BKK v Republic (Criminal Appeal E010 of 2023)
[2025] KEHC 1304 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E010 OF 2023

AC MRIMA, J

FEBRUARY 28, 2025

BETWEEN

BKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C. M Kesse (PM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 74 of 2019 delivered on 22nd March 2021)

JUDGMENT

Background:

1. BKK, the Appellant herein, was charged with the offence of Incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were that on diverse dates between 1st September 2018 and 1st March 2019 at Kitale Phase III Village in Trans-Nzoia County internationally caused your penis to penetrate the vagina of E.C.K a child aged 14 years who to your knowledge is your daughter.

2. The Appellant faced an alternative charge of committing an indecent act with a child. The particulars of the alternative charge were that on diverse dates between 1st September 2018 and 1st March 2019 at Kitale Phase III Village in Trans-Nzoia County internationally caused the contact between genital organ namely penis and the genital organ namely vagina of E.C.K a child aged 14 years.

3. A total of six witnesses testified for the prosecution. The Complainant, E.C.K testified as PW1, her mother, RCM was PW2. Dr. Racheal Muyira, a Dentist at Kitale District Hospital testified as PW3. John Koima, a Clinical Officer at Kitale County Referral Hospital testified as PW4. MC, the complainant's sibling was PW5 and No. 1010338 PC Purity Nabwire, the investigating Officer, testified as PW6.

4. At the close of the prosecution's case, the Appellant was placed on his defence. He. He gave sworn testimony and did not call any witness.

5. Upon considering the entirety of the case, the trial Court found the Appellant guilty of the main charge of incest and he was convicted under 215 of the *Criminal Procedure Code*. He was subsequently sentenced to 10 years imprisonment.

The Appeal:

6. The Appellant was dissatisfied with the conviction and sentence. Through Amended Grounds of Appeal, he urged this Court to quash his conviction and to set aside his sentence on the following grounds;

    1. That pleaded not guilty.

    2. That the learned trial magistrate erred in law and fact by failing to note that the appellants' absolute rights were violated infringed and contravened a per article 49(f) of *the Constitution*.

    3. That the learned trial magistrate erred in failing to note that the medical evidence produced do not conclusively proved the alleged penetration.

    4. That the learned trial magistrate erred in failing to note that the prosecution evidence was full of contradictions and inconsistency.

    5. That the learned trial magistrate failed to consider the mitigation and credible defence of the appellant before sentencing.

    6. The learned trial magistrate erred in failing to note that the investigating officer never visited the scene of crime.

    7. That the learned trial magistrate erred in failing to note that there was omission of the word unlawfully on the particulars of the charge sheet.

7. In his submissions, the Appellant stated that since he was kept in custody for a period more than 24 hours, his constitutional rights under Article 49(f) were violated. On the ground challenging penetration, the Appellant urged this Court to find that it was not established to the required standard. In reference to the evidence of the Clinical Officer, the Appellant submitted that he conducted examination 7 days after the alleged penetration. While referring to the decision in Criminal Case No. 2960 of 2012, Samwel Barasa v Republic, it was his position that there was no strong evidence of penetration. The Appellant further submitted the DNA was never conducted to prove that it was him who defiled the complainant.

8. Regarding contradictory and inconsistent evidence, the Appellant submitted that the evidence of the complainant was to the effect that the Appellant used to touch her breast and buttocks but later, on re-examination, said she was never found by Mitchelle, as such the complainant's evidence was unreliable. To that end, the Appellant drew support from the decision in Ruwalla v Republic [1084] EA App. No. 570. The Appellant further banked on the failure by the Investigating Officer to avail the inventory diary to show the information gathered from the scene of crime. The Appellant submitted that his credible evidence was disregarded on the basis that it was mere denials and untrustworthy.

9. On a different line of argument, the Appellant submitted that the failure by the trial Court to note the omission of the word 'unlawfully' in the particulars of the charge sheet was contrary to the provisions of Section 134 of the *Criminal Procedure Code*.

