



**KM v Republic (Criminal Appeal 37 of 2021)
[2023] KECA 289 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 289 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 37 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
MARCH 17, 2023**

BETWEEN

KM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Machakos
(Mutende, J.) dated 21st November, 2013 in HC. CR.A. No. 294 OF 2010)*

JUDGMENT

1. This is a second appeal from the conviction and sentence of the appellant, KM, by the Principal Magistrate’s Court, Makueni. The charge facing him was that of incest by a male person contrary to section 20 (1) of the *Sexual Offence Act* No. 3 of 2006 it being alleged that on February 10, 2010 at the place set out in the charge sheet, being a male person, he caused penetration of his male genitals with a female person namely “FMM”, who to his knowledge was his daughter. The alternative charge was that of Indecent Assault contrary to section 11 (1) of the said Act particulars being that at the said place he indecently committed an indecent act with the child aged 5 years by touching her private parts. A trial took place before the magistrate where the prosecution called 5 witnesses and; the appellant was put on his defence where he gave an unsworn statement. He was convicted and sentenced to serve 40 years in jail. The appellant then filed his first appeal to the High Court of Kenya at Machakos (Mutende, J.) and upon hearing, the appeal failed on conviction but the learned Judge allowed the appeal on sentence which was reduced to 30 years imprisonment, in a judgment delivered on November 21, 2013.
2. This being a second appeal our mandate is limited by section 361 (1)(a) *Criminal Procedure Code* to consider only issues of law, if we find any in the appeal and to resist the temptation to go into facts which have been tried by the first court and re-evaluated on 1st appeal – see *John Kariuki Gikonyo v Republic* [2019] eKLR where it was held by this Court on the said mandate:



- (15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213”.

3. We shall briefly visit the facts of the case to ascertain whether the two courts below carried out their mandate as required in law.
4. The complainant (“FMM” or PW1) narrated to the trial magistrate how on the night of February 10, 2010 the appellant beat up his wife (“EW” or PW2) and chased her out of the house. PW1 remained in the house with her younger brother and the appellant. She was asleep in the bed which she shared with her mother and younger brother when in her own words:

While I was sleeping in my bed, my father came from his bed He came to my bed, and touched me on my place of urinating I felt a lot of pain and I even cried.”

5. She explained how the appellant removed her clothes and defiled her; how he had warned her not to inform her mother, how she went to school the next morning and when she came back from school she found that her mother had returned. She told her mother that the appellant had defiled her the previous night. From the record, we note that her panty which was stained with blood was produced in court as part of the prosecution evidence. And that she was taken to hospital where she was treated.
6. PW2 testified that PW1 was 5½ years old. She (PW2) had been diagnosed as being HIV positive and had been advised to use a condom during sexual intercourse but her husband refused to use a condom at all. On the material night the appellant arrived home drunk and after serving him food he demanded to have unprotected sex with her but she refused. This prompted the severe beating she received from the appellant forcing her to run to his aunt’s house where she sought refuge. When she went back home she found PW1 looking sad. PW1 informed her of pain in her vagina and when she (PW2) and PW3 (“KW”- aunt to the appellant) examined the child they found dried blood in the vaginal area and the panty was blood stained.
7. PW4 PC David Kega of Kavumbu Police Station investigated the case and charged the appellant with the offence we have referred to.
8. The last prosecution witness was Onesmus Katua, a Clinical Officer at Makueni District Hospital. He received PW1 and on examination he found that the vaginal orifice was allowing the index finger which was abnormal for a child of 5 years. There was a tear on the perineum region (between vagina and anus) and he formed the opinion that the child had been defiled.
9. The trial magistrate found that a case had been established calling on the appellant to answer and in an unsworn statement in defence he stated that he had a dispute with his wife in the year 2010 and that was why she had framed him leading to the charges he faced in court. He confirmed that PW1 was his daughter; that his wife had left home that night but he denied that he had committed the offence.
10. The appellant in the homemade “Memorandum Grounds of Appeal” complains that High Court erred by upholding his conviction relying on the unsworn evidence of PW1 “... contrary to section 151 of the *CPC*”; that the evidence of the clinical officer did not prove penetration; that he was convicted



without the child's age being proved; that the High Court erred by not finding that there was a grudge between him and the complainant; and, finally, that there was a miscarriage of justice in the way the High Court handled the first appeal.

