**CMM v Republic (Criminal Appeal E085 of 2023)**
**[2024] KECA 1147 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1147 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL E085 OF 2023**

**MSA MAKHANDIA, A ALI-ARONI & JM MATIVO, JJA**

**SEPTEMBER 20, 2024**

**BETWEEN**

**CMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Kitui (Mutende, J.) dated 23rd August 2017 in HCCRA No. 44 of 2019)***

## JUDGMENT

1. The appellant Cosmas Mutinda Mutisya, was charged before the Senior Principal Magistrate's Court, Kitui, with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* ("the Act"). The particulars of the offence were that on diverse dates between 1st September 2012 and 6th October 2012 at an unknown time at Kitui County, the appellant intentionally committed an act which caused penetration with NKS, a child aged 11 years, by inserting his penis into her genital organ namely vagina who to his knowledge was his granddaughter.

2. In the alternative, he was faced with the charge of an indecent act with a child contrary to Section 11(1) of the Act. The particulars of the offence were that on diverse dates between 1st September 2012 and 6th October 2012 at an unknown time at Kitui County, he intentionally committed an act of indecency with NKS a child aged 11 years by touching her private parts namely vagina using his hands.

3. The prosecution's case is that PW1, NKS was 11 years old at the time of the incident. She lived with her grandmother N (PW2) and the appellant who was her grandmother's half-brother who had been accommodated by PW2. PW1 testified that on 6th October, 2012 while at home, the appellant called her to his house, and she found him alone. He asked her to get in his bed and undress. She was wearing a skirt at the time. The appellant removed her pants after she got into bed with him. He opened his trousers' zip, got on top of PW1, held his penis, put it in her vagina and had sex with her. The appellant

threatened that if she made noise he was going to beat and kill her. When he was done, he asked her to leave. She wore her panty and went away leaving the appellant in his house. She was injured in her genital area. Further it was her testimony that the appellant had sexually abused her several times before.

4. It was her further testimony that when her grandmother (PW2) came home she informed her of the incident and together with (PW2) they made a reported Mwitika AP post. She was later taken to hospital by PW2 and one Kavengi where she was treated.

5. PW2, in her testimony, she stated that the appellant was her stepbrother and that at the time of the incident, the appellant was living at her home and that on 7th October 2012 at 12:00 pm, she saw PW1 crying. PW1 then told her that the appellant had defiled her the day before and that he had been having sex with her and threatening her that he would kill her; if she told anyone. PW2 then sent for PW1's mother who came with PW1's father, S, and police officers and they took PW1 to a dispensary and later to Kitui District Hospital. At the hospital, they were issued with a treatment card. On 7th October 2012, the appellant was arrested and taken to Endau Police Station the following day, the 8th of October 2012. That the appellant had lived in her home for 6 months. She was the one who took care of the appellant after his mother died and that she had no grudge against him.

6. PW3 Thomas Muasya Ituka, a clinical officer at Kitui District Hospital testified that he filled PW1's P3 form on 9th October, 2012. An age assessment was undertaken a year later giving the age of PW1 at 11. That the labia majora and minora had lacerations, the hymen was absent and there was evidence of penetration. He did a urinalysis and nothing was detected. An HIV test was negative. PW1 was then referred for counseling. Further, he had learnt that it was not the first time PW1 was defiled by the appellant, who had warned her not to disclose their escapades to anyone. That PW1's examination was after 3 days of the incident.

7. PW4, Corporal Eric Ouma in charge Mwitika AP Post testified that on 8th October 2012 at 7:40 pm, while at the station, APC Njoroge informed him of a report of incest made by one FT, the complainant's grandmother and one S alleging an incident of incest by a grandfather. He accompanied them to the home but did not find the suspect. They found the suspect in another home ½ a km away with his crutches packed. The witness arrested the suspect and escorted him to Endau Police Station where he recorded his statement. He identified the appellant as the suspect he arrested.

8. PW5, Khamis Mohammed Salim of Endau Police Station the investigating officer in this matter, testified that on 8th August 2012 at 4:00 pm while at the police station, PW1 together with her grandmother (PW2) reported that she (PW1) had been defiled two days before. PW5 recorded the incident in the occurrence book and took witness statements. Upon his arrest, the suspect was taken to Mwitika by Corporal Ouma. Later, PW5 re-arrested the suspect. He was informed that the suspect was PW1's grandfather and consequently charged him with the offence of incest. He referred PW1 to Kitui District Hospital and a P3 form was filled. PW1 had no birth certificate and an age assessment was done 7 months later on 3rd May 2013, which placed her age at 12 years old, meaning that she was approximately 11 years old at the of commission of the offence.

