



**KKM v Republic (Criminal Appeal 94 of 2022)
[2024] KECA 689 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 689 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 94 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 25, 2024**

BETWEEN

KKM APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 14th October 2021 in High Court Criminal Appeal No. 49 of 2019)

JUDGMENT

1. The appellant, KKM, was charged with the offence of incest by male person contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the offence were that on 23rd May 2018 at around 5:00 a.m. at (Particulars withheld) village in (Particulars withheld) sub county within Lamu County being a male person unlawfully and intentionally caused his penis to penetrate the vagina of DKK female person who was to his knowledge his daughter who is 15 years old. He was tried before the Magistrates Court at Lamu and convicted in a judgment delivered on 17th August 2018. He was subsequently sentenced to serve life imprisonment. His first appeal was dismissed by the High Court at Malindi (Nyakundi, J.) in a judgment delivered on 14th October 2021.
2. His present appeal, a second appeal, is based on the grounds that the offence was not proved beyond any reasonable doubt; that the prosecution case was riddled with mass contradictions; that the provisions of Section 214 of the *Criminal Procedure Code* were not considered; and that his defence was also not considered.
3. The facts of the case are that the appellant is the father of the complainant DKK, who was 15 years old at the time the offence was committed. The mother of DKK is deceased. At the material time, the appellant, his children including his daughter DKK, and the appellant's mother (DKK's grandmother)



(PW2) were living in the same house where they had been put up by a good Samaritan as the appellant's house had apparently been destroyed by floods.

4. Early morning of 23rd May 2018, DKK was woken up by her grandmother, PW2, and instructed to go light up a fire and warm water for others to bath. DKK proceeded to the kitchen which was adjacent to the appellant's room. DKK narrated as follows:

“I got up and went to light up the fire. My father usually slept in the kitchen. When I got there, my father, called me to go near him. I went over. He told me that we needed to have sex. I told him that we should not do that. When I rejected his request, he pulled me by force laid me on his bed and had sex with me. After he finished, he let me go. As I was getting up to leave my grandmother saw me. I told her what had happened. And that our father had removed my panty before inserting his male organ into my private part-vagina. He just unzipped his trousers but did not lower his trousers. Then we had sexual intercourse. This was bad manners that he did. Grandmother is the one who actually caught us doing it. I told her that it was father who had asked me to have it-sex-with him. Then she called neighbours to the scene.”

5. Cross examined by the appellant, DKK was categorical that the appellant “inserted into [her] private female organ [his] male organ” and that this was not the first time for him to do so and that he had been having sex with her “for a number of years.”
6. DKK's grandmother (PW2) had for a long time suspected that the appellant was abusing his daughter DKK. She stated that on 23rd May 2018, after waking the complainant up and sending her to light up the fire and warm water for the others, after some time she decided to follow her into the kitchen. She explained:

“When I went in, I found KKM on top of his daughter who is my granddaughter. When I got there they were startled. She had left her underwear on the floor. He quickly got up and tried to hide his penis. He zipped up quickly while DKK got up. I slapped DKK and then using my walking stick hit KKM. He stepped out. I then raised an alarm. K and others came. The village elder was then called. He in turn called the police.”

7. Under cross examination by the appellant, PW2 maintained that she caught him ‘having sexual intercourse with my granddaughter.’
8. FK (PW3) was among the neighbours who followed PW2 into the kitchen. PW2 had apparently alerted him earlier that morning that the appellant was “suspected to be preying on his own daughter” and that PW2 had alerted him to be on standby for a signal that morning; that he was behind PW2 when he saw the appellant get up and “quickly zipped his trousers” while “the girl's panty was on the floor”; that although they wanted to lynch the appellant, they restrained themselves and alerted the home guard, a village elder after which the appellant was arrested and taken to Mokowe Police Station.
9. Police constable Daniel Kibet Kipchumba (PW5) was based at Mokowe Police Post performing general duties. On 23rd May 2018 at about 6:50 a.m. he was at the police station when PW2 in the company of DKK lodged a complaint that her son, the appellant, had been defiling her granddaughter, DKK. He escorted them to Hindi Dispensary where DKK was examined and treated. He issued a P3 form, visited the scene and recorded witness statements. He re-arrested the appellant and charged him with the offence.