11. When the appeal came up for hearing before us on a virtual platform on January 30, 2023 the appellant appeared in person from Manyani prison while the office of Director of Public Prosecutions was represented by learned State Counsel Miss Margaret Matiru. Both sides had filed written submissions. The appellant's document is titled "Supplementary Grounds of Appeal in accordance with section 65 (1) of the *Appellate Jurisdiction*" – 2 grounds of appeal are set out to the effect that the Judge on first appeal erred in law by failing to find that evidence in the case did not support the offence of defilement but supported the alternative charge of indecent act and there was thus an error where he was convicted on the main charge. Secondly, that the sentence imposed was harsh and excessive in the circumstances. In written submissions the appellant sets out the background of the case but states wrongly that he was charged with the offence of defilement while, as we have seen, the charge was that of incest. He says that the case was not proved beyond reasonable doubt; that penetration was not proved and that the prosecution proved the offence of indecent act with a female. On sentence the appellant faults the High Court which reduced imprisonment term from 40 years to 30 years claiming instead that he should have been sentenced under section 11(1) of the *Sexual Offences Act*.
12. It is the case of the respondent in the written submissions that we should not go to facts of the case because we are dealing with a second appeal; that the case was proved to the required standard and we should not interfere with the concurrent findings of the courts below.
13. We have considered the record of appeal, submissions made and the law. We find that there are issues of law raised in this appeal, one of which is the place of unsworn evidence in a criminal trial. The record shows that the trial court after conducting *voire dire* of PW1, where questions asked and answers given are set out, and the trial magistrate held that the witness would give unsworn statement as she did not understand the nature and obligation of an oath "... although since she understood the duty of speaking the truth, she may be cross-examined ...". PW1 then gave a fairly detailed testimony and was cross-examined by the appellant.
14. Section 151 *Criminal Procedure Code* requires that a witness in a criminal trial be examined on oath.
15. The *Oaths and Statutory Declarations Act* cap 15 Laws of Kenya provides as follows in respect of evidence of children of tender years:

Evidence of children of tender years

1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (cap. 75), shall be deemed to be a deposition within the meaning of that section."
16. As we have seen the trial magistrate after conducting *voire dire* on PW1 determined that her tender age did not allow her to understand the nature of an oath. The child gave unsworn evidence and was cross



examined by the appellant. The law allowed such evidence to be admitted and the complaint by the appellant in that regard has no merit and is dismissed.

17. The appellant complains that he was convicted when penetration had not been proved by the clinical officer.
18. Apart from the testimony of the victim who graphically detailed how she was defiled by her father there was the evidence of the clinical officer who testified that there was penetration of PW1's vagina to the extent that it allowed entry of the index finger which in his opinion was abnormal for a child aged 5 years. He found a tear on the perineum region (region between the vagina and anus) and there was a foul-smelling discharge from the vagina. He found that:

... The tear seen in the child may have been caused during the incident of forced penetration of the penis. The tear was fresh..."
19. Both courts below found that penetration had been proved. In the face of the evidence on record we reach the same finding that there was penetration.
20. On the issue raised by the appellant that he was convicted when the age of the complainant had not been proved, it was the evidence of PW2 (the child's mother) that PW1 was 5½ years old. The clinical officer gave her age as 5 years and estimated age is given as 5½ years in P3 form. The two courts below found that to be PW1's age.
21. It is true that the age of a victim of a sexual offence has to be established as sentencing is determined by the age of the victim. There are many ways of establishing age which may take the form of production of a birth certificate, baptismal card or other religious document or other documents. But it must always be remembered that a trial court is possessed of the necessary intelligence to make an appropriate decision in regard to age. It was held by the Court of Appeal of Uganda in the case of *Francis Omuromi v Uganda Court of Appeal* Criminal Appeal No. 2 of 2000 on the issue of determining age of a child in a sexual offence:

In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

22. This court in the case of *MM v Republic* [2019] eKLR stated:

In *Paul Odhiambo Mbola v Republic* (Kisumu) Criminal Appeal No 16 of 2014 (ur) this court found that the Sexual Offences Act adopts a definition of a child in the Children's Act and by section 2 thereof "age" is defined as:

"... where actual age is not known means apparent age..."

That is to say that actual age need not be proved and the trial court is entitled to go by apparent age of the child victim in a sexual offence. In the case before the trial court the child herself, her mother and the Doctor gave the child's age as 8 years and there is no merit in the complaint on the aspect of the age of the complainant."

23. Similarly, in *Evans Wamalwa Simiyu v Republic* [2016] eKLR we stated:

Indeed section 2 of the Children Act define "age" as meaning apparent age in cases where actual age is not known."



24. The child victim in the case before the trial court was aged 5½ years as per the evidence of her mother and the clinical officer. The trial magistrate after conducting voire dire determined that the child was of tender years. There was sufficient material on which it was found that the child was 5½ years old and the complaint by the appellant in regard to the age of the victim has no merit and is dismissed.
25. The appellant states in supplementary grounds of appeal that the Judge on first appeal erred by failing to find that the offence on which he should have been convicted supported a finding for indecent assault but not defilement. This complaint is equally misplaced. We have found, as did the other courts, that the appellant, who was the father to PW1, defiled her on the night in question as was supported by evidence. His conviction for the offence of incest was founded on solid evidence and the two courts did not err in reaching their findings.
26. On the issue of sentence, the appellant after conviction for the offence of incest was sentenced to 40 years imprisonment which was reduced to 30 years by the High Court on first appeal.
27. Section 20 of the *Sexual Offences Act* provides that:
- 20.
- (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.
- (2) ...
- (3) ...
28. In the circumstances of the case where the appellant defiled his daughter aged 5½ years and should have been sentenced to life imprisonment; the magistrate sentenced him to 40 years in jail but he was lucky to have the term of imprisonment reduced by the High Court to 30 years.
29. We have considered the whole record and find that there is no merit in this appeal which we accordingly dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

