



**DMM v Republic (Criminal Appeal 28 of 2017)
[2023] KECA 435 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 435 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 28 OF 2017
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
APRIL 14, 2023**

BETWEEN

DMM APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Voi delivered on 23rd March 2017 by Hon Lady Justice J. Kamau in High Court Criminal Appeal No 27 of 2015)

JUDGMENT

1. This a second appeal against the judgement delivered on March 23, 2017 by Kamau, J in High Court Criminal Appeal No 27 of 2015. The appellant had been charged before the Senior Resident Magistrates court at Wundanyi with two counts. In the first count he was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. In the second count, he was charged with incest contrary to section 20(1) of the *Sexual Offences Act*. To that count was similarly an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. Being a second appeal our mandate is limited by section 361(1) (a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Njoroge v Republic* [1982] KLR 388 it was held by this court on the said mandate on a second appeal:

“On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.”



3. As to what constitutes “matters of law” in relation to this court’s jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR characterised the three elements of the phrase

“matters of law” thus:

- a the technical element: involving the interpretation of a constitutional or statutory provision;
- b the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
- c the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

4. This court however held in *Jonas Akuno O’kubasu v Republic Kisumu* Criminal Appeal No. 69 of 1999 [2000] eKLR that:

“It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.” [Emphasis ours].

5. It was similarly held in *Karani v R* [2010] 1 KLR 73 that:-

“This is a second appeal. 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.”

6. We are also guided by the decision in *Adan Muraguri Mungara v R CA* Cr App No 347 of 2007 where it was held thus:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere.”

7. The determination of this appeal must therefore be based on the above principles. We shall briefly visit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their mandate as required in law.

8. The evidence was that PW1 was a step daughter of the appellant having been born before the appellant and PW1’s mother entered into a relationship. However, PW1 referred to him as her father throughout the proceedings. On the material day, Pw1 was left alone the appellant who carried her into his house



and defiled her. Pw1 narrated the incident to her mother PW2 and this prompted PW1 to be taken to Mwatate District Hospital for examination where PW1 was examined by PW3. The examination revealed that PW1 had a broken hymen but no injuries to her private parts. Upon investigations, PW4 made the decision to charge the appellant.

9. The appellant's defence was that the charges were motivated by his change of mind as regards his relationship with PW2. He denied committing the said offence.
10. In his judgement, the Learned Trial Magistrate found, that the Appellant should not have been charged with the two counts of defilement and incest. In his finding, based on section 20(1) of the *Sexual Offences Act*, since the relationship between the Appellant and PW1 was not that of biological father and daughter, the Count dealing with incest was of no consequence. The court then found that the ingredients of the offence of defilement had been proved, convicted the Appellant and sentenced him to life imprisonment. His appeal to the High Court was dismissed.
11. Before us the appellant has contended that the reasons given by the trial magistrate as to why he believed Pw1 were unsatisfactory; that the constitutional rights of the appellant were violated; and that the voir dire process in respect of PW1 was improper.
12. As regards the first ground, the issue whether or not the evidence of PW1 was believable which may well turn on the demeanour of the witness does not fall for determination before us. As was held in *Jonas Akunon O'kubasu v Republic* (*supra*):

“When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
13. We have no basis upon which we can differ with the concurrent findings of the two courts below as to whether or not PW1's evidence was believable.
14. The next issue for determination is whether the Appellant's rights were violated. This contention was based on the allegation that the Appellant was taken to Court on January 3, 2014. The issue whether the failure to arraign an accused within the legally prescribed period must automatically lead to an acquittal was dealt with in *Fappyton Mutuku Ngui v Republic* [2012] eKLR where it was held that:

“The correct position in law was set out in *Julius Kamau Mbugua v Republic* (2010) eKLR where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.”
15. We have not been addressed on the existing of any aggravating circumstances that should persuade us to find that the Appellant ought to be acquitted on those grounds.
16. Before us the appellant took issue with his sentence. As we have stated at the beginning of this judgement, the appellant was charged with two counts of defilement and incest. The learned trial magistrate held, rightly in our view, that it was improper to charge the Appellant with those two counts separately. The Learned Trial Magistrate therefore decided to ignore the count dealing with incest on



the basis that the evidence adduced was to the effect that the appellant and PW1 were not biologically related. This position was based on section 20(1) of the *Sexual Offences Act* which provides that:

- (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.

17. The Learned Trial Magistrate does not seem to have considered section 22(1) of the said Act which provides that:

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.

18. This provision was explained in *AKK v Republic* (Criminal Appeal 41 of 2018) [2021] KECA 15 (KLR) (23 September 2021) where this Court expressed itself as follows:

“Section 20 of the *Sexual Offences Act*, 2006 defines who can commit the offence of incest. This is a male person who commits an indecent act which causes penetration with his daughter, granddaughter, sister, mother, niece, aunt or grandmother. Section 22 of the said Act on “Test of relationship” 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. It was established on evidence that the appellant was PW2’s step father who lived with PW1 as wife, PW2 and his other children. PW2 regarded him as her father and her testimony was that her father had defiled her on six different occasions. In the recent case of *LOA v Republic* [2020] eKLR this court sitting at Kisumu was faced with facts on the relationship between the appellant and the victim in a case of incest. The appellant was step father to the child. The court held that sexual relationship between a step father and a step daughter was prohibited by section 22 of the said Act and the two having sex was incestuous. That is the position in this appeal. The appellant was prohibited in law from having sex with his step daughter.”

19. Similarly, in this case, the evidence was that the Appellant was half father of PW1. PW1 considered and referred to him as her father in her evidence. Based on the above decision the Appellant was prohibited in law from having sex with PW1. In our judgement, the charge ought to have been brought under section 20(1) of the *Sexual Offences Act* which was one of the counts that was properly placed before the Learned Trial Magistrate who instead, and erroneously in our view, convicted the Appellant under section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

20. As was held in in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* (*supra*) the elements of the phrase “matters of law” involve the application of the *Constitution* and the law to a set of facts



or evidence on record and the evaluation of the conclusions of a trial court on the basis of the evidence on record.

21. We find that the learned Judge of the High Court failed to sufficiently analyse the evidence before the trial court and that had she done so, she would have found that the learned trial magistrate erred in convicting the Appellant under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Based on the decisions in *Jonas Akuno O'kubasu v Republic* (supra) and *Karani vs. R* [2010] 1 KLR 73, we find that the said error amounts to an error of law for the purposes of this Court's second appellate jurisdiction.
22. We are cognisant of and appreciate the fact that, unlike the first appellate court, this Court must decide an appeal based on the grounds raised by the appellant. However, in the unique circumstances of this case, where the appellant was charged with both the offence of defilement and incest and was wrongly convicted of defilement whose sentence on the face of it is mandatory life sentence, this Court cannot shut its eyes to the glaring error made by the trial court and not considered by the first appellate court.
23. Accordingly, we allow the appeal, set aside the Appellant's conviction under section 8(1) and (2) of the *Sexual Offences Act* and substitute therefore conviction under Section 20(1) of the *Sexual Offences Act*. As PW1 was under the age of 18 years, pursuant to the proviso to the said section the appellant is liable to liable to imprisonment for life. The said section was considered in *D W M v Republic* [2016] eKLR where this Court held that:

“ As for the sentence the 1st appellate court properly addressed its mind to the operative words in section 20(1) of the *Sexual Offences Act* that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.”

24. As there were no aggravating circumstances, we set aside the life sentence and substitute therefor a sentence of 30 years from the date of the conviction.
25. It is so ordered.

Dated and delivered at Mombasa this 14th day of April 2023.

S GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