10. In the end, the Appellant, in mitigation, submitted that he is remorseful, and is the sole bread winner and the head of his family. He urged the appeal to be allowed.

The Respondent's case:

11. The Respondent challenged the appeal through written submissions dated 4th March 2024. It was its case that it had the obligation to prove age, penetration and relationship between the appellant and the complainant.

12. On the first limb, the Respondent submitted that the Doctor's evidence, PW3, who examined and produced the Age Assessment Report estimated the complainant's age at 14 years. The decision in Mwalango Chichoro v Republic was cited where it was observed that the proof of age is established by documentary evidence such as birth certificate, baptism card or by evidence of the child if the child is sufficiently intelligent was cited.

13. As regards the aspect of penetration, the Respondent submitted that it was proved to the requited standard. It was its case that the complaint's own testimony and that of the Clinical officer spoke conclusively to it. Support was drawn from the decision in Mark Oiruri Mose v R [2013] eKLR when the Court of Appeal stated thus:

    .... 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

14. The Respondent further submitted that there was no doubt the appellant was positively identified. It was its case that the complainant recognized the appellant because the sexual endeavours happened more than once. Regarding the relationship between the Appellant and the complainant, it was submitted that it was not contested and that the Appellant also stated that he knew the complainant and had lived with and raised her.

15. In conclusion, the Respondent submitted that it had established its case beyond reasonable doubt. It urged that the Appeal is dismissed and the conviction and sentence affirmed.

Analysis:

16. This being a first appeal, this Court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono v Republic [1972] EA 74).

17. Similarly, in Criminal Appeal No. 280 of 2004 Odhiambo v Republic [2005] 1 KLR the Court of Appeal held that: -

    .... On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion.

18. Further to the foregoing, this Court, in the processes of re-assessing the evidence, is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v Republic [2004] KLR 81.

19. I will hence embark on a journey of re-analysis of the evidence. Before that is necessary to appreciate the terms in which the *Sexual Offences Act* creates the offence of Incest. Section 20 of the said Act provides as follows: -

    Incest by male persons:

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) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

20. It is apparent from the foregoing provision that the ingredients that must be proved in order to sustain a charge of incest against a male person are;

i. Penetration

ii. Knowledge of blood relation and

iii. Age (for purposes of sentencing)

21. I will hence interrogate the incidence of the above limbs in turn.

Penetration:

22. The Complainant was subjected to voir-dire examination and whereas she was possessed of sufficient knowledge and understanding to give evidence, the trial Court affirmed her on the assessment that it was not certain she understood the solemnity of oath. It was her evidence that the period between 1st September 2018 and 1st March 2019, his father used to come from work at about 2pm when her mother had gone to Church and when she arrived from school her father would send the rest of her siblings to the shop to buy milk. He would then ask her to go into their bedroom and ask her to remove her panty and lay on bed. She further stated that the Appellant would then open the zip of his trouser lie on her and start having sex. She described the orders as follows;

... He removed his kitu yake ya kukojolea akaweka ndani yangu ya kukojolea....

23. She also stated that in the process the Appellant would choke her neck so that she could not scream and that he used to have sex with her every Wednesday and Friday between 2pm and 5pm when her mother was in Church. The complainant testified that her father threatened to kill her if she ever informed her mother.

24. PW4, the Clinical Officer testified that the complainant visited Kitale County Referral Hospital Gender Recovery Centre on 11th March 2019. Upon examining her, she stated that the complainant's hymen was torn and she had vaginal discharge. He formed the conclusion that there was sexual assault with penetration. He produced treatment notes and P3 Form as exhibits.

25. When PW5, the complainant's younger sibling testified, it was her evidence that the Appellant asked the complainant to go to the bedroom. He had removed his trouser and he slept with the complainant in bed. He then heard him threaten the Complainant that he would kill her if he said anything to anyone.

