



**JSM v Republic (Criminal Appeal 58 of 2021)  
[2023] KECA 750 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 750 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 58 OF 2021  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
JUNE 22, 2023**

**BETWEEN**

**JSM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Makueni  
(Ong’undi, J.) dated 8th August, 2019 in HC. CR. A. 51 of 2018)*

**JUDGMENT**

1. The appellant, JSM was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on diverse dates between 1<sup>st</sup> January, 2016 and March 20, 2016 he caused his penis to penetrate the vagina of JMM, a girl aged 10 years, who was his niece. There was an alternative charge of committing an indecent act with a child contrary to section 11(1) of the said Act it being alleged that on the said dates and place he committed an indecent act by unlawfully touching the vagina of the said child.
2. The prosecution called 4 witnesses while the appellant gave an unsworn statement in his defence and did not call any witnesses.
3. At the end of the trial, the court gave judgment on December 21, 2017 and found the appellant guilty as charged in the main count and sentenced him to life imprisonment. The appellant filed an appeal to the High Court of Kenya at Makueni which was dismissed on August 8, 2019 in a Judgment delivered by Ong’undi, J.



4. The appellant is before us on a second appeal. Our mandate on second appeals is limited under section 361(1)(a) of the *Criminal Procedure Code* to a consideration of matters of law only. This court stated as follows on the said mandate in the case of *Michael Ang'ara Paul v Republic* [2021] eKLR:

“Being a second appeal our jurisdiction is limited by Section 361(1) (a) *Criminal Procedure Code* where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – *Chemagong v Republic* [1984] KLR 611.”

5. We shall now look at the evidence adduced before the trial Court to ascertain whether the two courts rightly carried out their mandate as required in law.
6. JMM, (PW1), told the court that the appellant is her uncle, a brother to her late mother, and that she and her sister MMM (PW2) had lived with him for 4 years since their mother died. Her family used to live in Kitui but after her mother died, her uncle took them and they stayed with him, initially in Mombasa and thereafter at MN (K). She told the court that the appellant defiled her on 5 different occasions, starting with when they moved to Mombasa, and that he also defiled her sister MMM by putting his urinating organ into her urinating organ and she felt pain. He threatened to kill her if she screamed or informed anyone of the incidents. She also said that her sister had witnessed the appellant defile her. She said that they all lived in a single room wherein the girls slept on one bed and their uncle slept on another bed. She told the court that a Children’s Officer came to their home at Mbui Nzau and inquired why she and her sister were not attending school. The Children’s Officer was accompanied by police officers and they rescued the children and took them to Makindu District Hospital and thereafter to a Rescue Centre. She denied framing the appellant.
7. MMM (PW2) confirmed that she and her sister JMM lived with the appellant first in Mombasa and then in Kitui after their mother died. She confirmed to the court that the appellant defiled her and her sister where they used to reside in Mbui Nzau in a one roomed house and on two occasions she heard JMM cry and awoke to find the appellant defiling her sister (JMM). The appellant warned them not to disclose what was happening to them and they did not tell anyone because they feared him. She recalled that the Children’s Officers came to their home and directed the appellant to take them to school. MMM spoke to one of the Children’s Officers on the side and told them that the appellant was defiling them which led to their rescue.
8. Dr. Makali (PW3) was a medical officer at Makindu Sub-County Hospital who examined JMM on March 22, 2016 and stated that the girl had been assaulted on several occasions, including 2 days before the examination. She stated that the child had no injury as she had become used to the sexual assault. He found that JMM had a broken hymen which was evidence that she had been defiled.
9. Corporal Caroline Kibiwott (PW4) of Makindu Police Station was the Investigating Officer in this matter. She received the report of defilement of two children, PW1 and PW2, on March 21, 2016, with the last incident reported as having occurred the previous day, March 20, 2016. She took the children to Makindu Sub County Hospital. An age assessment conducted on JMM placed her as being 10 years old. She preferred charges against the appellant. The children informed her that they had been warned not to reveal the defilement. She denied the claim that she was forced by children’s rights activists to charge the appellant.



