



**Director of Public Prosecutions v F Double O (Criminal Case
E019 of 2022) [2024] KEMC 69 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEMC 69 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E019 OF 2022
ZK KAGENYO, RM
JANUARY 15, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

F DOUBLE O ACCUSED

JUDGMENT

1. The accused person was on the 7th day of March 2022 arraigned to face an indictment of incest contrary to section 20 (1) of the Sexual Offence [Act No. 3 of 2006](#) where it was said that on the 29th day of January 2022 at [Particulars withheld] area in Diani Location, Msambweni sub-county of Kwale county within Coast region, being a male person, caused his penis to penetrate the vagina of S.A.O a female person who was to his knowledge his daughter. In the alternative, he faced an indictment of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 where it was said that on the 29th day of January 2022 at [Particulars withheld] area, Diani location Msambweni sub-county of Kwale county within Coast region intentionally and unlawfully touched the vagina of S.A.O aged 8 years with his penis.
2. The accused denied the charges and a trial ensued. He conducted his case partly while in remand custody and the larger part of the trial period while out on cash bail of Ksh. 40, 000/= and one personal surety. He conducted the case on self-representation and attended court on all the sessions of the trial which was conducted in Kiswahili and English languages, the languages of choice by the accused.

The Prosecution's case

3. To prove the guilt of the accused, the prosecution rallied a total of 4 witnesses.
4. PW 1, TMK, the mother to the complainant told this court that on Wednesday the 26th day of January 2022, her ayah, LL, called her and informed her that the complainant had left school and she appeared



to be unwell. When she got home, she took her to PBH where she was treated as an outpatient having complaints of pain in her private parts, given a prescription and advised to observe her. The following day, she took her to DBH where she was admitted. At DBH the medics are said to have noticed that the urethra of the child was hanging from outside and on this basis, the hospital called the police. On the 5th day of February 2022, the hospital called PW 1 and informed that they had reported the matter to the police and had indeed obtained an OB entry number and as the police had visited the hospital and interrogated the child, the child had opened up and confided to them that her father had defiled her. The child was discharged from the hospital on that date. On cross examination, she said that she took the child to PBH on the 2nd day of February 2022 and not the earlier mentioned 27th day of January 2022. She further said that she tried to interrogate her child on whether any person had touched her privates, but the child remained mute on the same and PW 1 resorted to use of threats, threatening the child that if she does not tell her, PW 1 would call the police who would come with daddy and arrest her. PW 1 further added that the child bled for the first time according to her on the day she took her to PBH. After such diagnosis at PBH that did not give any ascertainable results, PW 1 added that it is at DBH that one lady, BRL who came up with the idea that the minor had been defiled and she asked for some time with the baby to interrogate the child which she did. According to PW 1, the baby upon such interrogation on 4th day of February 2022 told the said BRL that it was the ayah LL who had fingered her a slang that she said meant inserting the fingers into the minor's genitalia. In her evidence, she added that she hesitated when BRL requested her to call the ayah, LL for interrogations, and she was never interrogated. According to PW 1, BRL involved the police without informing PW 1 and she only saw two police officers namely Mr. K and Ms. M who interrogated her and the minor. The results of this second interrogation of the minor were that she said that she had lied about the ayah LL inserting her fingers into her vagina and instead, she had updated the interrogating panel that it was her father who had defiled her. As she wound up the cross examination, PW 1 told this court that at first, her daughter had told her that she had been defiled at school, then gave her the ayah's version and the father's version was the 3rd of the kind.