9. At the close of the prosecution's case, the trial magistrate found the appellant had a case to answer and put him on his defence. He gave an unsworn statement and denied the offence. In his testimony, he informed the court that on Sunday 7th October 2012, while at home nursing a broken leg and was still on crutches, when at about 11. 30 pm he heard a knock at the window. He saw an aunt to PW1, PW1's father, accompanied by two police officers. He opened for them, and the officers arrested him; and took him to Mwitika AP post, where he stayed until the following day when he was transferred to Endau Police Station, where he was informed of the allegation against him. He further informed the court that there existed a grudge between him and PW2 since 1997; that he was injured in August

2012 in Mombasa; and that he is an orphan yet PW2 had sold his parcel of land, a matter he reported to the chief and the clan; he denied that he lived at the home of PW2; further, it was his testimony that he had injured his left hand and was completely immobilized and it was unlikely that he could have committed the alleged offence; that PW2 had framed the charges against him.

10. In the end, the trial court was persuaded that the appellant had committed the offence, convicted him, and sentenced him to life imprisonment. The appellant being aggrieved by the judgment appealed against both conviction and sentence to the High Court and on determination of the appeal the High Court (Mutende J,) on 23rd August 2017 dismissed the appeal and upheld both the conviction and sentence.

11. The judgment by the High Court (Mutende, J.) precipitated the appeal before this Court on grounds to be found in an amended memorandum of appeal, stating that the learned judge erred in law: in affirming the sentence of life imprisonment and did not effectively evaluate the prosecution's evidence concerning the relationship between the appellant and the complainant.

12. The appellant in his undated submissions, contends that the term "granddaughter" referred to in the charge sheet does not fall within the meaning of Section 22 of the Act which outlines the test of the relationships that amount to incest and that the complainant's case does not fall within any of the clusters therein.

13. On age assessment, the appellant submits that scanty evidence was advanced by the prosecution which did not prove beyond reasonable doubt, that the complainant was 11 years as indicated on the charge sheet; that both PW1 and PW2 stated that the complainant was 12 years old while PW3 stated that she was 11 years old; and that the list of exhibited documents reveals that the P3 form and the age assessment report were missing from the court record.

14. Further he submits that the charge sheet was at variance with the actual evidence, as it did not support the charge sheet concerning the alleged offence and was therefore defective and that the prosecution's case was never proved, hence the life sentence was null and void.

15. On mitigation, he submits that the same was not considered by the trial court and in support of his assertion relies on the case of Julius Kitsao *Manyeso vs. Republic (Criminal Appeal No. 12 of 2021*) where the court allowed the appeal on sentence based on the fact that the appellant did not say anything in mitigation after conviction by the trial court.

16. The State on its part has filed submissions dated 15th October 2023. On proof of age, Learned State Counsel submits that Section 124 of the *Evidence Act* allows courts to convict on the evidence of a single witness; that in the instant case, the prosecution went beyond by tendering evidence to corroborate the age of the complainant to wit; that PW testified that PW1 was 11 years old at the time the offence was committed and also confirmed that the victim was the granddaughter of the appellant; that PW3 the clinical officer based at Kitui District Hospital filled the P3 form in respect of the minor and confirmed that an age assessment had been conducted and the same gave minor's age as 11 years. We are aware that, proof of age is crucial in defilement cases as was held by this Court in the case of Charles Wamukoya Karani vs. Republic (Criminal Appeal No. 72 of 2013) as follows; "The critical ingredient forming the offence of defilement are; age of the complainant, proof of penetration, and positive identification of the assailant."

17. On proof of penetration, learned prosecution's counsel submits that this was properly proved by the testimony of PW3 Thomas Muasya, a clinical officer from the Kitui General Hospital who confirmed that upon examination it was evident that there was penetration as the labia majora and minora had

lacerations; the hymen was absent. To fortify her assertion learned prosecution's counsel relies on the case of Mark Ouriri Mose vs. Republic [2013] eKLR where this Court stated; -

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration, whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

18. On proof of identification of the appellant, Learned State Counsel submits that PW4 and PW5 were the arresting and investigating officers and both confirmed that the appellant was the perpetrator of the offence. The respondent adds that the appellant was not a stranger to the victim as she knew him as her grandfather.

19. On whether there was a consanguine relationship between the appellant and PW1, she submits that the appellant was the step-grandfather to the child, and therefore a relationship of consanguinity was established by the prosecution. She relies on BNM vs. Republic [2011] e KLR, where the court had this to say:

> " ... "half father is a term which means exactly the same as step father – it means one who is not a biological father of the child. Therefore, by dint of this, S 22(1) of the Act, the appellant being a step father to the complainant and one who stood in "loco parentis" can be legally charged and indeed convicted of the crime of incest with her."

20. On the credibility of the PW1's testimony, learned counsel submits that the trial magistrate satisfied himself that PW1 who was aged 11 years was intelligent enough to give sworn evidence and that she understood the importance of telling the truth.