10. The appellant was placed on his defence and gave an unsworn statement where he told the court that on February 28, 2016 he traveled from Mbui Nzau to Mombasa with the intention of moving his business as a cameraman and boda boda operator to Mbui Nzau. After 3 days he received a call from an unknown person to go to Kanguni Center where he was interrogated as to why he was operating his motorcycle when he was not a member of any SACCO at Mbui Nzau. He decided to operate at night to avoid the hostility shown by other boda boda operators. On March 21, 2016 when he returned home, he found 3 men and a lady at the compound, and they demanded to know why the children were not going to school. They asked to speak to the children and the appellant let them do so. They then gave him an ultimatum to take the children to school within a week and he said that he would. The people left. About 2 hours later, a crowd came to his home led by officers from FIDA and boda boda operators and the crowd assaulted him but did not tell him why. The crowd took him to Makindu Police Station where the Officer Commanding Station told him that the children claimed that he had defiled them, which he denied.
11. As earlier stated, the appellant was convicted and sentenced and his first appeal failed and was dismissed.
12. The appellant has filed supplementary grounds of appeal combined with his submissions in one document. The appellant relies on the following grounds of appeal: that the High Court erred by failing to note that the charge sheet was defective; that there was a wrong procedure in plea taking; that the trial was unfair as it vitiated his right to information and representation; that the standard of proof was not met; that crucial witnesses were not called; that incredible witnesses were relied upon; that the court failed to consider the evidence objectively; that the sentence was illegal, that his defence was rejected without plausible reason, and that the prosecution case was inconsistent and contradictory.
13. The appellant submits that the prosecution case lacked probative value and reasonable doubt should have been exercised in his favour. He submits that the charge was not properly framed because it did not name Mombasa as a location where the defilement is said to have started and did not carry an alternative charge therefore it was defective. He also submits that the P3 Form indicated the date of examination as 22/2/2016 when the offence is said to have taken place on 21/3/2016, therefore there is a glaring inconsistency in evidence. He adds that the age of the minor was not proved as the age assessment report was an uncertified copy and the maker was not called to show what methodology was used to ascertain the age of the child. He also submits that he was prejudiced due to the lack of representation and failure to supply him with statements and exhibits. He also submits that the Court should have exercised discretion in sentencing.
14. The respondent filed submissions dated March 13, 2023. They submit that the High Court Judge discharged her duty fully on first appeal and urged us not to interfere with the Judgment by the High Court. They ask us to dismiss this appeal entirely.
15. As stated above, this court's mandate on second appeal is limited to a consideration of matters of law. This court in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR described matters of law by saying:

What then is a question of law over which we have jurisdiction, as opposed to a question of fact, over which we have none? Black's Law Dictionary defines the two terms as follows:

“Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law.”



One of the best expositions on the distinction between the two is to be found in the judgment of Denning, J. in the English case of *Bracegirdle v Oxley (2)* [1947] 1 ALL ER 126 at p 130;

“The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.”

16. In our view, the only matters of law arising in this appeal are whether the prosecution case was proved to the required standard, whether the appellant’s constitutional rights were violated, whether the appellant received a fair trial, whether the charge sheet was defective and whether the sentence was illegal.
17. A perusal of the evidence on record shows that JMM (PW1) and her sister MMM lived with the appellant after their mother died and therefore, he was well known to them as an uncle. JMM told the Court that the appellant defiled her on more than one occasion and also defiled her sister and threatened them not to tell anyone. The testimony of JMM was confirmed by her sister MMM who testified that she had witnessed the appellant defiling her sister on two different occasions when she switched on the lights to find the appellant in the act. He had on both occasions ordered her to switch off the lights. Upon examination by a doctor, PW3, the child was found to have a broken hymen but no visible injuries. The doctor opined that the child had been defiled but had no injuries because she had become used to the sexual activity. This evidence by the doctor corroborated the evidence by JMM and MMM on penetration and the fact that the appellant had defiled her several times. The age of the minor was confirmed through an age assessment report marked “Exhibit . We agree with the High court that the offence was proved beyond any reasonable doubt.
18. The appellant complains in this appeal that the High Court erred in law in not finding that the plea was not properly taken. We note that this issue was not raised on first appeal and we therefore have no benefit of what the High Court would have said on it.
19. The record shows that the appellant was presented before the Resident Magistrate at Makindu on March 23, 2016 when the charge was read over and explained to him in Kiswahili language which it is recorded was a language he understood and he pleaded not guilty and a plea of not guilty was entered. The hearing then proceeded on various dates leading to Judgment. We can see no error in the way the plea was taken.
20. On the issue of legal representation, it is true that Article 50 of the Constitution donates a right to an accused person to request for legal representation which request should be granted if made. This issue