5. PW 2 SAO the complainant told the Court that on the Saturday, she was having a stomachache and her father took her to DBH for the same where she was given medication and discharged and they went back home. While at home, after playing, she went and slept and while in her bed, the accused entered her room, and thinking that her dad was taking clothes to go and shower, he instead undressed her panties, inserted his finger into her vagina and thereafter inserted his penis into the vagina and then left. He asked her dad why he had done that to her, and her dad's silence prompted her to ask him for the second and last time and it is then the dad told her that if she dare tell anyone, he would call the police and cause her to be imprisoned in jail or else she be shot by a firearm. When she heard that, she went to the washroom and relieved herself and thereafter cleaned her genitalia. That evening, when her mother came back home from work, the minor kept the ordeal for herself as she awaited her daddy to leave for she was fearing to be shot by police. Her daddy left on Sunday and on Wednesday she told her mum that her daddy had undressed her and inserted his finger and penis into her vagina whereby the mother retorted, "ni sawa." After narrating that to her mother, her mother went to report to the police and then the minor says that, "halafu nikamwelezea huyo polisi hiyo stori." According to the minor, she was then taken to hospital on Thursday, at DBH where she was admitted. In cross examination, SAO told the court that, her chronology of events was that after they came from the hospital with the dad, the ayah left and the dad went and sat below a tree and then went to collect mangoes. Thereafter, SAO went to sleep and left her dad with her brother. Later, SAO woke up and her father warmed the water for their baths and after they took a bath, the father went and sat below a tree again. When asked why she did not tell her mother of the ordeal after the accused left for Kilifi, she said that she forgot to tell her mother. She informed the court that she did not inform her mother on subsequent days until on Wednesday after she left school when she told the ayah that her private parts were itchy and



when the mother came back, SAO informed her as much. After such information, her mother asked her whether any person had touched her private parts which she answered in the negative. She negated her mother's statement that PW 1 had threatened her with the issue of the police. At the end of her cross-examination, she said that she had been interrogated by a nurse at the hospital and she confided to the nurse that it was her father who had defiled her and for telling such truth, the nurse gave her some money.

6. PW 3 ZJ, a Clinical Officer told the court that the minor had been medically examined and her hymen membrane was intact but she had urethral prolapse in that her urethra had come out. She further observed that there was inflammation at the genitalia. She explained that urethral prolapse is usually caused by muscle weakness and only surgery can help restore it. Further, she explained that the intactness of the hymen gave an inference that there had been no penetration. On cross examination, she said that some of the signs of urethral prolapse is spotting and bleeding and that the mother informed the hospital that she had seen the bleeding at home.
7. PW 4, PC (W) MF testified in her capacity as the Investigating Officer, on an account that resembled the foregoing. After her evidence, the prosecution closed its case.

Defence case

8. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) of *the Constitution* having been explained to the accused person, he, in person, elected to defend himself by way of tendering unsworn evidence without calling any witness.
9. The accused denied the charges and invited the court to find that;
 - i. The case was a scheme by his wife, PW 1, to have him incarcerated and take away his wealth;
 - ii. The charges were based on fabricated evidence and coaching of the minor; and
 - iii. The case was poorly and partisanly investigated.
10. Towards this end, the accused person gave evidence on the journey into his now strained marriage, the genesis of the marital disputes and hardships and continuing.
11. On the investigation of the matter, he testified how he had been locked out of the picture and only realized what was happening so much later after his time of arrest, arrest which he heavily criticized as unconventional. He told the court that the truth of the matter is that he is a doting father who could not even imagine of doing such abominable acts to his daughter and his wife was using her as a pawn to get to his wealth.
12. After his evidence, he closed his case and instantaneously filed his submissions, which comprised his evidence in defence and the rest was the closing submissions.
13. Both parties having closed their respective cases, the prosecution's intention to file their closing submissions remained and remains as such as they never filed despite being given adequate time, thrice, while as earlier pointed out, the accused filed his submissions immediately after closing his case.
14. Having heard the parties to their full lengths and considered the material before me in its entirety I do proceed to make my findings as hereinbelow.
15. On a preliminary issue, I wish to comment on the submissions by the accused person, submissions which I have read and considered in my findings. However, I must say that a reading of the accused's submissions would tempt one to relate with Uncle Abe's old adage when he said that a man who is



his own lawyer has a f**l for a client. I say this because, the substance of the accused's substance was so good, but its form characterized by use of some pieces of unpalatable language left a bad taste. Many are times when people while doing something assessed as do or die for themselves tend to be too emotional and run the risk of expressing themselves in an otherwise manner. That is one of the risks of self-representation, at times. One may be too overwhelmed and lose sight of the core issues and dwell on the less significant peripheral issues. I challenge the accused person to re-read his submissions and he might find it necessary to substitute some phrases and descriptive colloquialism as in my opinion that would enhance effective and less vitriolic communication in future instances. All the best.

