



SCK v Republic (Criminal Appeal 11 of 2020) [2024] KECA 644 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 644 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 11 OF 2020
AK MURGOR & KI LAIBUTA, JJA
JUNE 7, 2024**

BETWEEN

SCK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) dated 14th April, 2020 in HCCRA No. 22 of 2019)

JUDGMENT

1. The appellant, Sammy Charo Kirao, was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the offence were that, on diverse dates between July 2016 and February 2017 at (Particulars withheld) Village within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of KKS (PW1), a child aged 16 years, knowing her to be his daughter.
2. In the alternative count, he was charged with the offence of Indecent Act contrary to section 6(b) of the same Act, the particulars being that, on diverse dates between July 2016 and February 2017, he intentionally and unlawfully touched the vagina of KKS (PW1), a child aged 16 years with his hands.
3. The appellant pleaded not guilty and the matter proceeded to hearing. Upon considering the evidence, the trial Magistrate convicted the appellant for the offence of incest and sentenced him to life imprisonment. The first appellate Judge, upon considering the appeal, rendered a Judgment upholding the conviction and sentence meted by the trial court.
4. The appellant was aggrieved and filed an appeal on grounds that the learned judge failed to appreciate that Articles 49(1) and 50(2) (c) and (j) of the *Constitution* were violated; and that he erred in law in upholding the sentence of the appellant that was harsh and excessive.



5. In his written submissions, the appellant submitted that he was charged after one week of his arrest; that the charges were fabricated in violation of his rights; and that the prosecution did not prove its case to the required standards as penetration and identification were not proved. On sentence, the appellant submitted that the life sentence imposed on him is unconstitutional and ought to be set aside.
6. On their part, the learned prosecution counsel for the State, Mr. Kamanu, submitted that the appellant's rights were not breached at all before, during or after the trial; that, once the respondent closed its case, the appellant was given an opportunity to give his version of events and rebut the evidence by the prosecution witnesses; that the evidence was supplied to the appellant in advance, and that he had sufficient time to prepare his case; and that the appellant has failed to demonstrate how his rights were breached during the trial or at all.
7. Counsel further submitted that the prosecution proved all the ingredients of the charge in that the age of the minor was proved; that the minor was the appellant's daughter, and that penetration was established by the minor's evidence and corroborated by PW4; and that, further, there were no contradictions or invariance in the evidence. It was contended that the trial court was satisfied that the evidence was sufficient to place the appellant on his defence and give rise to the conviction. Counsel maintained that the respondent proved the key elements of the offence, and that the sentence imposed was lawful.
8. This is a second appeal. The jurisdiction of this Court is limited to consideration of matters of law only. Accordingly, this Court is bound by the concurrent findings of fact by the two courts below. However, this Court may depart from findings on matters of fact for the reason that such findings are not based on any evidence, or that they are derived from a misapprehension of the evidence, or are plainly untenable. (See: *Karingo v Republic* [1982] KLR 219 and section 361 of the *Criminal Procedure Code*). Having considered the record, the submissions and the law, the issues for determination are: i) whether the offence of incest was proved beyond any reasonable doubt; ii) whether the appellant's rights under Articles 49(1) and 50(2) (c) and (j) of the *Constitution* were violated, and whether the sentence was harsh and excessive.
9. Before determining the issues, it is necessary to set out the evidence as was laid before the trial court. PW1 testified that she lived with the appellant in a one room mud 'makuti' thatched house. She testified that she used to sleep with her grandmother until the appellant ordered her to go and live with him. One night, the appellant beat and strangled her and defiled her thrice. She stated that he had also defiled her before she moved into his house. He touched her breasts and stomach as he defiled her. She stated that, because she was in pain, she reported the assault to the 'madrasa' teacher.
10. PW2, MNK, a Village elder in Mbogolo, testified that the appellant is her neighbor; that she received information from the neighbors that the appellant was defiling his daughter; that, when she visited his house, she saw one bed in the room; that, when she interrogated him, he informed her that KKS slept on the floor while he would sleep on the bed; and that she reported her findings to the gender desk at the police station, whereafter, the appellant was arrested and KKS was taken to Kilifi sub- county hospital to be examined.
11. PW3, LK testified that the appellant and KKS lived in the same house; that, at one time, the village elder, PW2, wanted to know why KKS was not attending school and, instead, stayed with the appellant in the house. He testified that the village elder had had him arrested.
12. PW4, No. 66446 Cp. Philip Dzombo attached to Kilifi Police Station, testified that, on 9th February 2017, he received a report that the appellant was defiling his daughter; and that he interrogated the appellant and KKS, who confirmed that the appellant had been defiling her over a long period. He



issued her with a P3 form after which she was taken to the hospital where her age was assessed at 16 years, and he produced her age assessment report.

