellant is the father of the victim and thus existed relationship as envisaged in the Act.

21. On the issue of relationship therefore between the Appellant and the victim, this was not contested and everybody acknowledged that the two had a father –daughter relationship which falls within the ambit of Section 22 of the *Sexual Offences Act*.

22. There was sufficient proof that the Appellant was related to the complainant.

Age of minority of the victim

23. On the issue of the age of the victim being a minor, this was confirmed by production of the Birth Certificate which indicated that VM was born on 26th August 2006 and was thus 16 years of age at the time of the incident which occurred on diverse dates between 5th May 2023 and 7th May 2023. The Appellant did not challenge the age of the victim in the appeal.

ii. Whether the court failed to give due consideration to the Appellant's plausible defence and ended up in convicting and sentencing him to serve life imprisonment.

24. Upon re-analyzing the totality of the evidence presented at the trial court, I observe that the Appellant opted to remain silent and did not tender any evidence in defence. The Appellant cannot now fault the trial magistrate for not having considered his defence when none was tendered. This ground of appeal is therefore misplaced and must fail.

25. On the whole there is no doubt that the Prosecution proved their case beyond reasonable doubt as to the offence of incest. The upshot is that the appeal as against conviction under the offence of incest therefore fails.

26. As regards the sentence, this Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

27. In Maingi & 5 others Vs. Director of Public Prosecution & Another (Petition No. E117 of 2021) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

> " to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

28. The legislation that was in force before commencement of *the Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under Article 27 of *the Constitution*, 2010 and as appreciated in the Francis Muruatetu

case and applied by courts in several cases. See Christopher Ochieng V Republic Kisumu CA Criminal Appeal No 202 of 2011 and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 0f 2104.

29. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

30. In Francis Karioki Muruatetu & another Vs Republic the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing At. Paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

31. What are the relevant circumstances herein? The Appellant did take advantage of her biological daughter and defiled her to the extent of her becoming pregnant. I cannot tell what was the end game for the Appellant being that this was his own blood daughter and therefore it should not even have crossed his mind that he can imagine having anything sexually with her. He ought to know better the consequences of any kind of sexual offences against anyone. What is more confusing and disheartening is that out of the heinous act of incest herein, a child was born who is torn in between whether to refer to the Appellant as "Daddy" or "Grandpa" and this will haunt the victim and the child forever.

32. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 20(1) of the *Sexual offences Act* No. 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was within the law given a reasonable proportionality between the sentence passed and the crime committed. In Republic vs Scott (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, 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 is to denounce the conduct of the offender.

33. The upshot is that, I hereby find that this appeal lacks merit and is dismissed in its entirety.

34. Right of Appeal 14 days.

It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 8TH OCTOBER 2025.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 8TH OCTOBER 2025

In the presence of:

In person from Kamiti Max............... for Applicant

Ms. Agatha .... for Respondent

Millygrace..................... Court Assistant