Analysis and Determination

16. The accused is charged with the offence of incest under section 20 (1) of the [Sexual Offences Act](#), 2006, hereinafter the Act, which provides thus,

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.

17. In my view, section 20 (1) of the Act gives two alternative ways in which the offence of incest, a term which I think is used generally as a word of art, can be committed. As such, I find it to be a misnomer to charge an accused person under section 20 (1) of the Act for the offence of "incest" and in the alternative charge him for the offence of committing an indecent act under section 11 (1) of the Act. I say this because, by its own nature and as described under section 20 (1) of the Act, it is to be seen that the offence of incest can be committed in two ways namely;

- a. Incest by penetration; or
- b. Incest by indecent act.

18. Moving on to the charges, on incest, the prosecution was duty bound to prove;

- a. That the accused knew that SAO was his daughter; and
- b. That the accused inserted his penis into the vagina of the complainant; or
- c. For the alternative count of incest by way of indecent act, he caused contact between any part of his body with the genital organs, breasts or buttocks of the minor but did not cause penetration, and more particularly in this case, that he caused his penis to touch the vagina of the minor.

For the purposes of sentencing, the prosecution was also duty bound to prove that SAO was a minor.

Did the accused know that SAO was his daughter as at 29/01/2022

19. Through the evidence of the mother, the minor and the accused, this question is answered in the affirmative.



Did the accused cause penetration?

20. Section 2 of the [Sexual Offences Act, 2006](#) defines penetration as,
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
21. The medical evidence adduced negated any probability of penetration and as such, the question of whether the accused caused penetration is answered in the negative and I make a finding that the offence of incest by penetration was not proven beyond reasonable doubt and the accused is for acquittal under section 215 of the Criminal Procedure Code.
22. Turning on to the alternative count.

Was the complainant a child?

23. The evidence of both PW 1 and DW 1 was unambiguous that the complainant was their child and was a minor. A certificate of birth produced as P. Exh 7 showing the holder, SA daughter of FOO and TKM and born on 16th May 2014 proved as much that as at 29th day of January 2022, the minor SA
- $\frac{1}{2}$
- was just but 3 months shy to celebrating her 8th birthday and hence a minor as defined in section 2 of both the retired [Children Act, 2001](#) and the operational [Children Act, 2022](#).

Did the accused cause his penis to come into contact with the vagina of the complainant?

24. In my view, it becomes easier to scientifically prove penetration as opposed to contact as the latter might not leave traces, at times. As such, much of the evidence that guides the court is the other forms of evidence such as the oral evidence. The complainant said that her father put his penis into her vagina. By the mere fact that that was done, I believe that the same could not have happened without contact. In other words, contact need not lead to penetration, but penetration leads to contact by its very nature.
25. Apart from the complainant and the accused, there was no one else said to have witnessed the occurrence of the alleged offence. I am well guided that Section 124 of the [Evidence Act](#) enjoins me to take note that survivors of Sexual and Gender Based Violence and more particularly rape and defilement experience the horrendous acts in the absence of other people who cannot corroborate their accounts and the only two or more persons who know of the same are the people involved in it, and hence a court may convict without corroborating evidence on the account of the complainant save as for medical evidence and other corroborating documentary evidence if available. However, the court is required to record the reasons why it is believing the survivor as telling the truth. In other words, the court is tasked to give its reasoning for believing the prosecution’s case.
26. The question that the court therefore endeavored to answer was whether the evidence of PW 2 met the threshold of the desired believability. In that regard, I observed that;
- a. The child SAO told her mother two related untruthful statements which were;
- i. That in the first place, she had been defiled by another person at school; and
- ii. That she later changed and told her mother that it was her ayah who had caused her finger to penetrate her vagina.



