JKM v Republic (Criminal Appeal E071 of 2023)
[2025] KEHC 7984 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E071 OF 2023

EN MAINA, J

MAY 29, 2025

BETWEEN

JKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence by Hon. P. Wechuli (PM) at the Kithimani Principal Magistrate's Court Criminal S.O. No. 47 of 2020)

JUDGMENT

1. The Appellant was charged, tried, convicted and subsequently sentenced to a term of imprisonment of twenty (20) years for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates of 5th August 2020 and 20th August 2020 at [Particulars withheld] village Kyeleni location in Matungulu sub county within Machakos County, being a sole male person caused his penis to penetrate the vagina of F.M.K. a female child aged 13 years who to his knowledge, was his daughter.

2. Being aggrieved and being late in preferring an appeal, he sought and obtained leave to prefer this appeal out of time. The grounds of appeal as set out in the petition of appeal are:

> "1. That the learned trial magistrate erred in law by failing to find that the Appellant equal right before the law to a fair trial was infringed contrary to provisions in Article 50 (2) (g) of *the Constitution* of Kenya.
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> 2. That the learned trial magistrate erred in law by failing to observe that the entire prosecution case was impeachable under section 163 (1) of the *Evidence Act*.

3. That the Trial court erred in law and facts by failing to give the Appellant's defence adequate consideration as per the requirements under section 169 (1) of the *Criminal Procedure Code*."

3. The Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence.

4. The appeal which is vehemently opposed was canvassed by way of written submissions. The Appellant appeared in person while the respondent was represented by Ms Kaburu.

5. Through his homegrown submissions dated 15th January 2025 but filed herein on 24th February 2025, the Appellant contended firstly, that the report concerning him was made on 20th August 2020 but there was a delay of five days before he was arrested which and raises eyebrows; that his defense was undermined by his unlawful detention, to wit, his incarceration for four days before being arraigned in court, which goes against the spirit of constitutional fairness; that the manner in which he was ambushed, coerced and compelled to proceed with the hearing on 8th December 2020 without legal representation, was unfair; that the learned magistrate failed to observe his constitutional rights such as informing him of his right to representation and that the magistrate should have invoked Article 50(2)(h) of *the Constitution* and assigned him an advocate or an intermediary at State expense; that he was not able to cross examine the witnesses exhaustively as he was not represented. That the lack of representation occasioned him injustice.

6. Further, that he was convicted on unsubstantiated evidence as the birth certificate produced by the prosecution was an uncertified copy but not the original hence raising an issue of authenticity of the document. He urged this court to expunge the document from the record. He also faulted the learned magistrate for relying on a birth certificate, P3 and PRC forms which were not correctly serialized. He contended that the same being annexures the requirement for serialization is mandatory. Further, that there was no inventory/investigation diary and a form outlining the chain of custody to substantiate the documentation and give information on the storage and handling of exhibits hence prejudicing his case. He urged this court to order a retrial but should this court find that the case was not proved it should set him at liberty but not order a retrial.

7. In regard to the sentence, the Appellant submitted that the regime of law in other jurisdictions prescribe less severe offences for sexual offences and that the proviso to Section 20(1) of the *Sexual Offences Act* should be read in line with the law in those other jurisdictions and be interpreted as providing a sentence of ten years on the lower side but not 20 years. He contended that the learned magistrate misinterpreted Section 20 (1) of the *Sexual Offences Act* by overlooking the Ugandan case of Opoya v Uganda (1967) EA752.

8. In support of his submissions, the Appellant placed reliance on the following cases among others; Odhiambo vs Republic [2005] 1 KLR, Douglas Kamwaka vs Republic [2016] e KLR, GMW vs R [2019] e KLR, Charles Gitaru Gatembe and others vs R, Criminal Appeal no 180 of 2007, Legal Aid South Africa vs Van Der Merwe and others [2010] ZAWCHC 525, ZWO vs R [2019] e KLR, Evans Wanjala Aiibi vs Republic, Criminal Appeal no 314 of 2018, Meshack Juma Wafula vs R [2019] e KLR, Kenga Hisa vs R [2020] e KLR, Dr. Solomon Omega Omache & Another vs Zachary O . Ayieko & 2 others [2016] e KLR, Opoya vs Uganda [1967] EA 752 and David Musenge Sande vs R, Criminal Application no 161 of 2021.

9. Prosecution Counsel relied on the submissions of filed way back on 31st May 2024 by Martin Mwongera, Principal Prosecution Counsel, where it was submitted that no prejudice was suffered by the Appellant for not being informed of the right to legal representation; that direct and documentary evidence was produced to prove the guilt of the Appellant; that the Appellants evidence was an

afterthought since the prosecution case was overwhelming and unimpeachable. Counsel pointed out that the elements of incest were proved beyond reasonable doubt and urged this court to dismiss this appeal. Counsel supported his submissions with the cases of Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties) [2021] eKLR, FOD vs Republic [2014] e KLR and R vs Scot (2005) NSWCCCA 152

Determination

10. As the first appellate court I have a duty to reconsider and evaluate the evidence in the trial court, so as to arrive my own independent conclusion while bearing in mind that I did not hear or see the witnesses as did the trial court- see the case of Okeno v Republic [1972] EA 32 where the court stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. The burden of proof in criminal cases lies on the prosecution and the standard of proof is beyond reasonable doubt. Lord Denning discussed the standard of proof I the case of Miller vs. Ministry of Pensions (1947) 2 All ER, 372 and observed as follows-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

12. The above therefore is the standard that I shall apply to this court. Suffice it to say at this early stage that as a Republic, Kenya has its own unique law on sexual offences based on its own circumstances. It is not bound by the regime of laws in other jurisdictions and the most value that those laws would have is persuasive. I disagree with the Appellant's submission that the trial magistrate was bound to follow the Ugandan case of Opoya v Republic(supra).

