



**DKG v Republic (Criminal Appeal 6 of 2019) [2022] KECA 918 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 918 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CRIMINAL APPEAL 6 OF 2019**  
**MSA MAKHANDIA, S OLE KANTAI & KI LAIBUTA, JJA**  
**JULY 22, 2022**

**BETWEEN**

**DKG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi  
(Thuranira, J.) dated 22nd June 2018 in HC.CR. A. No. 154 of 2016)*

**JUDGMENT**

1. DKG, the appellant was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#) before the Senior Resident Magistrate's Court at Gatundu. He also faced an alternative count of indecent act with a female contrary to Section 11 (1) of the [Sexual Offences Act](#).
2. The particulars of the main count were that on 22<sup>nd</sup> October 2011 at [particulars withheld] Village in Gatundu North within Kiambu county, the appellant intentionally caused penetration of his genital organ namely the penis into genital organ namely, the vagina of JWN, a child aged 11 years who, to his knowledge, was his granddaughter.
3. As to the alternative charge, the particulars were that on the same day and place, the appellant intentionally and unlawfully committed an indecent act with JWN, a child aged 11 years, by touching her genital organ, namely Vagina. In brief, the prosecution case was that, JWN was born on 16<sup>th</sup> March 2000, and that the appellant was her grandfather with whom they lived in the same compound.
4. On 22<sup>nd</sup> October 2011 while playing in the compound with her cousin, JN and her brother, RK, the appellant called her and sent her to buy paraffin for him. When JWN took the paraffin to the appellant, she found him in the house seated. The appellant then asked her to take the paraffin to the bedroom and, when she proceeded to the bedroom, the appellant followed her and closed the bedroom door, covered her mouth with a shirt and removed her biker, and pushed her on his bed and thereafter inserted his penis inside the JWN's vagina for about five minutes. JWN felt pain and bled



from her vagina but was warned by the appellant not to inform her mother. JWN immediately ran home and informed her brother, RK whom she found in the house, and who, in turn, informed their elder sister, one, BK. Later, her mother, SW, was informed of the incident and immediately took her to her grandmother who equally lived in the same compound. Afterwards, she was taken to Igegania hospital where she was treated and later reported the incident to Igegania police station.

5. R.K., a ten years old and a cousin to JWN, testified that they were playing hide and seek game with JWN when the appellant called her, but when he tried to accompany her, the appellant chased him away referring to him as a dog. A short while later, JWN returned crying and informed him that the appellant had done bad manners to her. JWN was subsequently taken to her grandmother's home and thereafter to hospital. That, during all this time, the appellant had locked himself in his house.
6. SW, the mother to JWN testified that she was aged 12 years old at the time of the commission of the offence, and that the appellant was a grandfather to the complainant. That she had been informed by JWN that she had been sexually assaulted by the appellant in his house after he had sent her to buy him paraffin and when she brought the same the appellant sent her to the bedroom and forced her to have sex with her. That, on examining her, she noted that there was whitish discharge from her vagina as well as blood. That, after this examination, she informed the appellants mother, after which she took her to hospital. That she thereafter took police officers from Igegania AP post who arrested the appellant. JWN was later taken to Gatundu hospital where she was issued with a P3 form.
7. Dr. Wycliffe Omolo Ogutu, a doctor who had been previously stationed at Igegania hospital, testified that he had prepared a medical report in respect of JWN and filled the P3 form. That JWN had visited the hospital in the company of her mother with a history of defilement by the appellant. There were bruises on the labia minora and her hymen was broken with yellowish foul-smelling discharge. He concluded that there had been sexual contact.
8. PC Mary Kitole, a police officer stationed at Gatundu police station, testified that she had taken over the file from PC Okello, who was initially the investigating officer, and had been transferred. That, according to the immunization card, PW1 was born on 16<sup>th</sup> March 2000. She thereafter reiterated the evidence of JWN.
9. In his unsworn statement of defence, the appellant denied the charges and maintained that, on the fateful day, he had spent the whole day in Ongata Rongai attending a wedding and went back home at around 1.00a.m. whilst drunk and was surprised when he saw police officers at his door who arrested him. That there was a land dispute in his family and the case was a mere plot to have him eliminated so that JWN's grandfather, who is his brother, could get a bigger portion of the land they were entitled to.
10. After considering the evidence tendered by both the prosecution and the defence, the trial court was persuaded that the appellant had committed the offence. The appellant was accordingly convicted for the offence and sentenced to 20 years' imprisonment. Aggrieved by the decision, the appellant filed an appeal in the High Court which, after the hearing, was dismissed. Undeterred, the appellant has now brought this second and perhaps last appeal faulting the first appellate court for not properly re-evaluating the evidence before the trial court; for not addressing contradictory and inconsistent evidence that led to the conviction of the appellant; for failing to find that crucial witnesses were not called to testify; and finally, for dismissing the appellants defence without any basis at all.
11. At the plenary hearing of the appeal the appellant appeared in person while Ms. Matiru, learned Prosecution Counsellor, appeared for the state. The appellant relied wholly on his written submissions in which he complained that the period of time spent in remand custody was not considered by the trial court, and that the High Court erred in not rectifying the situation, but proceeded to affirm the judgment of the trial court. He contended that his trial had taken four years two months and some



days, but which was not considered in determining the sentence and, thus he was not accorded fair and impartial trial as provided by law. This resulted in the imposition of illegal, excessive, harsh, lengthy and, improper sentence. According to him the learned judge had erred in law and facts by failing to observe the contravention of Article 25(1), 50 (2), 27, 48, 20 & 159 (2) (a) & (b) of *the Constitution*. In his written submissions, the appellant merely rehashed the grounds of appeal that we have already set out elsewhere in this judgment, and we need not reiterate them here. Save to add that the appellant prayed for the appeal to be allowed.