The accused was the 3rd to be mentioned and in this series of changes, the minor telling different accounts to her primary caregiver, the court ought to have taken her evidence cautiously alive to the fact that it is more a stranger to the minor than the mother is to that minor and hence not immune to variance in accounts based on the decision of the minor when narrating.

- b. At one point when being cross examined, the minor gave an account similar to that of the accused as to the events of the material day. She said that she was taken to hospital by the dad, then went back home and while at home, the accused went and sat under a tree. Thereafter, the accused went to collect mangoes and afterwards, the minor went and slept leaving the accused with her brother and it is after she woke up that she took a bath. This version was so strikingly similar with what the accused explained in his defence and notably, it omitted the defilement part. That, contrasted with the version she had given at the examination in chief, that she played and after she got tired, she went to sleep and while in such state of sleeping, the accused went to that room and took his clothes as if he wanted to shower then defiled her, casts doubt on which version to take.
- c. I observed SAO as she testified. In no way can I underestimate her intelligence and to that, I give all credit to her. However, some pieces of her testimony appeared to have some element of external influence and not organically from within her. For instance, the minor testified thus, Mommy came back at night. When she came back, I did not explain to her what had happened. I was waiting for daddy to leave. I was fearing to be shot by police. Daddy left on Sunday. On Wednesday I told momma daddy had undressed me and inserted his finger and she said, “ni sawa.” After that, she went to report to police, “halafu nikamwelezea huyo polisi hiyo stori.” I went to hospital on Thursday. We went with my mother at DBH.

However, according to the prosecution, as at that Wednesday, the mother had known nothing about the defilement. In fact, the mother knew of the idea of defilement after BRL had brought it up and it did not come from the complainant. Further, when the minor says that the mother went and reported the matter to the police, that is not supported by the chronology of events by the prosecution side. It is not even the mother who reported to the police first but it was BRL. It is to be noted that when the minor was testifying, she told the court that BRL interrogated her and gave her money thereafter for telling the truth. Isn't it reasonably doubtful that the minor could have been under threats or such other forms of manipulation such as monetary promises? Were there other external voices telling her what to say? For such reasons, I am forced to make an observation that some of the accounts by the minor had been influenced by external forces beyond her.

27. In his submissions, the accused questioned the manner in which the case was investigated as a whole. He verily believed that the process was marred with compromises and underhand deals. Whereas I cannot make a finding on his allegations of impropriety and questionable integrity of the officers involved as the same would be a conviction based on opinion and not propounded and tested evidence, I can however safely opine on the manner in which the matter was investigated which I dare say is in the least desirable nature. For instance, the investigating officer said that she does not know who BRL is and that she did not interrogate her, she did not know the day police officers went to DBH to investigate the matter, she did not know how the minor had been interrogated, she did not cause the officers Mr. K and Ms. M to record their witness statements, she did not interrogate LL the ayah among other very basic processes expected of investigations.
28. In fact, one of the most chilling responses was when the said investigating officer was asked why police officers Mr. K and Ms. M did not record their statements only for her to say that they were not available. Really? Police officers working with the National Police Service and more particularly deployed in the



same region, county and station as the investigating officer were not available to record statements? In all honesty, I found this to be either lack of the wherewithal, oomph and zeal to conduct the investigations or having a predetermined outcome of the investigations even before delving into the investigations process and for this case, I just hope that it was lack of the former set on the part of the investigating officer and not the latter reason.