13. Section 20 (1) of the *Sexual Offences Act* under which the Appellant was convicted states-

> " 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:
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> 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."

14. Therefore, the ingredients that were required to be proved by the prosecution in this case was the relationship of the Appellant to the victim of the offence, indecent act or penetration, the age of the victim and identification of the Appellant as the perpetrator. These are the issues that will be analysed in this case.

15. For the offence of incest to be established it must be proved beyond reasonable doubt that the perpetrator was related to the victim in the degrees set out in Sections 20 or Section 22 (1) and (3) of Sexual Offences. In this case it was alleged that the victim was the Appellant's daughter. The victim testified that she was thirteen years old; that before the Covid 19 pandemic, she and her sister were living with their maternal grandmother but when schools went on holiday the Appellant went for them and took them to his own maternal home where they briefly stayed with his mother before he took them to his house. Their mother was in Nairobi where she worked. According to the victim her parents were estranged. Referring to the Appellant as her father, the victim narrated how on the material day he told her that he wanted her to grow up and cautioned her to never disclose what he was going to do to her. She stated that when she resisted, he threatened to cut her with a knife. He then raised her dress and removed her under pant then lowered his trousers. After that he parted her legs and inserted his genital organ into her genital organ. He then ordered her to clean the seat covers and cautioned her again then he went to sleep and she also slept.

16. Whether or not the victim of a sexual offence is related to the perpetrator is a matter of fact. In this case I am satisfied that the Appellant is the father of the victim. This is a fact which was not denied by the Appellant and indeed even his own mother who testified as his witness confirmed that as did his other witnesses. The victim's maternal grandmother (PW2) referred to Appellant as the father of the victim a fact also borne by the birth certificate which has his name as her father. The contents of the birth certificate it was issued on 11th May 2025 and that it is a certificate issued under the *Births and Deaths Registration Act* and is a certified copy as provided under Section 80 of the *Evidence Act* which read together with Section 38 of the *Evidence Act* makes it admissible in this case. The argument by the Appellant that it should be expunged is therefore without any basis and is rejected. I for the record the Sections state;

> " [38] Entries in public records.
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> An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible"
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> "[80] Certified copies of public documents.
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> (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever

such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section"

17. The requirement for serialisation of exhibits applies only in civil cases and indeed the case cited by the Appellant to support that argument is a civil case. The argument is not relevant to criminal cases where exhibits are marked by the court but not by the parties.

18. Having evaluated the evidence adduced carefully I am certified that the Appellant did have intercourse with the victim who to his knowledge was his daughter. It is trite that the evidence of a victim of a sexual offence does not require corroboration. The court can convict on the evidence of that victim solely provided that it believes them and gives it's reasons. Be that is it may it is my finding that the evidence of the victim in this case received more than adequate corroboration from medical evidence, to wit the medical notes, the PRC form and P3 form. As I stated earlier the documents did not require serialisation and I must also state that being documents which were obtained from the hospital as opposed from the Appellants custody they required neither an inventory nor a chain of custody form.

19. I am also satisfied that the victim positively identified her assailant as the Appellant and as I have already stated the fact that he is her father was proved beyond reasonable doubt.

20. As for her age that was proved through the birth certificate which is the best evidence of age. It is instructive that the certificate was obtained in 2018 while the offence was committed in the year 2020. It cannot therefore be that it was obtained for the purposes of this case. Its validity does not therefore arise. the victim was born on 20th January 2007 and as this offence was committed on 5th August 2020, she was thirteen years old. I am therefore satisfied that the sentence meted by the learned magistrate was lawful.

21. I have carefully examined the record of the trial court and have not seen any element of violation of the Appellant's right to fair trial. Even though he was not represented he was accorded ample opportunity to cross examine the prosecution witnesses and to call his own witnesses. There is nothing whatsoever to demonstrate that lack of representation occasioned him prejudice. The record also indicates that before the trial commenced the accused indicated that he was ready to proceed. His contention that he was ambushed and compelled to proceed when he was unprepared is an afterthought and is without basis.

22. The Appellant also raised the issue of illegal detention. It is however trite that such detention does not invalidate the trial as he can always sue for redress for such illegal detention. As for the issue of the delay of five days between the report and his arrest, that too does not cast any doubt on the prosecution case as in my view the delay was not inordinate.

23. The other ground raised is with regard to section 169 of the *Criminal Procedure Code*, which is on the content of a judgment in a criminal case. Section 168(1) is about the judgment being written by the presiding officer, in the language of the court, and containing the points for determination, decision and the reasons for it, and it ought to be signed and dated in open court. Having perused the impugned judgment, I am satisfied that it complies with all those requirements. I am also satisfied that the learned magistrate considered the evidence adduced by the Appellant as I have also done. was considered.

24. The upshot is that this appeal has no merit and is accordingly dismissed. The appeal is accordingly dismissed and the conviction and sentence of the lower court are upheld save that as the trial magistrate does not appear to have complied with Section 333(2) of the *Criminal Procedure Code* the sentence imposed by the trial court shall be computed to run from the date of arrest, to wit 27th August, 2020 to 31st March 2021, so as to take into account the period of about seven months the Appellant spent in remand custody.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E N MAINA

JUDGE

IN PRESENCE OF:

Miss Kaburu for the State/Respondent.

The Appellant in person.

Geoffrey- Court Assistant/Interpreter.