10. At Hindi Dispensary, DKK who presented with a history of defilement was examined by a clinical officer, Joseph Njeru (PW4). On examination, PW4 observed that DKK's hymenal membrane had been torn long ago. He opined that intercourse had taken place. He administered drugs for prevention of HIV transmission and pregnancy prevention. He signed treatment notes and filled out a P3 form as well as the Post Rape Care Form which he produced in evidence.
11. In his sworn defence, the appellant stated that he went to sleep on 22nd May 2018; that on the morning of 23rd May 2018, he heard her daughter knock on the door and soon thereafter someone by the name Mwanza, "and other home guards showed up" and he was falsely accused of incest. He stated that the claim was fabricated; that he had no ability to have intercourse. Under cross examination, he stated that he had six children the youngest of them being two years old; and that his mother has a grudge against him.
12. As already indicated, the finding of guilt by the trial court, as well as the sentence, was upheld by the High Court. The appellant in the present appeal maintains that there were contradictions in the prosecution case; that the offence was not proved and that his defence was not considered.
13. At the hearing of the appeal before us on 27th July 2023, the appellant appeared in person virtually from Shimo La Tewa Prison while Miss Nyawinda Principal Prosecution Counsel held brief for Mr Jami Acting Assistant Director of Public Prosecutions.
14. The appellant relied entirely on his written submissions in which he urged that there were contradictions in evidence on penetration; that whereas PW3 stated that he saw the appellant in *fragrante delicto*, PW1 told court that PW3 found her sitting outside the house after the sexual encounter had concluded. It was refuted that PW3 witnessed the incident. The appellant further urged that penetration was not proven vide the availed medical evidence.
15. In opposition, counsel for the respondent in her written submissions urged that there are concurrent findings of the trial and the first appellate court that the appellant is the father of the complainant; and that the appellant was found in *flagrante delicto*. To counsel, there was no reason to interfere with the concurrent findings of fact.
16. We have considered the appeal and submissions. The role of this Court on second appeal is circumscribed. In *Karani vs. R* [2010] 1 KLR 73 this Court expressed that:

"By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."
17. The issue that arises is whether the trial court and the High Court erred in concluding that the prosecution had established the ingredients of the offence of incest to the required standard; whether there are material inconsistencies in the prosecution evidence; and whether the appellant's defence was considered.
18. Regarding the question of whether the trial court and the High Court erred in concluding that the prosecution had established the ingredients of the offence of incest to the required standard, it is the appellant's case that there was inconsistency in the evidence as to whether he was caught in *flagrante delicto*. He also added that the medical evidence did not prove penetration. On the other hand, and as



already stated, the respondent maintained that there are concurrent findings in that regard and there is no doubt that the complainant is the daughter of the appellant.

19. Based on our own review of the evidence as set out above, we are satisfied that the ingredients of the offence were proved beyond reasonable doubt and the concurrent findings by the two courts below are well supported by the evidence. There is no material discrepancy between the testimony of the complainant, and that of PW2 and PW3 which establishes beyond any reasonable doubt that the appellant was caught in the act of sexual intercourse with his daughter, PW1.
20. DKK, gave a consistent account of the events of the day as corroborated by medical evidence and the evidence of PW2 and PW3. It was established that PW1 was certainly a child in primary school in Class 7; born in 2003 and was aged 15 years. There was no question as to the identity of the defiler, the appellant, being the father of the complainant and the son of PW2, who caught the appellant in the act of sexual intercourse with his daughter. The concurrent findings by the two courts below are well supported by the overwhelming prosecution evidence which dislodged the appellant's defence and we have no basis for interfering.
21. As regards sentence, the record shows that in mitigation, the appellant stated that he was an only child, had 6 children who depended on him for upkeep and education and sought forgiveness. After considering the same, the age of the appellant and that of the victim and the mitigation, the trial court expressed that:

“Section 20(1) (proviso) provides that a sentence of life imprisonment shall be passed if the victim is aged below 18 years. His children will be much safer away from his predation. I thus pass the only sentence provided for in law.”

22. However, Section 20(1) of the [Sexual Offences Act](#) provides 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 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.” [Emphasis added]

23. The learned trial magistrate misconstrued the expression “liable to imprisonment for life” to mean he had no discretion. It was, we think, a misdirection on the part of the trial court to hold, as it did, that life sentence was the only sentence provided by law. In [SMW vs. Republic](#) (Criminal Appeal 48 of 2014) [2023] KECA 512 (KLR) (12 May 2023) (Judgment) this Court expressed that:

“...the sentence of life imprisonment provided for under Section 20 (1) of the [Sexual Offences Act](#) is not a mandatory sentence and the courts have discretion to impose a lesser sentence which discretion must of course be exercised judiciously depending on the particular circumstances of each case”.

24. See also [LHA v Republic](#) (Criminal Appeal 30 of 2021) [2023] KECA 1324 (KLR) (10 November 2023) (Judgment). The High Court did not address itself to the sentence.



- 25. Bearing the foregoing in mind and the mitigation offered by the appellant before sentencing, the age of the victim and the age of the appellant, we substitute the sentence of life imprisonment with sentence of 25 years' imprisonment to take into account the period the appellant was held in custody since his arrest on 23rd May 2018. To that extent of sentence only, the appeal succeeds. The appeal otherwise fails and is dismissed.
- 26. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL
P. NYAMWEYA

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JUDGE OF APPEAL
J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed
DEPUTY REGISTRAR