29. Further, I found that there were very important potential persons that would interest the investigating officer, but they appeared to be strangers to her. Such persons were BRL who indeed complained and called the police officers. I wonder whether how BRL is said to have acted is the modus operandi of the DBH in all other cases and patients and that this was not the special case that was treated in a special way.
30. A look at the document produced as P. Exh 6, a note from TRHTC dated 11th February 2022 from one KKS the in-charge of the facility addressed to DB although written on a paper belonging to DBH, shows that the TRHTC made a request from DBH to have documents to help them fill medico-legal documents. This shows that TRHTC had been approached to have such documents filled. However, a look at the Medical Examination Report, Police Form P3 shows that it was filled up at DHC, 10 days after TRHTC made the request for documents from DBH. Why is this so? If at all the investigators had opted for TRHTC and had initiated the processes therein, how then were the documents filled at the DHC? Was it a case of forum shopping and looking for a one-sided favourable report? One would make a different finding if the investigating officer explained how this changed but her evidence was that she does not know that TRHTC had been approached, tempting one to make a finding of either forum shopping or that the investigating officer was not in charge of the investigations.
31. When the form P3 was being filled at the DHC, the medical practitioner told this court that PW 1 told her that she had seen the girl bleed at the first instance while at home. However, PW 1 said that she first saw the girl bleeding while at the hospital, after examination by the medics. In a case of such nature, it is no secret that bleeding or lack of it thereof would in one way or another influence the finding a medical practitioner would arrive at. What was the motive of PW 1 misrepresenting such crucial facts to the medical practitioner at that stage?
32. On the condition that the minor was suffering from, urethral prolapse, the said medical practitioner provided some of the reasons that can cause the same. The principal reason was weakened muscles which was said that it can be caused by a set of factors. At this juncture, I do not have reasons to settle on one factor over the other based on the overall questionable credibility of the evidence adduced.
33. The accused person advanced a case theory of a vendetta, vengeful and envious wife. It would appear that their marriage had suffered marital turmoil and has been almost capsizing but opting to hold on due to the children. Based on this, the accused alluded to the motive of PW 1 as the mastermind of the evil scheme as he termed it. On my part, I am not in a position to make a concurrence finding and I depart from the accused's analogies given that his evidence was not only uncorroborated but also untested.
34. The sumtotal of the foregoing is that I find that there is doubt, highly reasonable doubt, that the accused could have done the acts of incest with the complainant as is alleged.
35. In my final remarks, I take notice that this case has caused a wider rift to an already existing fault in the nuclear family of 2 parents and two innocent souls, SAO and her younger brother. Much has been said about a family and its worth in the society, one religious leader describing it as the basic cell of human society while one former first lady is quoted as having said that when all the dust is settled and all the crowds are gone, the things that matter are faith, family and friends. As the accused walks out of the courtroom with no baggage of a case hanging on him, I ask the two parents to find a lasting solution



to the baggage that befell their once glittering marital relationship and if not for them, just for the two darling children. I wish them well.

Disposition

- 36. Having analysed the evidence, I find that there is doubt, reasonable doubt for that matter, that on the 29th day of January 2022, the accused person touched the complainant as alleged or committed the offences alleged to have been committed, and consequently this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for both the main count of incest by penetration proscribed under section 20 (1) of the Sexual Offences Act, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the Sexual Offences Act, 2006.
- 37. The accused person who has been on the trial while on a cash bail of Ksh. 40, 000/= that was deposited in court on the 24th day of March 2022, and one personal surety, is discharged forthwith. Consequently, the aforesaid cash bail deposited in court shall forthwith be refunded to the depositor. The personal surety, PMO is equally discharged as a surety.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 15TH DAY OF JANUARY, 2024.

KIONGO KAGENYO

RESIDENT MAGISTRATE

List of relevant Abbreviations (For the Court File only)

PBH-Palm Beach Hospital

DBH-Diani Beach Hospital

TRHTC-Tiwi Rural Health Training Centre

DHC-Diani Health Centre

Others may be extracted and gleaned from the proceedings.

KIONGO KAGENYO

RESIDENT MAGISTRATE

15th January 2024

This Judgment has been Delivered in Open Court at Kwale on this 29th day of January 2024, by Hon C.K Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

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In the presence of

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