12. Opposing the appeal, the respondent submitted that, indeed, the ingredients of the offence were proved, being, a consensual relationship, age of JWN, penetration and the identification of the appellant. The respondent submitted that the appellant was a grandfather to JWN and, thus, in terms of the case of *BNN Vs. Republic*, Mombasa Criminal Appeal No. 232 of 2009, fell within the forbidden degrees of consanguinity pursuant to section 22(1) of the *Sexual Offences Act*; that the appellant was clearly identified by the complainant as he was a family member and a grandfather to the appellant; and that the evidence of JWN, SW and Dr. Wycliffe Omolo Ogutu proved penetration. On the sentence, the respondent submitted that the appellant was lucky to have gotten away with twenty years' imprisonment when the offence attracts a life sentence.
13. We have considered the grounds of appeal in conjunction with the record, the respective submissions tendered and the law. Before considering the grounds of appeal, it is necessary that, we remind ourselves that this is a second appeal which by dint of section 361(1) of the Criminal Procedure Code, can only be entertained if it raises matters of law.
14. In *David Njoroge Macharia Vs. Republic* [2011] eKLR, it was stated by this Court 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 are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong Vs. Republic* [1984] KLR 213).”
15. From the record, what we think is the key issues for determination, and which are matters of law are whether the offence of incest was proved to the required standard; failure to call crucial witnesses; failure to consider the appellant's defence and lastly, the sentence.
16. We have perused the judgments of both the trial court and the High Court and it is clear to us that both courts were satisfied that there was a relationship between the appellant and the JWN, and that the same fell within the definition of incest in terms of section 22 of the *Sexual Offences Act*. The appellant did not recant such a relationship in the trial court, the 1<sup>st</sup> appellate court, or in this Court going by his submissions. We therefore have no reason to depart from that concurrent finding by the two courts below. The two courts below also came to concurrent finding that JWN was aged 11 years old at the of the commission of the offence. JWN herself testified as to her age. SW too testified as to the age of JWN. Similarly, there was the medical evidence Dr. Wycliffe Omolo Ogutu as the age. Lastly, we note that the appellant did not dispute the age of JWN. On the question of penetration, there was overwhelming evidence of JWN, SW and Dr. Wycliffe Omolo Ogutu on that aspect, which was not seriously controverted by the appellant. On whether it was the appellant who committed the crime, we note that the crime was committed in broad daylight, the appellant was a close relative of JWN. Indeed, he was her grandfather and stayed in the same compound. There is therefore no possibility of JWN having mistaken him for someone else. We also note on the whole that, soon after the incident, the appellant locked himself in his house until he was arrested by the police. Surely, if he was innocent



why would he behave in that manner? Obviously, this was not the conduct of an innocent party. In the end we are satisfied on the totality of the evidence on record that the conviction of the appellant by the trial court, and which was confirmed by the 1<sup>st</sup> appellate court, cannot be faulted. In dismissing the appeal, the 1<sup>st</sup> appellate court extensively re-examined the evidence tendered in the trial court. In our view, the 1<sup>st</sup> appellate court performed this statutory duty very well. Accordingly, the complaint by the appellant to the contrary is obviously without merit.

17. The issue of the right to a fair hearing as enshrined under Article 50(2) (e) of *the Constitution* was considered extensively by the High Court. The court placed reliance on the case of *Julius Kamau Mbugua Vs. Republic* Criminal Appeal No. 50 of 2008 and observed rightly so in our view, that any grievance would lie in civil action if one claims to have spent more time in police custody before being arraigned in court. Further, the court dealt with the issue of delay in having the case concluded. The court was emphatic that the same was occasioned by both parties, and that the appellant cannot blame the respondent for his long stay in custody. We agree with this disposition of the first appellate court on the issue. However, we hasten to add that the complaint is not among the grounds of appeal before us.
18. As regards the alleged contradictions and inconsistencies in the prosecution case, the said contradictions and or inconsistencies were never specifically stated and or highlighted by the appellant for this Court to deal with. We therefore do not wish to go on a fishing expedition on the issue.
19. As to failure to call crucial witness to testify, this Court is alive to the fact that there is no legal requirement in law on the number of witnesses to be called in order to prove a fact. Indeed, Section 143 of the *Evidence Act* provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required to prove any fact. In the case of *Bukenya & Others Vs. Uganda* [1972] EA 549, the court addressed itself on the issue thus: -
  - “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
  - (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
  - (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”
20. In the case of *Keter Vs. Republic* [2007] 1 EA 135, the court held inter alia thus:
  - “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”
21. Our perusal of the record and submissions shows that the appellant has not indicated the crucial witnesses he wanted called. In any case, we are satisfied that there was no lacuna in the prosecution evidence that would have warranted the trial court to entertain any doubts as to the culpability of the appellant.
22. On the issue of the defence by the appellant, we have perused both judgments and are satisfied that the same was properly considered and rejected. It did not displace the strong and simply overwhelming prosecution case. The alibi put forth by the appellant could not withstand the testimony of RK.
23. On sentence, Section 20(1) of the *Sexual Offences Act* provides: -
  - “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.”

24. The evidence is clear that JWN was below 18 years of age at the time of the sexual assault. It therefore follows that the sentence of 20 years imprisonment was unlawful as the appellant ought to have been sentenced to life sentence in terms of the above provision of the law. However, since there is no cross-appeal on the sentence, we will leave it at that.
25. In the circumstances, we find that the High Court did not err in upholding the appellant’s conviction and sentence. The upshot of the foregoing is that the appeal on both conviction and sentence is without merit, and the same is hereby dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