13. PW5, Dr. Aziza, a doctor at Kilifi County Hospital, presented the P3 form filled with the assistance of PRC No. 52/2017. She stated that the minor was aged 16 years old and, upon examination, it was established that her hymen was broken, and had lacerations to her vagina. No spermatozoa were present, and the age of injury was weeks old. The type of injury was blunt and the degree of injury was harm. The pregnancy test was negative, HIV and Syphilis tests were also negative.
14. When placed on his defence, the appellant stated that he was arrested in Mavueni when he was doing his laundry. He was taken to the police station and charged with this offence. He affirmed that he used to sleep with his daughter in his tiny room, but did not defile her.
15. We begin with whether the offence of incest was proved. The offence of incest is defined in section 20(1) of the *Sexual Offences Act* thus:
 - “(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.”
16. The ingredients for the offence of incest are: (i) proof that the offender is a relative of the victim; (ii) proof of penetration or indecent Act; (iii) identification of the perpetrator; and (iv) proof of the age of the victim.
17. It was KKS’ evidence that she was 13 years old at the time of the incident. This evidence was corroborated by PW4, who produced an age assessment report indicating that KKS was 13 years old. PW2 and PW3 confirmed that she was the appellant’s daughter, a fact that the appellant himself also confirmed. Consequently, KKS’ age, and her relationship to the appellant as his daughter were sufficiently established.
18. With respect to penetration, KKS testified that the appellant defiled her on several occasions and would beat her. He threatened her not to tell anyone about the incidents of assault.
19. The offence of incest as provided for under section 20 (1) of the *Sexual Offences Act* envisages an act of penetration or an indecent Act. An, “indecent act” is defined under section 2 (1) of the Act as:
 - “(a) any unlawful intentional, which causes a) any contact between any part of the body of a person with genital organs breasts or buttocks of another, but does not include an act that causes penetration”.

While “penetration” is defined as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person”.



20. With respect to the act of penetration, both the trial court and the High Court relied on the evidence of PW5, the Treatment Notes and the P3 form, which indicated that KKS' hymen was broken, and concluded that there was penetration. Further, KKS gave a detailed description of how the appellant insisted on sleeping with her on the same bed in the tiny room, and how he continually defiled her, and would then physically assault her.
21. Furthermore, the trial court found her to be a truthful witness and relied on section 124 of the *Evidence Act*, to find that the act of penetration by the appellant was proved. By so finding, the trial court went on to convict the appellant for the offence of incest. See *EMM v Republic* (Criminal Appeal 58 of 2020) [2023] KECA 673.
22. We too are satisfied that offence was proved to the required standard.
23. KKS was 13 years of age at the time, and the appellant was her biological father. Penetration was established by the evidence of KKS, PW5, and the medical reports. As such, the evidence pointed to the appellant as the person responsible for defiling KKS. As did the High Court, we too uphold the conviction reached by the trial court, which we are satisfied was rendered safe.
24. On the appellant's contention that his rights under Article 49(1) and Article 50(2) (c) and (j) of the *Constitution* were breached because he was not supplied with the charge sheet and witness statements immediately after taking plea in court, the first appellate court considered the issue and concluded that the appellant was supplied with the witness statements in advance of the commencement of the trial when the first prosecution witness begun to testify.
25. A review of the record indicates that, when the appellant took plea on 17th February 2017, the trial magistrate ordered that he be supplied with the witness statements. When the matter came up for hearing on 3rd March 2017, the witness statements were yet to be supplied, and the court issued similar orders for the supply of the witness statements. On 3rd April 2017, the appellant informed the court that he had yet to be supplied with the statements. When the matter came up for hearing on 11th April 2017, the trial proceeded. Notably, this time the appellant did not raise the issue of the witness statements. Instead, he proceeded with the trial and went on to vigorously cross examine the witnesses. Much as the record does not indicate that the appellant had received the witness statements, going by his previous requests for the statements and his subsequent preparedness to proceed with trial displayed by his active cross examination of the witnesses, as was the High Court, we are satisfied that the appellant was supplied with the witness statements prior to commencement of the trial, and that, therefore, he was not prejudiced in any way, and neither were his constitutional rights violated.
26. On the life sentence imposed by the trial court and upheld by the High Court, the appellant's contention is that it is unconstitutional.
27. Section 20 (1) of the *Sexual Offences Act* provides:
 - “(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 ..., 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...”
28. A reading into the above statute requires a court to impose the sentence of life where it is established that a child below the age of 18 years was defiled by a male person who to his knowledge was his



“...daughter, granddaughter, sister, mother, niece, aunt or grandmother”. So that contrary to the appellant’s assertions, the life sentence imposed was prescribed by statute law and was therefore lawful.

29. In this case, the appellant, a father to the complainant, was a man entrusted to provide her with protection and care. Yet, he defiled her from a very tender age and continued to do so upto the time she was aged 13 years.
30. He forced her to sleep with him in the same bed in a tiny single room, and would also physically assault her thereafter. Given the facts and circumstances of this case, we have no reason to interfere with the lawful sentence imposed by the trial court and upheld by the High Court.
31. In effect, the appeal fails and is hereby dismissed.
32. The Judgment is signed under Rule 34(3) of the *Court of Appeal Rules* (CAR), since Hon. Mr. Justice Odunga, JA refuses to sign the Judgment.

And it is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