21. On the sufficiency of the prosecution witness's testimony, learned counsel submits that the victim's testimony was well corroborated by PW2, PW3, PW4, and PW5, and at no time were there any inconsistencies or contradictions in the testimony presented before the trial court.

22. On the harshness of the sentence, learned counsel submits that the minor was only 11 years old hence the sentence meted out to the appellant was fair and safe and within the provisions of the law.

23. This matter comes before us on a second appeal. Section 361(1)(a) of the Criminal Procedure Code limits our mandate to only matters of law. Further, the court will not interfere with concurrent findings of facts by the two courts below, unless such findings were not based on evidence, were based on a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. This provision has received judicial interpretation in numerous decisions of this Court. See for instance the cases of Chemogong vs. Republic [1984] KLR 611, Ogeto vs. Republic [2004] KLR 14, and Koingo vs. Republic [1982] KLR 213. In the latter case, the court stated that:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi s/o Karanja V. R. [1956] 17 E.A.C.A 146)"

24. We have carefully considered the record, submissions by the rival parties, and law. We take note that although the amended memorandum of appeal was confined to only two issues, the appellant had elaborate submissions covering several grounds not contained in his amended memorandum of appeal,

and the State either out of caution, or in error addressed the said issues. For our part, we shall not delve into issues not addressed in the amended draft and therefore discern the issues for our determination as:

i. Whether the judge failed to consider whether the alleged consanguineal relationship between the appellant and PW1 was within the parameters set by the law.

ii. Whether the learned Judge erred in affirming the sentence of life imprisonment.

25. Whether there existed a consanguineal relation between the appellant and PW1 is a matter that was taken up for consideration by both the two courts below. There was no dispute that the appellant was a half-brother to PW2 (though referred to throughout the proceedings as step-brother), who happens to be PW1's grandmother. Notable is that the judge did not list the ground in her summary of grounds to be considered and casually addressed the issue. The appellant's case both before the High Court and this Court is that the law as it is does not place him within the prohibited degree of consanguinity.

26. In our view to appreciate the prohibited degree of consanguinity under our law, Sections 21(1) and 23 of the Act must be read together. The said sections provide:

> "21(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.
>
> 22(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.

27. Section 361(1) & (4) of the Criminal Procedure Code sets the parameters of this Court's mandate on second appeals as follows:

> "(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
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> (a) on a matter of fact, and severity of sentence is a matter of fact; or
>
> (b) ....."
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> .....
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> (4) Where a party to an appeal has been convicted of an offence and the subordinate court or the first appellate court could lawfully have found him guilty of some other offence, and on the finding of the subordinate court or of the first appellate court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the

Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the subordinate court or by the first appellate court a conviction of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the subordinate court or by the first appellate court as may be warranted in law for that other offence."

28. A close look at Section 21 as read with Section 22 of the Act, as argued by the appellant does not cover the relationship between him and PW1, and to that extent his complaint is justifiable. What it means, is that both the two courts below failed to consider the provision of the law, convicted and sentenced the appellant of a wrong offence. Having said so, we find that there was overwhelming evidence that the appellant defiled PW1, who at the time of the incident was 11 years old, and based on Section 8(1) as read with Section 8(2) of the Act the appellant is guilty of the offence of defilement.

29. On the issue of sentence, this Court has on several of its decisions reiterated that sentencing is a matter for the trial court. The subject was extensively discussed as follows in the case of Bernard Kimani Gacheru v R. [2002] eKLR:

> " 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. The position was stated succinctly by the Court of Appeal for East Africa in the case of OGOLA s/o OWOURA VS REGINUM (1954) 21 270 as follows: -
>
> 'The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge...'"

30. The Supreme Court in the case of R vs. Joshua Gichuki Maingi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) (12 July 2024), on its part in addressing this issue stated; -

> " 48. Before further delving into the question of the constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court. We produce the same verbatim as follows:
>
> "361. Second Appeals1.A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the

High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

a. on a matter of fact, and severity of sentence is a matter of fact;

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

49. Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

31. We turn to the issue of sentence and based on our analysis above we have to consider if the sentence meted out to the appellant remains lawful, having found that the appellant was convicted of a wrong offence, bearing in mind that this Court can set aside the wrong conviction and substitute the same with a proper one. Section 8(2) of the Act provides that anyone found guilty of having committed the offence of defilement with a child aged 11 years and below is liable to imprisonment for life.

32. In the end having found that the appellant committed the offence of defilement, we set aside the conviction based on the offence of incest and substitute the same with a conviction for the offence of defilement and cognizant of the decision by the Supreme Court in the case of R vs. Joshua Gichuki Maingi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra), we uphold the sentence of life imprisonment, which remains lawful for the offence of defilement.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**