was raised before the Judge on first appeal and the Judge considered it and reached the conclusion that the appellant's case did not meet the threshold set in the case of *Macharia v Republic* (2014) eKLR where this court held that:

“ Article 50 of the *Constitution* sets out a right to a fair hearing; which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the guilt of their crime may receive a State appointed lawyer, if the situation required it. Such cases may be those involving complex issues of fact or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties, or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result’, persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense.”

21. The Judge on first appeal held on the issue of legal representation that there were no complex legal or factual issues in the case and that the appellant participated fully in the trial and cross-examined witnesses; that there was no language barrier and it was not a case that attracted public interest. We agree. The appellant took the plea in a language he understood; he fully participated in the trial and at no time did he request that he required to be represented by a lawyer. He did not say that he could not engage a lawyer himself. This ground of appeal has no merit and must fail.

22. Then there is the ground of appeal that he was convicted on a defective charge sheet. This ground was raised and considered by the High Court on first appeal. The Judge considered the provisions of section 134 of the *Criminal Procedure Code* which requires that every charge or information must contain a statement of the specific offence with which an accused is charged together with the particulars giving reasonable information as to the nature of the offence charged. The importance of a charge sheet being clear and specific with necessary particulars being given is rooted in the law on the right to a fair trial and compliance with *Criminal Procedure Code* as was recognized by this court in the case of *Benard Ombuna v Republic* [2019] eKLR where we stated:

“ 3. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person's right to a fair trial contrary to article 50(2) (b) of the *Constitution*.”

23. The charge in the instant case stated the specific offence which the appellant was charged with which was incest and it was stated in particulars of the charge that the appellant had on diverse dates at a named place had caused his penis to penetrate the vagina of the child aged 9 years whom he knew to be his niece. The charge was specific and particulars of the offence were given and informed the appellant of the charge he faced. We can see no breach of law at all in the framing of the charge and the ground of appeal in that respect has no merit and is dismissed.



24. The appellant has questioned the sentence imposed and says in grounds of appeal which are combined in submissions:

“The sentence of life meted upon the appellant has overridden the proportional legal tenets of punishment thus does not achieve the objectives intended in the SOA No 3 of 2006 and goes against the new developments in law hence sentence legality.”

25. The charge facing the appellant was incest contrary to section 20 (1) of the *Sexual Offences Act*. That provision of law is to the effect that a male person who commits incest with a relative (including his niece) is liable to imprisonment for a term not less than 10 years but if the person defiled is less than 18 years or less the defiler shall be sentenced to life imprisonment. The appellant defiled his niece who was aged 10 years. The trial court considered mitigation given and the High Court on first appeal further went on to consider that the child’s mother (sister to appellant) had died and the appellant took the defiled child with her sister to live with him while they could have lived with their father or grandmother. He took advantage of a situation where he defiled the child who considered him a father to defile her repeatedly in Mombasa and in Kitui. The High Court upheld the sentence. That was the right thing to do in the circumstances.

26. We did not find any merit in the grounds of appeal raised. The appeal has no merit and we dismiss it accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