26. In order to ascertain whether the complainant's, PW4 and PW5's evidence proved penetration, I will refer to section 2 of the *Sexual Offences Act* and how courts have appreciated the offence. The said section defines the term 'penetration' as follows;

> " the 'partial' or complete insertion of the genital organs of a person into the genital organs of another."

27. Penetration was expounded by the Court of Appeal in Criminal Appeal 295 of 2012, Mark Oiruri v Republic [2013] eKLR when it observed as follows: -

> ...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. 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...

28. The Clinical Officer's testimony and the P3 form was definitive proof of penetration. Upon examining the complainant, he observed that her hymen was torn. He made the conclusion that there was penetration.

29. A torn hymen, according to Court of Appeal decision in Mark Oiruri v Republic [2013] eKLR (supra) is indictive of penetration and corroborates the complaint's testimony that it had been happening for a prolonged period. In the premises, the evidence presented to this Court meets the threshold enumerated in the Court of Appeal in the case.

30. The Appellant's quest for DNA test to prove it was him who defiled the is immaterial considering the dictates of section 2 of the *Sexual Offences Act* as appreciated alongside the principles espoused by the Court of Appeal in Mark Oiruri case [supra]. Further, the claim by the Appellant that the charge sheet omitted the word 'unlawfully' does not make the charge defective and neither does it render him deficient of knowledge that he was facing offence of incest.

31. In the premises, I find no reason to disturb the trial Court's finding that indeed there was penetration. It was proved beyond reasonable doubt.

Relationship:

32. The Appellant did not appeal this limb of the offence in his grounds of Appeal, however, in his evidence before the trial Court, he stated that the complainant is his wife's niece. It is, therefore, necessary to interrogate this aspect.

33. When the complainant testified, she described the Appellant, at different points in her testimony, as follows: -

> " .... My dad used to time when mom has gone to church at around 2 PM"
>
> "...My father works at sister Freda"
>
> "...My father used to touch Mitchelle"
>
> "... my father had sex with me in September"
>
> "my father has not touched me since in I joined class seven.

"I would feel pain after sex with my father."

34. Similarly, when PW2, the complainant's mother testified, she described the complainant as her first-born daughter. She further stated that when the complainant approached her, she described the assailant as his father.

35. Firstly, it is consistent from the Complainant's evidence that she knew the Appellant as his father both from her evidence in Court and how she reported the incident to her mother. If indeed the Appellant was an uncle or a stranger that would have come out in evidence. Her mother corroborated the nature of the blood relation. Suffice to say that save from just mentioning that the Complainant was his niece, the Appellant did not proffer any evidence to corroborate that fact.

36. In this Court's view, even in the event the Appellant had proved that indeed the complainant was his wife's niece, she would still fall among the persons contemplated by Section 20(1) of the *Sexual Offences Act*.

37. Therefore, blood relation is still in existence, and was proved to the required standard.

Age of the complainant:

38. In her own testimony, the complainant stated that she was 14 years old. There was also the evidence of PW3, Dr. Munyira Racheal, a Dentist at Kitale District Hospital who assessed the complainant's age at 14 years. She produced the Age Assessment Report as PExh.1. Having assessed the Report, and bearing in mind that it was not a contested issue, this Court finds and hold that it was proved to the required standard that the complainant was 14 years of age during the period under inquiry.

39. Deriving from the foregoing, the offence of incest was proved as required in law. The conviction was, hence, proper and the appeal thereof fails.

40. On the aspect of sentence, the Appellant was rendered to serve a term of 10 years imprisonment. That is the minimum sentence where the victim is an adult. However, as per the dictates of section 20(1) of the *Sexual Offences Act*, the Appellant was liable to serve up to life imprisonment since the complainant was less than 18 years. Since the Respondent did not cross-appeal or seek enhancement of sentence, this Court will not disturb the trial Court's sentence.

41. The appeal on sentence also fails.

Disposition

42. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

43. In the end, I find the appeal to be wholly without merit and it is hereby dismissed. For avoidance of doubt, the conviction and sentence of the trial Court are hereby upheld.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Benson Kibet Kiboi, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.